IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH REPUBLIC INSURANCE COMPANY, Plaintiff, on behalf of itself and all others similarly situated, vs. THE UNITED STATES OF AMERICA, Defendant.	No. 1:16-cv-00259-MMS (Judge Sweeney)

PLAINTIFF HEALTH REPUBLIC INSURANCE COMPANY'S REPLY IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO THE UNITED STATES' CROSS-MOTION FOR SUMMARY JUDGMENT

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Plaintiff Health Republic Insurance Company ("HRIC" or "Plaintiff"), on behalf of itself and the QHP Issuer Class (the "Class"), respectfully submits this reply in further support of its request for summary judgment for the Class (Dkt. 47) ("Mot."), and in opposition to Defendant the United States of America's (the "Government" or "Defendant") cross-motion for summary judgment (Dkt. 52) ("Gov. Br.").

I. INTRODUCTION

The Government's cross-motion for summary judgment boils down to a simple, yet remarkable, proposition: that Congress may enact a statute saying the Government "shall pay" private entities specific amounts in specific circumstances, yet then renege on those commitments by failing to make appropriations to satisfy them. That is simply not the law.

When Congress states that it or a federal agency "shall pay" specific amounts, that creates a money-mandating statute enforceable in this Court. Congress does not need to enact an appropriation for the obligation to take effect. Nor does Congress need to provide "budget authority" in the statute. By stating that the Government "shall pay" specific amounts, the obligation to pay arises and remains unless and until Congress prospectively amends the money-mandating statute before the circumstances requiring payment occur. The Supreme Court made this clear in the nineteenth century, and it has remained true ever since.

The Government attempts to confuse this point of law by conflating two separate concepts: (1) an obligation to pay arising from a money-mandating statute; and (2) an agency's "obligation" of an appropriation. The latter is a term of art referencing the point at which an agency "uses" appropriations. The former is a far broader concept encompassing Congress's decisions to create payment obligations. Agencies may not obligate amounts they have not been appropriated, which the Government's case law unsurprisingly holds. Congress, however, is not similarly constrained and this Court may enforce Congressionally-imposed monetary obligations

by issuing a judgment that may be tendered to the Treasury for payment through either a special appropriation or the Judgment Fund.

With this in mind, the Government's cross-motion crumbles for lack of any legal foundation. Moreover, the Government's arguments also fail for independent reasons. For example, the Government argues that the risk corridors program is budget neutral for a variety of textual, legislative history, and policy reasons. But in so doing, the Government, *inter alia*, argues interpretations of Section 1342 of the Affordable Care Act that contradict its plain language, including by reading in requirements and restrictions that appear nowhere in the text; ignores that every piece of evidence surrounding the ACA's enactment indicates Congress intended to minimize the risks for QHP issuers in the early years of the ACA exchanges; and ignores that Congress demonstrated throughout the ACA that it was fully capable of creating budget neutral programs and restricted payment obligations when it wanted to do so. In short, the Government is seeking to rewrite history (and the ACA) through this litigation.

The Government also fails to show that the 2015, 2016, and 2017 Spending Bills somehow amended Section 1342's full payment requirements. Courts, including the Supreme Court, are clear that "repeal by implication" via appropriations acts are extremely disfavored. Appropriations acts, therefore, must evince Congress's "clear intent" to repeal the existing payment obligation, and then may only ***pro***spectively repeal payments for obligations that have not yet been incurred. Each of the Spending Bills on which the Government relies for its repeal arguments simply prevents HHS from making risk corridor payments from specific funds. "Mere limitations" of specific funding sources are, by law, insufficient to constitute the requisite clear intent to repeal. Similarly, the Supreme Court, lower courts, and the *GAO Red Book* make clear that Committee statements accompanying appropriations acts, like those the Government

cites, cannot demonstrate "clear intent" because they are not the law and are often partisan in nature. In any event, the evidence before Congress when it enacted all three Spending Bills was that HHS represented to the world it believed the Government must make full risk corridor payments pursuant to Section 1342's plain terms. Congress never contradicted those statements, thus precluding the notion that there is any "clear intent" to repeal here.

As HRIC and the Class explained at length in their motion for summary judgment, Section 1342 and its implementing regulations require full, annual risk corridor payments, and the payments for the 2014 and 2015 plan years are long overdue. The Government offers no real response to these arguments, instead choosing to mount an appropriations-based defense coupled with an argument for budget neutrality that cannot stand in light of the statute and facts. Because these arguments fail for the reasons summarized above, the Government must satisfy the risk corridor payment obligations Congress imposed. Doing so may not fully undo the chaos Congress created with the Spending Bills, but it will be a start. Summary judgment should therefore be awarded on behalf of the Class.

II. ARGUMENT

A. The Government's Cross-Motion Is Based Upon Fundamental Misapprehensions Of The Law

Although the specifics of the Government's various cross-motion arguments fail with any level of close inspection, *see* Sections II(A)-(D) *infra*, the broader problem is that the cross-motion relies on fundamentally incorrect premises. The Government errs first by assuming that a statute must have an appropriation built into it in order to be money-mandating, and second by implying this Court is unable to issue a judgment for payment if Congress does not appropriate funds to satisfy a money-mandating statute. Both concepts are wrong as a matter of law and therefore undermine the entirety of the Government's cross-motion.

1. A statute is either money-mandating or not, regardless of whether it also includes an appropriation in its text

Whether or not a statute is money-mandating depends only on whether it is "reasonably amenable to the reading that it mandates a right of recovery in damages." *See United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473 (2003); *see also United States v. Mitchell*, 463 U.S. 206, 219 (1983) (courts must "examine whether [sources of substantive law] can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties they impose"). A plaintiff must therefore allege and establish "that the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum." *Health Republic Ins. Co. v. Untied States*, 129 Fed. Cl. 757, 770 (2017) (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967)). "[A] statute is money mandating when the government has an absolute duty to make payments to any person who meets the specific requirements set forth in the statute." *ARRA Energy Co. I v. United States*, 97 Fed. Cl. 12, 19 (2011) (citing *Grav v. United States*, 886 F.2d 1305, 1307 (Fed. Cir. 1989)).

Statutes that state the Government "will pay" or "shall pay" certain amounts are money-mandating. *Health Republic*, 129 Fed. Cl. at 770; *see also Greenlee Cnty., Ariz. v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007) ("*Greenlee II*") (holding that statutory provisions are generally money-mandating if they provide that the Government "shall" pay an amount of money); *Britell v. United States*, 372 F.3d 1370, 1378 (Fed. Cir. 2004) ("[T]his type of mandatory language, e.g., 'will pay' or 'shall pay,' creates the necessary 'money-mandate' for Tucker Act purposes."); *Agwiak v. United States*, 347 F.3d 1375, 1380 (Fed. Cir. 2003) ("We have repeatedly recognized that the use of the word 'shall' generally makes a statute money-mandating.") (citations omitted).

In its brief, the Government tries to confuse this law by conflating the concept of a statutory obligation to pay arising from a money-mandating statute with an appropriation "obligation." *See*, *e.g.*, Gov. Br. at 24-25 (arguing that Section 1342 does not include "the language of 'obligation'" addressed in a case, *Prairie County*, about an agency's use of appropriated funds). As the General Accountability Office ("GAO") has explained, the latter is a term of art "central [and specific] to appropriations law" and references the amount of money an agency is able to legally obligate from a preexisting appropriation. *See* GAO, *Principles of Fed. Appropriations Law* (Ch. 7), at 7-3—7-4 (3rd ed. 2006).[1] Obligations are one of the two ways an agency may "use" an appropriation (the other being a direct expenditure). *Id.* at 7-2. An agency may not obligate amounts it has not been appropriated, because to do so would violate the Anti-Deficiency Act, 31 U.S.C. § 1341, which, among other things, prohibits agencies from "obligating" or committing to pay amounts in excess of appropriations. *Id.* (Ch. 6), at 6-36—6-37.

But an agency's "obligation" of an appropriation should not be confused with Congress' own commitment to pay specific amounts, which may arise from two other forms of legislation besides an appropriations act: (1) "organic" (or "enabling") legislation; and (2) "appropriation authorization" legislation. The former establishes, *inter alia*, federal programs and the latter establishes amounts that may or will be paid out under such programs. But neither typically includes budget authority or an appropriation as part of the legislation. *GAO Red Book* (Ch. 2), at 2-54 (4th ed. 2016); *see also id.* at 2-55 ("[P]rovisions conferring budget authority and

[1] The GAO's opinions, such as those in GAO's *Principles of Fed. Appropriations Law* (the "*GAO Red Book*"), are non-binding, but highly persuasive, authority on federal appropriations law. *See*, *e.g.*, *Nevada v. Dep't of Energy*, 400 F.3d 9, 16 (11th Cir. 2005). The *GAO Red Book* is being updated on a chapter-by-chapter basis, and the Class's citations to the *GAO Red Book* specifically reference the controlling edition of each cited chapter.

authority to make payments to liquidate obligations nearly always appear in appropriations acts, ***not in organic legislation or in appropriation authorization legislation*.") (emphasis added).

Whether a piece of organic or appropriation authorization legislation contains an appropriation is thus completely irrelevant to whether the legislation requires the Government to make monetary payments; *i.e.*, is money-mandating. *See*, *e.g.*, *Agwiak*, 347 F.3d at 1380 (concluding statute was money-mandating without regard to whether it was supported by a corresponding appropriation). If the legislation is money-mandating, failure to appropriate sufficient funds to meet payment obligations established in the legislation gives rise to the right to recover by lawsuit. *GAO Red Book* (Ch. 2), at 2-63 (4th ed. 2016) (collecting citations). The Federal Circuit and this Court have been clear on this point. *See*, *e.g.*, *Slattery v. United States*, 635 F.3d 1298, 1320 (Fed. Cir. 2011) (holding that "the source of funding of an agency's activities or for payment of its judgments is not a limitation on Tucker Act jurisdiction"); *Wetsel-Oviatt Lumber Co., Inc. v. United States*, 38 Fed. Cl. 563, 570-571 (1997) (finding that "[i]nsufficient appropriations" do "not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties") (citation omitted).[2]

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[2] Another critical point is that the Anti-Deficiency Act does not impose limitations on or otherwise restrict money-mandating obligations; it only restricts agencies' abilities to make payments. *Compare* Gov. Br. at 23 (invoking the Anti-Deficiency Act); *with Greenlee II*, 487 F.3d at 877 ("Rather than limiting the government's obligation, a 'failure [of Congress] to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements, but such rights [remain] enforceable in the Court of Claims.'") (quoting *N.Y. Airways v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966)); *see also Wetsel-Oviatt*, 38 Fed. Cl. at 571 (noting the failure to appropriate sufficient funds to meet statutory obligations "merely impose[s] limitations upon the Government's own agents," but does not eliminate the Government's obligation to pay) (citations omitted). For this reason, to the extent HHS publicly stated it would make full risk corridor payments "subject to the availability of appropriations," *see* Gov. Br. at 35 n.16, that was simply a recognition of the limits placed on it by the Anti-Deficiency Act. The more important aspect of HHS's statements

Further, the Government claims incorrectly that a money-mandating statute must also have a corresponding appropriation in order for the obligation to be enforceable. Gov. Br. at 19. But the Federal Circuit has directly rejected the Government's argument: "It has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute." *Greenlee II*, 487 F.3d at 877 (quoting *N.Y. Airways, Inc. v. United States*, 177 Ct. Cl. 800 (1966)). Indeed, the cases the Government relies upon (at 19) stand only for the proposition that if an otherwise money-mandating statute has *additional* language explicitly making payment contingent on available appropriations, then the Government's obligation to pay is limited to those appropriations. In other words, while money-mandating statutes normally require full payment regardless of available appropriations, "in some instances the statute creating the right to compensation (or authorizing the government to contract) may restrict the government's liability or limit its contractual authority to the amount appropriated by Congress." *Greenlee II*, 487 F.3d at 878. The Government's cases fit squarely within this category of cases where the statutes at issue explicitly restricted the Government's liability to amounts appropriated by Congress.[3] No similar statutory limitation exists in the risk

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is that it consistently maintained it owed QHP issuers full risk corridor amounts. *See* Mot. at 7-9 (collecting HHS statements).

[3] *See Prairie Cty., Mont. v. United States*, 782 F.3d 685, 689 (Fed. Cir. 2015) (holding Government's obligations were limited by provision stating "[a]mounts are available *only as provided in appropriation laws*") (emphasis added); *Greenlee II*, 487 F.3d at 878 (also holding Government's obligations were limited by provision stating "[a]mounts are available *only as provided in appropriation laws*") (emphasis added); *Nevada v. Dep't of Energy*, 400 F.3d 9, 13 (D.C. Cir. 2005) (holding that statutory language that "makes expenditures . . . '*subject to appropriations*'" was not a continuing appropriation) (emphasis added); *Star-Glo Assocs., LP v. United States*, 414 F.3d 1349, 1354 (Fed. Cir. 2005) (holding that government's obligation to pay was limited where statute stated that the "Secretary of Agriculture shall use $58,000,000 of the funds of the Commodity Credit Corporation to carry out this section, *to remain available*

corridor program.

In arguing that money-mandating statutes must have accompanying appropriations, the Government most prominently relies on *Prairie Cnty., Mont. v. United States*, 113 Fed. Cl. 194 (2013) (Sweeney, J.) ("*Prairie Cnty. I*"), *aff'd*, 782 F.3d 685 (Fed. Cir. 2015) ("*Prairie Cnty. II*"), *cert. denied*, 136 S. Ct. 319 (2015). As discussed, however, *Prairie County* simply demonstrates that, in assessing a Tucker Act claim, it is important to determine what limits, if any, Congress placed on a statutory program. In that case, the statute in question (PILT) stated, "Necessary amounts may be appropriated to the Secretary of the Interior to carry out this chapter. ***Amounts are available only as provided in appropriation laws***." *Prairie Cnty. I*, 113 Fed. Cl. at 197 (emphasis added). The highlighted language "limit[ed the Government's] contractual authority to the amount appropriated by Congress." *Id.* at 199-200 (citing *Greenlee II*, which interpreted the same statute). *Prairie County I* was thus a statutory language-driven decision based on a limitation that has no analogue in Section 1342 or its implementing regulations. *Compare Prairie Cnty. I*, 113 Fed. Cl. at 197 (quoting version of 31 U.S.C. § 6906 in place at the times relevant to the lawsuit); *with* 42 U.S.C. § 18062; 45 C.F.R. § 153.510. The case is therefore inapposite.

2. The Tucker Act provides legal relief if Congress fails to appropriate sufficient funds to satisfy a money-mandating statute

Throughout its brief, the Government argues that "Congress controls the power of the purse" and that no money may be paid from the Federal Treasury without authorization from Congress. *See*, *e.g.*, Gov. Br. at 1. That is true. But it is also overly simplistic, particularly

until expended") (emphasis added); *Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1168 (Fed. Cir. 1995) (stating that relevant "statute recognizes that Congress may choose to appropriate less money for entitlements under the Act than is required to fund those entitlements fully").

because it ignores the Tucker Act, the difference between the Government's monetary liability and its payment of that liability, and the Judgment Fund.

As the Court noted in its motion to dismiss order, the Tucker Act long ago "waive[d] sovereign immunity for claims against the United States that are founded upon the Constitution, a federal statute or regulation, or an express or implied contract with the United States." *Health Republic*, 129 Fed. Cl. at 770 (citing 28 U.S.C. § 1491(a)(1)). To be sure, the Tucker Act is "merely a jurisdictional statute" and "does not create any substantive right enforceable against the United States for money damages." *Id.* (citation omitted). But if a plaintiff establishes a substantive right to money damages due to, *inter alia*, a "money-mandating constitutional provision, statute or regulation," the Tucker Act allows them to obtain a money judgment against the Government from this Court. *Id.*

The crucial distinction the Government misses is that this Court's ability to issue a judgment is not contingent on the plaintiff's ability to obtain payment from the Federal Treasury. As an *en banc* Federal Circuit held, this Court's ability to determine the Government's monetary liability has nothing to do with whether Congress appropriated money to satisfy that liability. *Slattery*, 635 F.3d at 1320-1321 ("[T]he source of funding of an agency's activities or for payment of its judgments is not a limitation on Tucker Act jurisdiction."). The only pertinent questions are whether there exists a substantive right to payment (*e.g.*, via a money-mandating statute) and whether the plaintiff falls into the category of entities that may invoke that right. *Greenlee II*, 487 F.3d at 876.

Importantly, whether or not a statute is money-mandating—and therefore can stand as the basis on which a plaintiff may obtain a money judgment against the Government—is ***both*** a jurisdictional ***and*** merits question. *Fisher v. United States*, 402 F.3d 1167, 1173 (Fed. Cir. 2005)

(en banc).[4] Thus, the determination on a motion to dismiss that a statute is money-mandating also controls for the merits portion of the case. *Id.*; *see also Adair v. United States*, 497 F.3d 1244, 1251 (Fed. Cir. 2007) (citing *Fisher*); *Metz v. United States*, 466 F.3d 991, 997 (Fed. Cir. 2006) (same). For this reason, the Government's attempt to downplay the Federal Circuit's opinion in *Slattery* by claiming it is only about jurisdiction, *see* Gov. Br. at 30 n.14, ignores why that binding precedent renders the vast majority of the Government's cross-motion moot. In short, this Court already held on the merits that Section 1342 is money-mandating. Unless Congress somehow amended Section 1342 via an appropriations bill (which, as discussed in Section II(C) *infra*, it did not), the failure to appropriate sufficient funds for risk corridors "payments out" establishes this Court's jurisdiction and the basis for the Government's liability. *See Slattery*, 635 F.3d at 1320-1321; *see also Greenlee II*, 487 F.3d at 877; *N.Y. Airways*, 369 F.2d at 748; *Wetsel-Oviatt*, 38 Fed. Cl. at 571.

Underscoring this point is that the Government has admitted that a failure to appropriate sufficient funds is not a defense to a Tucker Act claim, nor to payment for a Tucker Act judgment. In *United States House of Representatives v. Burwell*, No. 1:14-cv-01967-RMC, Defendants' Memorandum in Support of Their Motion for Summary Judgment, 2015 WL 9316243 (D.D.C. Dec. 2, 2015) (No. 1:14-cv-01967), ECF No. 55-1, the Government stated "[t]he absence of an appropriation would not prevent the [QHP issuers] from seeking to enforce that statutory right [advance payment of cost-sharing reductions] through litigation." *Id.* at 20. The Government then explained QHP issuers could pursue their rights via the Tucker Act, and, if

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[4] "For purposes of the case before the trial court, the determination that the source is money-mandating shall be determinative both as to the question of the court's jurisdiction and thereafter as to the question of whether, on the merits, plaintiff has a money-mandating source on which to base his cause of action." *Fisher*, 402 F.3d at 1173.

successful, would be able to draw on the Judgment Fund for payment. *Id.* "The mere absence of a more specific appropriation is not necessarily a defense to recovery from that Fund." *Id.*

The Government's apparent citation of *Nevada v. Dep't of Energy*, 400 F.3d 9 (D.C. Cir. 2005), for the opposite proposition, *see* Gov. Br. at 19, is misleading. *Nevada* dealt with a statute establishing a "Waste Fund" related to nuclear waste disposal and authorizing the Secretary of Energy to spend Waste Fund money "subject to appropriations." *Id.* at 11. Nevada incurred $4 million in uncompensated costs it believed were covered by (and should be compensated out of) the Waste Fund, *id.*at 12-13, so the case hinged on whether Congress had made appropriations permitting the DOE to reimburse the State. *Id.* at 14-17. Contrary to the Government's argument (Gov. Br. at 19), there was no broad holding that a plaintiff must identify an appropriation in order to proceed with a Tucker Act case for failure to satisfy a money-mandating statute. *Nevada* was specifically about whether Congress made an appropriation where, unlike here, the governing statute limited the Government's obligation to pay to only those amounts Congress chose to appropriate. *Id.* at 13-17.

Similarly, the Government's repeated arguments (at 28-30) that the Judgment Fund was unavailable to HHS for 2014 and 2015 plan year risk corridor payments miss the point. The Judgment Fund exists in order to satisfy judgments against the United States. It was created to eliminate the need for Congress to enact special appropriations each time this Court, its predecessor, or any other tribunal handed down a money judgment against the Government. *See Slattery*, 635 F.3d at 1317, 1320-1321; *see also* Gov. Br. at 33 n.15 (citing *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 424-425 (1990), for the proposition that "until the creation of the Judgment Fund in 1956, most money judgments against the United States required special appropriations from Congress for payment"). The Class does not argue that the existence of the

Judgment Fund bears on Section 1342's money-mandating nature nor the merits of the Class's claims. The Judgment Fund is only relevant insofar as the Class obtains judgment against the Government and seeks payment from the Federal Treasury via the Fund. Any implication from the Government that the Class makes any broader argument is a mischaracterization.

B. The Risk Corridors Program Is Not "Budget Neutral," And The Government Committed To Making Full "Payments Out"

The Government's cross-motion also makes an improper attempt to revisit the Court's order on the motion to dismiss by surreptitiously arguing Section 1342 and its implementing regulations are not money-mandating. As the Court already held, it is "folly" to do so. *Health Republic*, 129 Fed. Cl. at 770. Nevertheless, the Government makes that attempt. In a reversal from its previous motion to dismiss arguments, the Government now argues that the risk corridors program was entirely budget neutral (as opposed to just budget neutral during the "three-year payment framework" HHS ostensibly established in 2014).[5] As set forth below, the Government's budget neutrality and money mandating arguments fail.

[5] *Compare*, *e.g.*, Gov. Br. at 24-28; *with*, *e.g.*, Dkt. 8 at 1 ("HHS, in its discretion, established a three-year payment framework, consistent with the three-year length of the program established by Congress. Under this framework, HHS cannot owe Health Republic, or any other issuer, final payment before the end of the program cycle in 2017."), 16 ("HHS exercised this discretion by establishing a three-year payment framework. Under this framework, if risk corridors claims exceed collections for a given benefit year, as they did in fiscal year 2015 (for benefit year 2014), payments are temporarily reduced so as not to exceed HHS's budget authority for that year; however, further payments for that benefit year are made in subsequent payment cycles, with final payment not due until the final payment cycle in 2017."); Dkt. 14 at 1 ("Section 1342 does not require annual risk corridor payments in full, and HHS, under its authority to 'establish and administer' the risk corridors program, implemented a three-year payment framework in a budget neutral manner, such that final payment is not due until the end of the temporary, three-year program."), 3 ("HHS, under its express authorization to administer the risk corridors program, 42 U.S.C. § 18062(a), has elected to establish a three-year framework, with final payment not due until after the conclusion of the three-year program.")

1. Section 1342 and its implementing regulations require full "payments out" unconstrained by "payments in"

As HRIC and the Class noted in their motion for summary judgment, the first step in any statutory construction analysis is the plain language of the statute itself. If the statute is clear on its face, that is the end of the inquiry. *See* Mot. at 15-16.

Just as the Court did in its Order denying the Government's motion to dismiss, *Health Republic*, 129 Fed. Cl. at 770, the Class's motion walks through Section 1342 and its implementing regulations' language, demonstrating how they unequivocally state the Government "shall pay"—or, as stated in the regulations, QHP issuers "will receive" and HHS "will pay"—specific amounts if QHP issuers' losses exceeded certain levels in any of the 2014, 2015, or 2016 plan years. Mot. at 16-18. Furthermore, as relevant to the Government's cross-motion, neither Section 1342 nor the implementing regulations have any sort of cap on the amounts the Government agreed to pay if QHP issuers lost more than anticipated in those plan years. *See generally* 42 U.S.C. § 18062; 45 C.F.R. § 153.510(b). Congress knew how to—and did—limit other ACA programs to amounts appropriated by Congress,[6] yet it included no similar limitation in the risk corridors program. Thus, Section 1342 and its implementing regulations are plain on their face that they are not "budget neutral" and require full "payments out" from the Government for the 2014-2016 plan years, particularly given their context with other ACA

[6] *See*, *e.g.*, ACA § 4102 (codified at 42 U.S.C. § 280k(a)) ("The Secretary . . . shall, subject to the availability of appropriations, establish a 5-year national, public education campaign . . . ."); ACA § 4304 (codified at 42 U.S.C. § 300hh-31(a)) ("Subject to the availability of appropriations, the Secretary . . . shall establish an Epidemiology and Laboratory Capacity Grant Program . . . ."); ACA § 5303 (codified at 42 U.S.C. § 293k-2(e)) ("The provision of such payments shall be subject to annual approval by the Secretary and subject to the availability of appropriations for the fiscal year involved to make the payments."); ACA § 6703 (codified at 42 U.S.C. § 1397m-1(b)(2)(A)) ("Subject to the availability of appropriations . . . the amount paid to a State for a fiscal year under the program under this subsection shall equal . . . .").

programs that were limited to only those appropriations Congress provided. *See Health Republic*, 129 Fed. Cl. at 770; *Greenlee II*, 487 F.3d at 877; *Britell*, 372 F.3d at 1378; *Agwiak*, 347 F.3d at 1380; *ARRA Energy*, 97 Fed. Cl. at 22; *cf. Prairie Cnty. I*, 113 Fed. Cl. at 199 ("[T]he language 'subject to the availability of appropriations' [which has no analogue in Section 1342] is commonly used to restrict the government's liability to the amounts appropriated by Congress for the purpose.") (quoting *Greenlee II*, 487 F.3d at 878).

In the face of this plain language, the Government raises two general arguments, neither of which changes the proper conclusion. First, the Government claims Section 1342 requires a budget neutral program because its only explicit funding source is "payments in" from other QHP issuers. Gov. Br. at 6, 14-15, 17-18. That is incorrect; on its face, Section 1342 does ***not*** permit HHS to use "payments in" as a funding source for "payments out" (and Judge Lettow erred in holding otherwise, *see Land of Lincoln Mut. Health Ins. Co. v. United States*, 129 Fed. Cl. 81, 92 (2016)). In order for a federal agency to use funds it receives from a program to make payments under that same or a different program, the statute(s) establishing the program must either explicitly grant that authority or establish a revolving fund for that purpose. *See* 31 U.S.C. § 3302(b); *GAO Red Book* (Ch. 12), at 12-89 (3d ed. 2008) ("Perhaps the most fundamental rule relating to revolving funds is that a federal agency may not establish a revolving fund unless it has specific statutory authority to do so."). As both the GAO and CRS noted, however, Section 1342 contains no such language. *See* GAO, Opinion Letter on Department of Health & Human Services-Risk Corridors Program to former Senator Jeff Sessions and Congressman Fred Upton, 2014 WL 4825237, at *2 (Sept. 30, 2014) ("Section 1342, by its terms, did not enact an appropriation to make the payments specified in section 1342(b)(1)"); CRS, Memorandum to House Energy and Commerce Committee, *Funding of Risk Corridor Payments Under ACA §*

1342, at 3 (Jan. 23, 2014) ("Notably for purposes of this memorandum, the amounts received by HHS from plans that have overestimated premiums for a given year are not explicitly designed to be deposited in a revolving account or otherwise made available for outgoing payments under § 1342(b)(1). Therefore, there does not appear to be sufficient statutory language creating a revolving fund that would make amounts received under § 1342(b)(2) available to pay amounts due to eligible plans under § 1342(b)(1).") (cited in Gov. Br. at 7). The only reason HHS was able to use risk corridor "payments in" to make "payments out" in 2015 and 2016 was because the subsequent Spending Bills for each of those years permitted HHS to utilize "user fees" (such as risk corridors "payments in") to partially satisfy the Government's "payments out" obligations. GAO, Opinion Letter on Department of Health & Human Services-Risk Corridors Program to former Senator Jeff Sessions and Congressman Fred Upton, 2014 WL 4825237, at *4-*5. These later appropriation acts, however, have nothing to do with Section 1342's plain language or Congress's intent when it enacted the statute four years earlier. *See* Mot. at 24-25.

Next, the Government argues that the "operative provision" of Section 1342 is subsection (a), which "simply describes the way the Secretary shall administer the program of payment adjustments ***among QHPs***." Mot. at 24 (emphasis added). According to the Government, Section 1342's "payment adjustment system" (*i.e.*, the risk corridors program) is one in which QHP issuers shift payments between each other in a budget neutral fashion, without any independent contribution from the Government. *See* Mot. at 1 ("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"), 5 (the risk corridors program is one "under which amounts collected from profitable insurers are used to fund payments to unprofitable insurers"), 14 ("Section 1342 directed HHS to 'establish and administer' a system of

payment adjustments among insurers for the 2014, 2015, and 2016 calendar years . . . ."). As "proof" for this interpretation, the Government offers no language from Section 1342 or its implementing regulations beyond the words "payment adjustment system."

Again returning to the plain language of the statute, this argument fails because it seeks to torture Section 1342 and its implementing regulations into unrecognizable shapes. Section 1342(b) directs the Secretary in no uncertain terms to establish a program under which the Secretary pays specific amounts to QHP issuers under specific circumstances. 42 U.S.C. § 18062(b). That directive is not limited to amounts HHS receives from other QHP issuers. *Id.* Furthermore, the Government ignores that 45 C.F.R. § 153.510 is also a money-mandating statute on which the Class seeks compensation and which is fully consistent with Section 1342's mandate. *See Health Republic*, 129 Fed. Cl. at 770. That implementing regulation has no "establish and administer" language because it ***is*** the program Congress directed HHS to establish. Section 153.510(b) is clear that, pursuant to Section 1342, QHP issuers "will receive" specific amounts and that HHS "will pay" those amounts in full; there is no limitation to just amounts that are collected from other QHP issuers. 45 C.F.R. § 153.510. Thus, it is the Government that errs by trying to write in language to Section 1342 and the implementing regulations that does not exist. *See Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 646-647 (2005) (rejecting restricted appropriations for statute where original statutory language unambiguously required full funding, and, given the unambiguous original language, also rejecting argument that the later acts "clarifie[d]" the original statute); *see also Bull v. United States*, 479 F.3d 1365, 1377 (Fed. Cir. 2007) (there is a "strong presumption that the plain language expresses congressional intent") (internal quotation marks and citation omitted).

2. Congress's inclusion of "budget authority" in other ACA programs or Medicare Part D is irrelevant

Faced with the overwhelming textual and other evidence demonstrating why the risk corridors program is not budget neutral, the Government next resorts to arguing it may avoid making full risk corridor payments because, in contrast to other ACA programs and Medicare Part D, Section 1342 did not preemptively provide "budget authority" or make appropriations to HHS. Gov. Br. at 14-15. This argument fails because the Government erroneously equates budget authority with a money-mandating statute.

The key to the Government's error lies in the words it wishes to ignore: that "the Secretary shall pay" QHP issuers specific risk corridor amounts for each of the 2014, 2015, and 2016 plan years. Where a statute establishes a federal program and affirmatively states the Government "shall pay" specific amounts in specific circumstances to specific entities in connection with the program, the statute creates a legally enforceable obligation regardless of whether it includes a separate appropriation for satisfy that obligation. *See*, *e.g.*, *Agwiak*, 347 F.3d at 1380 (concluding without analyzing Title 5 more broadly that 5 U.S.C. § 5942(a) is money-mandating because it states individuals "shall be paid" certain amounts); *Greenlee II*, 487 F.3d at 877.

That Section 1342 does not contain an appropriation is therefore unsurprising because, "[i]n the case of entitlements, '[b]udget authority . . . is not necessarily provided in advance, and thus entitlement legislation requires the subsequent enactment of appropriations unless the existing appropriation is permanent.'" *Greenlee Cnty., Ariz. v. United States*, 68 Fed. Cl. 482, 489 (2005) ("*Greenlee I*") (quoting GAO, *A Glossary of Terms Used in the Federal Budget*

Process 57), *aff'd* 487 F.3d 871.[7] Statutory language stating that the Government "will pay" or "shall pay" specified amounts to specific categories of individuals creates such an entitlement. *See*, *e.g.*, *Jackson v. Shinseki*, 526 Fed. App'x 947, 950 (Fed. Cir. 2013) (finding that 38 U.S.C. § 1110 creates an entitlement because it states the Government "will pay" for any disability resulting from active military service); *Skinner v. Brown*, 27 F.3d 1571, 1573 (Fed. Cir. 1994) (finding that REPS statute, Pub. L. No. 97–377, § 156, 96 Stat. 1920 (1982), created an entitlement because it stated the Secretary of Veteran Affairs "shall pay" certain benefits every month).[8]

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[7] "[E]ntitlement authority" is "the authority to make payments . . . , ***the budget authority for which is not provided for in advance*** by appropriation Acts, to any person or government if, under the provisions of the law containing that authority, the United States is obligated to make such payments to persons or governments who meet the requirements established by that law." 2 U.S.C. § 622(9) (emphasis added). "Authorization for entitlements constitute a binding obligation on the part of the Federal Government, and eligible recipients have legal recourse if the obligation is not fulfilled." *Greenlee II*, 487 F.3d at 878 (quoting GAO, *A Glossary of Terms Used in the Federal Budget Process* 57 (3d ed. 1981)).

[8] To the extent the Government implies (citing the *Prairie Cnty.* opinions) that the obligation to pay benefits only arises once Congress appropriates funds for those benefits, *see* Gov. Br. at 23-26, this directly contradicts the Federal Circuit's controlling precedent. *Star-Glo Assocs., LP v. United States*, 414 F.3d 1349 (Fed. Cir. 2005) (discussed in more detail *infra* at Section II(C)(3)) is on point, as *Greenlee II* cited it in reaching its decision on PILT, and which the *Prairie Cnty.* opinions in turn cited when remarking on PILT's status as a benefits program. In *Star-Glo*, the Federal Circuit observed that, as opposed to contracting situations where predictability from the contract's plain language is typically key, there is "greater room" to assess legislative history when assessing the Government's ability to limit funds for a benefits program. *Id.* at 1355. The Circuit therefore was more willing in *Star-Glo* to assess legislative history and make findings based on that history, because the program at issue was a benefits program, not a contract. *Id.* at 1355-56. The same held true for PILT in *Greenlee II*, because that also was a benefits program, not a contract. *Greenlee II*, 487 F.3d at 879. Neither those cases nor *Prairie Cnty. II*, however, stand for the broader proposition that Congress may limit funds for ***every*** benefits program, regardless of the underlying statutes' plain language; such a holding would contradict decades of Supreme Court and Federal Circuit/Court of Claims precedent. *See* Section II(A), *supra*.

Given this law, there can be no real dispute that Section 1342 requires the Government to pay QHP issuers full risk corridor amounts. Section 1342 directs HHS to establish and administer a program in which HHS "shall pay" QHP issuers specific risk corridor amounts in each plan year from 2014-2016. 42 U.S.C. § 18062(b)(1). This alone creates the requirement, but the regulations HHS implemented in response to Section 1342 make similar statements that further underscore the amounts to which QHP issuers are entitled. 45 C.F.R. § 153.510(b) (QHP issuers "will receive payment from HHS in the following amounts," and "HHS will pay" those amounts). Because Section 1342 establishes an entitlement, its lack of budget authority language is unsurprising and, in the end, completely irrelevant to the statute's (and its implementing regulations') money-mandating nature. *See Agwiak*, 347 F.3d at 1380; *Jackson*, 526 Fed. App'x at 950; *Skinner*, 27 F.3d at 1573.

The absence of "budget authority" language in the ACA, therefore, does not defeat the Class's right to risk corridor payments the Government has legally obligated itself to pay.

3. The CBO's failure to score the risk corridors program in 2010 does not indicate Congress intended to create a budget neutral program

The Government's third argument that Section 1342 is budget neutral centers on the Congressional Budget Office ("CBO"), which scored the other two 3R programs in 2010 shortly before Congress passed the ACA, but did not score the risk corridors program. *See* Gov. Br. at 16-17 (citing Dkt. 52-1*,* CBO Cost Estimate, Tbl. 2, A81-A82). According to the Government, because Congress indicated it believed the CBO's scoring demonstrated that the ACA would reduce the federal deficit, this further indicated that Congress assumed risk corridor payments would not increase the deficit. Gov. Br. at 16-17. Although the Government does not actually use the words "budget neutral" in its argument on this point, *id.*, it argues that these facts

demonstrate Congress did not intend the risk corridors program to be "an obligation of the government" (*i.e.*, a payment obligation from a non-budget neutral federal program). *Id.*

As an initial matter, it is well settled that the CBO's analysis of the costs associated with a statute is irrelevant to the statute's construction. *See Sharp v. United States*, 80 Fed. Cl. 422, 436 (2008) ("[T]he CBO's 'view—on which the Congress did not vote, and [which] the President did not sign— cannot alter the meaning of enacted statutes.'") (quoting *Ameritech Corp. v. McCann*, 403 F.3d 908, 913 (7th Cir. 2005)), *aff'd Sharp v. United States*, 580 F.3d 1234, 1238-39 (Fed. Cir. 2009) ("[T]he CBO is not Congress, and its reading of the statute is not tantamount to congressional intent."); *Ameritech Corp.*, 403 F.3d at 913 (7th Cir. 2005) ("Although the Congressional Budget Office expressed an opinion that the 1986 law would not impose new costs on states, this view— on which Congress did not vote, and the President did not sign—cannot alter the meaning of enacted statutes.").

But, even if CBO scoring were an appropriate method of determining legislative intent, there is nothing in the CBO's March 20, 2010 letter to Speaker Pelosi indicating why the risk corridors program was omitted from the analyses. *See generally* CBO, Letter from Douglas Elmendorf, Director, CBO, to Nancy Pelosi, Speaker, House of Representatives (Mar. 20, 2010). The Government certainly cites no such evidence and offers no reason why, given the plain language of the then-contemplated Section 1342, anyone—Congress, CBO, or any other party—would assume Congress had committed to anything other than full, annual risk corridor payments to QHP issuers. *See* Gov. Br. at 16-17. Moreover, when a later Congress specifically asked CBO about its interpretation of the Government's obligations pursuant to the risk corridors program, CBO stated that, based on Section 1342's terms, it believed the program was ***not*** budget neutral. *See* CBO, *The Budget and Economic Outlook: 2014 to 2024, Appendix B:*

Updated Estimates of the Insurance Coverage Provisions of the Affordable Care Act (Feb. 2014) at 110, *available at* https://www.cbo.gov/sites/default/files/cbofiles/attachments/45010-breakout-AppendixB.pdf (last visited May 12, 2017).[9] It is difficult to see how CBO could have assumed risk corridors were budget neutral shortly before the ACA's passage—supposedly leading Congress, which wrote Section 1342, to believe the same thing—and then later assume the exact opposite. Accordingly, the Government's unsupported assertion that Congress "relied on" CBO's budget neutral interpretation, Gov. Br. At 17, is not evidence of legislative intent.

4. Partial risk corridor payments further no intended policy or goal

Another, more fundamental (and fatal) problem with the Government's arguments in support of "budget neutral" risk corridor payments is that such arguments neither rely on nor cite any Congressional policy or goal from 2010. The Class recounts at length the evidence showing Congress intended to incentivize QHP issuers to provide plans on the ACA health exchanges by promising to backstop any outsized losses incurred due to the uncertain nature of those new markets. *See* Mot. at 20-22. The Government provides no similar evidence. Instead, it simply claims that (1) the 3R program "were designed to *mitigate* insurers' risks, not to *eliminate* [them]" (emphases in original); (2) that the ACA exchanges presented business opportunities for QHP issuers, who compete for market share through (among other things) lower premiums; and (3) eventually paying owed risk corridor amounts at some later date will still serve the program's purpose, just not to the extent QHP issuers prefer. Gov. Br. at 27-28.

Addressing each of these arguments in turn:

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[9] "In contrast to the risk adjustment and reinsurance programs, payments and collections under the risk corridor program will not necessarily equal one another: If insurers' costs exceed their expectations, on average, the risk corridor program will impose costs on the federal budget; if, however, insurers' costs fall below their expectations, on average, the risk corridor program will generate savings for the federal budget."

(a) Risk mitigation v. risk elimination

Certainly, the risk corridors program was meant to mitigate, not eliminate, risks. That is why the Government must only pay a ***portion*** of QHP issuers' outsized losses, and why QHP issuer "winners" must pay the Government only a ***portion*** of outsized profits. 42 U.S.C. § 18062(b)(1) & (2). As the name of the program suggests, a risk "corridor" incentivizes entry to a new market by collaring losses and gains to a predefined range. This corridor gives entrants comfort they can learn the new market's demographics while not falling too far behind any luckier competitors. Declaration of M. Kate Bundorf dated Aug. 14, 2016 ¶¶ 8(c), 9 ("Bundorf Decl."). Of course, part of the deal is that the entrant agrees to pay the Government any outsized gains if they are among those luckier competitors. However, the program smooths out risk in the market's early years so competition can be on the merits once the market matures. Bundorf Decl. ¶¶ 8-10. In its brief, the Government ignores this incentive structure in favor of sound bites about not making taxpayers "the guarantor of profits for the health insurance industry." Gov. Br. at 1; *see also id.* at 27. That is not substantive argument and does not address the actual policy underlying the program.

(b) The business opportunities the ACA exchanges represent have nothing to do with the purpose of the risk corridors program

The Government next argues it could not have intended to provide full, annual risk corridor payments because that would have incentivized QHP issuers to lower premiums to unreasonable levels in the ACA exchanges' early years. Gov. Br. at 27. As support for this argument, the Government offers no evidence besides a hearsay article. *Id.* But more importantly, the Government does not address the program's real concern: incentivizing QHP issuers to enter the ACA exchanges in the first place, given those markets' new and unknown demographics. *Id.* As the Class discussed in its own motion (and above), creating those entry

incentives was Congress's primary concern when it passed the ACA, and the only reading of Section 1342 consistent with that concern is the one in which the Government obligated itself to backstop QHP issuers' early losses on an annual basis. Mot. at 9-11, 20-22.

(c) A subsequent Congress cannot undermine a statutory program and then claim that provides insight into the program's original intent

The final, and most cynical, of the Government's policy defenses is its claim that Congress was free to refuse to pay risk corridor amounts because the limited payments QHP issuers received still serve the program's purpose, just to a much, much lesser extent. Gov. Br. at 28. First, as a factual matter, the ***only*** evidence in the record is that the failure to pay full (or anywhere near full) risk corridor amounts for the 2014 and 2015 plan years crippled many QHP issuers when it was supposed to protect them. Mot. at 13-14 (documenting the chaos the Government's failure to pay caused among QHP issuers). The failure to pay full risk corridor amounts also caused the program to fail; it was unable to help stabilize insurance premiums and was a classic "bait and switch," leading many QHP issuers to leave the ACA exchanges when the program was meant to incentivize them to both join and remain in the exchanges. *Id.*; *see also* Bundorf Decl. ¶¶ 8-10.

Second, the broader fallacy with this policy argument is that a statute's failure to reach its goals (for whatever reason, particularly subsequent partisan politics) says nothing about the statute's requirements and what Congress intended when it enacted the statute. *See Hoechst Aktiengesellschaft v. Quigg*, 917 F.2d 522, 526 (Fed. Cir. 1990) ("When faced with such ambiguity [requiring inquiry into legislative history] it is incumbent upon this court to examine the legislative history *to discern Congress' intent*.") (emphasis added). Here, again, the *only* goals any party has ever identified for the risk corridors program is to incentivize QHP issuers to enter the ACA exchanges and allow them time to learn the facets of the demographics in the new

exchange markets. The *only* interpretation that is consistent with those goals is one in which the Government made full, annual risk corridor payments.[10]

C. The Spending Bills Did Not Amend Or Eliminate The Government's Risk Corridor Payment Obligations To The Class

The Government next claims that, even if Section 1342 is money-mandating and requires full, annual risk corridor payments, the Spending Bills "superseded any such obligation." Gov. Br. at 20-24.[11] Because appropriations laws "have the limited and specific purpose of providing funds for authorized programs," they are presumed to *not* impact substantive law. *See TVA v. Hill*, 437 U.S. 153, 190 (1978). Thus, although Congress may have the legal authority to prospectively amend preexisting statutory obligations, it must do so "expressly or by clear implication." *Prairie Cty. II*, 782 F.3d at 689 (Fed. Cir.) (citation omitted); *see also N.Y. Airways*, 369 F.2d 743, 749 (Ct. Cl. 1966) ("The intent of Congress to affect a change in the substantive law via provision in an appropriation act must be ***clearly manifest***.") (emphasis added)*; accord Greenlee II*, 487 F.3d at 877 (quoting *N.Y. Airways*); *District of Columbia v. United States*, 67 Fed. Cl. 292, 335 (2005) (same). "This rule applies with especial force when the provision advanced as the repealing measure was enacted in an appropriations bill." *United States v. Will*, 449 U.S. 200, 221-22 (1980).

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[10] For this reason, the Government's citation (at 28) to *Rodriguez v. United States*, 480 U.S. 522 (1987), is inapposite. In *Rodriguez*, the Supreme Court noted that the lower court erred when concluding a statutory provision in the Comprehensive Crime Control Act of 1984 ("CCCA") repealed a prior statute by implication because that interpretation was consistent with the broader purpose of the CCCA. *Id.* at 525-526. This was error because the statute did not explicitly repeal the prior statute and could be reconciled with the statute it supposedly repealed. *Id.* If anything, *Rodriguez* supports the Class, not the Government, because it holds that a supposed repeal by implication is not effective unless it is "clear and manifest." *Id.* at 524.

[11] The Spending Bills are the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130 ("2015 Spending Bill"); Consolidated Appropriations Act, 2016, Pub. L. No. 114–113, 129 Stat. 2242 ("2016 Spending Bill"); and Continuing Appropriations Act, 2017, Pub. L. No. 114-223, 130 Stat. 857 ("2017 Spending Bill").

"In general, to determine whether Congressional intent was clearly manifest, courts look first to the language of the appropriations law." *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 458 (2017) (citing *N.Y. Airways*, 369 F.2d at 750). If a statutory instruction in the appropriation act "was a mere limitation on the expenditure of a particular fund," then that does not express a clear intent to modify the preexisting statutory obligation. *Gibney v. United States*, 114 Ct. Cl. 38, 50 (1949); *see also United States v. Vulte*, 233 U.S. 509, 515 (1914) (noting that appropriations acts could modify a preexisting statute only when "there was something more than the mere omission to appropriate a sufficient sum"). Similarly, if the insufficient appropriation does not state that it is in "full compensation" (or the equivalent) of the monetary obligation, that does not amend or otherwise obviate the amount the Government must pay. *United States v. Langston*, 118 U.S. 389, 393-94 (1886); *Vulte*, 233 U.S. at 514-15.

Although courts may also look to ancillary factors for this inquiry, "legislative history is not legislation. As useful and important as legislative history may be in resolving ambiguities and determining congressional intent, it is the language of the appropriation act, and not the language of its legislative history, that is enacted into law." *GAO Red Book* (Ch. 2), at 2-59 (4th ed. 2016). Because of this, "[e]xpressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress." *Id.* (quoting *TVA v. Hill*, 437 U.S. at 191); *see also Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 646 (2005) ("The relevant case law makes clear that restrictive language contained in Committee Reports is not legally binding."). Inquiries into legislative intent in a repeal by implication situation must therefore receive substantial skepticism and, if the record before Congress at the time of the appropriations act is that the Government believes the statutory obligation remains binding even in the absence of full appropriations, no clear intent to amend exists. *N.Y. Airways*, 369 F.2d at

750-51. Likewise, if the legislative history is ambiguous on intent, then no clear intent exists. *District of Columbia*, 67 Fed. Cl. at 335-36.

1. The Spending Bills are just a "mere limitation on the expenditure of a particular fund"

The beginning and end of the inquiry on the Spending Bills is with their plain language, which makes clear that they are simply a limitation on HHS's ability to use specific funds to pay risk corridor amounts. In the 2015 Spending Bill, Congress stated only that:

> None of the funds made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the "Centers for Medicare and Medicaid Services–Program Management" account, may be used for payments under section 1342(b)(1) of [the ACA] (relating to risk corridors).

2015 Spending Bill, at div. G, tit. II, § 227, 128 Stat. at 2491. On its face, the language is limited only to funds made available in "this Act" and prohibits HHS from drawing on certain Funds in paying risk corridor amounts. *Id.* There is no prohibition from paying risk corridor amounts in total, nor is there any statement that Congress intended to change the Government's payment obligations. In short, the 2015 Spending Bill's risk corridors rider has none of the "clear intent" needed to repeal Section 1342 by implication. *See Vulte*, 233 U.S. at 514-515; *Langston*, 118 U.S. at 393-94; *N.Y. Airways*, 369 F.2d at 750-51; *Gibney*, 114 Ct. Cl. at 50; *District of Columbia*, 67 Fed. Cl. at 335.

The 2016 Spending Bill fares no better. In addition to reiterating the same language as the 2015 Spending Bill, *see* div. H, tit. II, § 225, 129 Stat. at 2624, Congress also stated:

> In addition to the amounts otherwise available for "Centers for Medicare and Medicaid Services, Program Management", the Secretary of Health and Human Services may transfer up to $305,000,000 to such account from the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund to support program management activity related to the Medicare program: *Provided*, That except for the foregoing purpose, such funds may not be used to support any provision of [the ACA] or Public Law 111–152 (or any

> amendment made by either such Public Law) or to supplant any other amounts within such account.

Id. at div. H, tit. II, § 226, 129 Stat. at 2625. Similar to the original language from the 2015 Spending Bill, this was simply a limitation to specific funds and included no broader statement evincing an intent to permanently amend the Government's risk corridor payment obligations. *See Vulte*, 233 U.S. at 514-15; *Langston*, 118 U.S. at 393-94; *N.Y. Airways*, 369 F.2d at 750-51; *Gibney*, 114 Ct. Cl. at 50; *District of Columbia*, 67 Fed. Cl. at 335.

Finally, the 2017 Spending Bill simply states that the same appropriations from 2016 remain in place with respect to HHS for 2017. 2017 Spending Bill, at div. C, 130 Stat. at 909. For similar reasons, this language fails to repeal the Government's risk corridor payment obligations in any way.

Given that the Spending Bills' plain language does not evince a "clear intent" to repeal Section 1342, the Court should therefore reject the Government's repeal by implication arguments on that basis alone. *See Vulte*, 233 U.S. at 514-15 (interpreting appropriations act's plain language for evidence of clear intent to repeal by implication, and finding none); *Langston*, 118 U.S. at 393-94 (same); *N.Y. Airways*, 369 F.2d at 750-51 (same); *Gibney*, 114 Ct. Cl. at 50 (same); *District of Columbia*, 67 Fed. Cl. at 335 (same).[12]

2. The legislative history of the Spending Bills does not demonstrate an intent to repeal, let alone a "clear intent"

Since the Spending Bills facially do not repeal Section 1342, the Government next attempts to argue the legislative history shows "clear" intent to repeal. The Government quotes

[12] For examples of appropriations acts evincing such clear intent, the Class respectfully directs the Court to Section III(C)(3) *infra*, at 31-36, which discusses *United States v. Dickerson*, 310 U.S. 554 (1940); *United States v. Will*, 449 U.S. 200 (1980); and *United States v. Mitchell*, 109 U.S. 146 (1883).

two committee statements from 2014 and 2015 support of this proposition. The first is from an Explanatory Statement the House Committee on Appropriations appended to the 2015 Spending Bill regarding, *inter alia*, the risk corridors rider. In full, it stated:

> Risk Corridor Program. — In 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. The agreement includes new bill language to prevent the CMS Program Management appropriation account from being used to support risk corridors payments.

160 Cong. Rec. H9307-1, H9838 (Dec. 11, 2014) (quoted in part in Gov. Br. at 10-11). Nothing in this statement evinces an intent to repeal. The first sentence is a statement of fact of what HHS has done; it is not a statement of intent and does not even suggest such an intent, as the Government misleadingly claims multiple times in its brief (*see* Gov. Br. at 2, 23, 30, 34). Rather, it merely reports on HHS's decision in 2014 to treat the risk corridors program as budget neutral, and then only notes that the effect of the approach would be to delay full payment during the term of the "three-year payment framework" the Government highlighted at the motion to dismiss phase.

The Class's motion for summary judgment explains at length why HHS's decision to utilize a "three-year payment framework" violated Section 1342 and HHS's own implementing regulations. *See generally* Mot. at 15-31. Important for the present discussion, however, is that HHS had stated on multiple occasions before this Explanatory Statement that it believed it and the Government were obligated to make full risk corridor payments at the end of the "three year period risk corridors are in effect." *See*, *e.g.*, 78 Fed. Reg. 15,410, at 15,473 (Mar. 11, 2013) ("Regardless of the balance of payments and receipts, HHS will remit payments as required under Section 1342 of the Affordable Care Act."); 79 Fed. Reg. 30,240, at 30,260 (May 27, 2014) ("HHS recognizes that the Affordable Care Act requires the Secretary to make full

payments to issuers.”). Because the House Committee on Appropriations demonstrated it was aware of HHS’s various statements, the evidence is therefore that Congress knew of their substance, and approved of them because it did not contradict the statements in either the 2015 Spending Bills or any of the subsequent acts. *Cf. Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.”).

The second sentence of the Explanatory Statement, also does not evince any intent to repeal. It says nothing except that Congress intended to limit access to the CMS Program Management appropriation account—*i.e.*, access to a specific fund—for risk corridor payments. 160 Cong. Rec. at H9838. But just limiting access to a particular fund does not provide clear legislative intent to repeal a preexisting statute. *See Vulte*, 233 U.S. at 514-15; *Langston*, 118 U.S. at 393-94; *Gibney*, 114 Ct. Cl. at 50. The Explanatory Statement therefore provides no support for repeal by implication via the 2015 Spending Bill.

The Government’s next piece of supposed evidence regarding legislative intent to repeal is a Senate Appropriations Committee Report from late 2015 regarding the 2016 Spending Bill. That report stated in relevant part:

> 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 includes the following:
>
> > —Risk Corridor—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.

Gov. Br. at 11 (quoting Dep’ts of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Bill, 2016, S Rep. No. 114-74, at 12 (2015)).

Nothing in this statement evinces an intent to repeal. As an initial matter, to the extent the Government (at 11) implies the first sentence of this statement is proof of Congress's ***original*** intent when it enacted the ACA, that argument must be rejected. *Cherokee*, 543 U.S. at 646-47 (finding that later appropriations acts could not provide insight into original intent behind statute); *see also Cobell v. Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005) (cited in Mot. at 25) ("The significance of appropriations bills is of course limited and the associated legislative history even more so. . . . [P]ost-enactment legislative history is not only oxymoronic but inherently entitled to little weight."); *Mission Critical Sols. v. United States*, 91 Fed. Cl. 386, 409 ("Congress's statements about the proper interpretation of a statute subsequent to the statute's passage are of little persuasive authority."), *dismissed*, 452 F. App'x 962 (Fed. Cir. 2010). Another preliminary point is that, as the Supreme Court itself notes, such partisan committee statements must be viewed with skepticism when interpreting an appropriations act's effects, because the statute, not a committee statement, is the final law. *TVA*, 437 U.S. at 191 ("Expressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress."); *Cherokee Nation*, 543 U.S. at 646 ("[R]estrictive language contained in Committee Reports is not legally binding.").

But even ignoring these admonitions, the Committee's statement does not evince any intent let alone a clear intent to repeal Section 1342. First, the statement again only prohibits access to funds from "the Labor-HHS-Education appropriations bill"; *i.e.*, a single bill and a single source of funding for the risk corridors program. S. Rep. No. 114-74, at 12. As noted above, that is wholly insufficient to demonstrate or effect a repeal by implication. *Vulte*, 233 U.S. at 514-15; *Langston*, 118 U.S. at 393-94; *Gibney*, 114 Ct. Cl. at 50. Second, the Committee statement does not—as it must, if it wanted to effect a repeal by implication—state that it is

cutting off ***all*** funds for the risk corridor program or making any other permanent change. *N.Y. Airways*, 369 F.2d at 750-51; *District of Columbia*, 67 Fed. Cl. at 335. Third, just as with the Explanatory Statement to the 2015 Spending Bill, the Committee made its statement in the face of multiple HHS statements in the Federal Register and elsewhere admitting that the risk corridors program required full payments regardless of whether HHS would temporarily operate the program in a budget neutral manner. *See supra* at 28. There is thus no clear intent to repeal by implication, even when taking the Committee statement into account. *N.Y. Airways*, 369 F.2d at 750-51; *District of Columbia*, 67 Fed. Cl. at 335.

3. The Government's "best" cases highlight why the Spending Bills did not repeal Section 1342's money-mandating obligations

Further underscoring why there was no repeal by implication is the Government's own case law on repeal by implication. Gov. Br. at 19-23. Each of the Government's primary cases demonstrate the statutory features Section 1342 and the Spending Bills would have needed to include in order for any of the Government's cross-motion arguments to have any merit.

Star-Glo. In October 2000, Congress enacted a statute "appropriat[ing] funds for the Secretary of Agriculture to provide assistance to Florida citrus growers whose trees were removed as a result of citrus canker efforts." *Star-Glo Assocs., LP v. United States*, 414 F.3d 1349, 1351 (Fed. Cir. 2005). In the statute, Congress specifically approved of earlier agency efforts along similar lines and said as much directly in the text. *Id.* It then set a per tree price to pay citrus growers ($26/tree). *Id.* at 1351-52. Importantly for the purposes of the present motion, Congress provided that the "Secretary of Agriculture shall use $58,000,000 of the funds of the Commodity Credit Corporation to carry out this section, to remain available until expended." *Id.* at 1352. When two citrus growers sought payment under this statute after the

$58,000,000 had already been expended, the Government refused payment on the basis that the appropriation had been a statutory cap. *Id.* at 1353.

In the subsequent lawsuit, the Federal Circuit agreed with the Government and held that the statute created a cap on payments. Central to this analysis was the clause that the $58,000,000 appropriation was "to remain available until expended." *Id.* at 1354-55. Citing the *GAO Red Book*, the Federal Circuit noted that "[t]he 'shall be available' family of earmarking language presumptively 'fences in' the earmarked sum," and "***can*** establish a cap ***if Congress so intends***." *Id.* at 1354 (emphasis added). In other words, the statutory language at issue in *Star-Glo* required an inquiry into legislative history because, as a matter of law, the language used was not a definitive indication of intent. *Id.* The Circuit therefore conducted a factual analysis into legislative history and held that, given the uncontradicted evidence for that particular statute, Congress clearly intended to create a payment cap. *Id.* at 1354-55.

Section 1342 contains no language even remotely similar to *Star-Glo*. *See* 42 U.S.C. § 18062. Thus, far from undercutting the Class's claims, *Star-Glo* in fact demonstrates that Congress did ***not*** intend to create any sort of cap on its risk corridor payments to QHP issuers. Indeed, Congress clearly demonstrated in other ACA programs it knew how to—and did—create caps on payments, but it explicitly chose not to do so with respect to risk corridors.[13]

[13] *See*, *e.g.*, ACA § 1101 (codified at 42 U.S.C. § 18001(g)(1)) (appropriating $5 billion to pay certain claims and administrative costs, and stating "[s]uch funds shall be available without fiscal year limitation"); ACA § 1102 (codified at 42 U.S.C. § 18002(e)) (same); ACA § 3024 (codified at 42 U.S.C. § 1395cc-5(h)) ("Amounts transferred under this subsection for a fiscal year shall be available until expended."); ACA § 4101 (codified at 42 U.S.C. § 280h-4(5)) ("Funds appropriated under this paragraph shall remain available until expended."); ACA § 10315 (codified at 42 USC 1395fff note) ("Amounts available under this subparagraph shall be available until expended."); ACA § 6402 (codified at 42 U.S.C. § 1395i(k)(7)) ("The funds appropriated under this paragraph . . . shall be available without further appropriation until

Highland Falls*.** Although the Government spends more time discussing *Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166 (Fed. Cir. 1995) than *Star-Glo*, the case is similarly unhelpful to the Government's position. This is primarily because *Highland Falls* does not deal with a money-mandating statute. 48 F.3d at 1169 (noting the lower court concluded that "the Impact Aid program ***is not a mandatory spending program") (emphasis added). The statute at issue in *Highland Falls*, the Impact Aid Act, entitled local educational agencies in counties where the federal government owned land to receive amounts the Secretary of the Department of Education determined, ***in its discretion***, equaled the financial burden imposed by the government's land ownership (and corresponding lack of tax revenues). *Id.* at 1168 (citing 20 U.S.C. § 237(a)). The statute did not unequivocally state the Government "shall" or "will" pay certain amounts. This immediately distinguishes and renders *Highland Falls* inapposite to the current case, where there is clearly a money-mandating statute at issue. *Health Republic*, 129 Fed. Cl. at 770.

Nevertheless, the Government cites *Highland Falls* for the proposition that the opinion shows Congress may repeal a payment obligation simply by underfunding that obligation. That argument, however, substantially misunderstands *Highland Falls*.

Unlike Section 1342 and its implementing regulations, the Impact Aid Act ***specifically allowed Congress to appropriate less funds than necessary*** in full satisfaction of the Act's entitlements. 48 F.3d at 1168 (discussing 20 U.S.C. § 240(c)). Specifically, Section 240(c) of the statute stated that, if Congress did not appropriate enough to fund the full scope of Impact Aid programs, then the Secretary was to allocate that lump-sum appropriation in specific ways,

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expended."); ACA § 4108 (codified at 42 U.S.C. § 713(f)) ("Amounts appropriated under this subsection shall remain available until expended.").

including by allocating enough of the appropriation to fund 100% of entitlements under § 237 of the act. *Id.*[14] From 1989-1993, instead of making lump-sum appropriations, Congress provided earmarked appropriations identifying specific amounts it appropriated to each Impact Aid program. The amounts Congress allocated for the § 237 program proved insufficient to satisfy all entitlements under that Section in those years, which meant the plaintiff received less than § 237 technically provided. The plaintiff demanded full payment from DOE, but under the argument that DOE should have allocated more funds from the other Impact Aid programs. *Id.* at 1170. DOE refused because it concluded that Congress' earmarked appropriations overrode § 240(c)'s allocation formula. *Id.* at 1169.

At issue, then, was ***not*** whether the Government could underfund the program. Instead, the dispute centered around whether DOE erred by not "borrowing" funds from other Impact Aid programs pursuant to § 240(c) in order to make full payments under § 237.

As noted above, the Court first found that the Impact Aid Act was not money-mandating. *Id.* at 1168. Thus to the extent Court entertained the allocation issue at all, it was only for the sake of argument. *Id.* at 1170. In drawing that argument to its conclusion, the Federal Circuit held that the earmarks did supersede § 240(c) because they identified specific amounts Congress intended for the entitlements. *Id.* at 1170-1171. Put differently, Section 240(c) was a default allocation method for the Secretary in case Congress did not give the agency enough money to pay the Impact Aid entitlements (as Congress allowed itself to do by statute). By earmarking specific amounts to specific programs, Congress took the allocation decisions out of the Secretary's hands, thus explicitly overriding § 240(c) in those specific years. *Id.*

[14] The act also created entitlements under two other sections: §§ 238 and 239. *Highland Falls*, 48 F.3d at 1168.

The differences between *Highland Falls* and this case show why the Government's repeal by implication arguments must fail. First, there is a money-mandating statute here and there was none in *Highland Falls*. Second, the statute in *Highland Falls* specifically permitted Congress to underfund the Impact Aid program. There is no similar provision for the risk corridors program anywhere in Section 1342 or the ACA, meaning the decision to underfund the risk corridors program gives rise to liability on the statute's face. *See Greenlee II*, 487 F.3d at 877; *N.Y. Airways*, 369 F.2d at 748; *Wetsel-Oviatt*, 38 Fed. Cl. at 571. Third, the appropriations acts at issue in *Highland Falls* clearly set a cap on all payments for the Impact Aid program. *See Star-Glo*, 414 F.3d at 1355 (noting that the *Highland Falls* Court found that the specific statutory language within the context of the Impact Aid program "impose[d] a cap"). The Spending Bills here simply state they do not make certain funds out of certain accounts available to HHS for payment of risk corridor amounts. As noted above, both pre- and post-*Highland Falls* precedent makes clear such an action does not obviate the Government's payment obligations.

Dickerson, Will, and Mitchell. In addition to *Star-Glo* and *Highland Falls*, the Government also cites *United States v. Dickerson*, 310 U.S. 554 (1940), *United States v. Will*, 449 U.S. 200 (1980), and *United States v. Mitchell*, 109 U.S. 146 (1883), as examples of instances where an appropriations law amended a preexisting statutory obligation. Gov. Br. at 21. However, in each of these cases, the appropriations acts in question went far beyond the mere limitation found in the Spending Bills.

For example, in *Dickerson*, Congress stated in a subsequent appropriation that the preexisting statutory obligation "is hereby ***suspended***," "no part of ***any appropriation*** contained in this or ***any other Act*** for the fiscal year . . . shall be available for the payment . . . ***notwithstanding the applicable provisions of***" the statute. *Dickerson*, 310 U.S. at 555-57

(emphasis added). Similarly, in *Will*, the appropriation stated that "[n]o part of the funds appropriated in this Act ***or any other Act*** shall be used" to meet the statutory obligation; the preexisting statutory obligation that "***shall not take effect***"; "[n]o part of the funds appropriated for the fiscal year ending September 30, 1979, by this Act ***or any other Act*** may be used to pay" the statutory obligation; and "funds available for payment . . . shall not be used to" meet the statutory obligation. *Will*, 449 U.S. at 205-08 (emphasis added). Finally, in *Mitchell*, the underlying statutory obligation to pay and limitation were both contained in appropriations acts, and both involved the special case of Indian appropriations. The Court held that Congress's "purpose" in the subsequent appropriations act was "to suspend the law." *Mitchell*, 109 U.S. at 150. These cases are notable primarily because the language that repealed the prior statutory obligation finds no analog in Section 1342, the ACA, or the subsequent Spending Bills. And, as Judge Wheeler noted in the *Moda* opinion, Congress demonstrated it was fully capable of employing repealing language such as that used in these cases because it employed virtually identical repealing limitations as in *Dickerson* and *Will* when it enacted the Spending Bills. *See Moda*, 130 Fed. Cl. at 461.

4. The Government offers meaningless "distinctions" of the Class's case law showing why the Spending Bills did not repeal by implication

The Government attempts to distinguish four of the Class's case citations by claiming that this case "bears no resemblance" to that precedent. Gov. Br. at 31-34. The Class respectfully disagrees, but, more importantly, what the Government ignores is the broader propositions for which each of those cases stands (and which establish why judgment in the Class's favor is proper).

Langston, for example, addresses a statute in which Congress stated it would pay a certain amount—rendering it a money-mandating statute—and then subsequently appropriated

only a fraction of that amount. 118 U.S. at 393-394. The Supreme Court was clear that Congress did not repeal the original statute by implication via this mere limitation to the full amount of funds and therefore ordered that the Government still owed the remainder. *Id.* As discussed at length above, Section 1342 is an entitlement like the statute in *Langston*, and the Spending Bills, like the appropriations act in *Langston*, only constitute "mere limitations" on specific funds from which HHS may make risk corridor payments. The Government's claims to the contrary (at 33) simply conclude otherwise without any support.

District of Columbia likewise supports the Class's claims and any differences in specific facts have no bearing on that applicability. In that case, the Government argued that Congress's failure to appropriate funds to HHS for statutorily required building renovations necessarily narrowed the Government's liability for those renovations. 67 Fed. Cl. at 335. The court disagreed, finding that Congress's failure to appropriate sufficient funds did "not mean that the government's obligation ha[d] been fulfilled under the . . . Act, or that the [plaintiff] is precluded from seeking additional funds owed to it." *Id.* at 335. Furthermore, although the Government cited some legislative history that suggested an intent to partially defund the renovations, this history was not "unambiguous," so the court did not accord it much weight. *Id.* at 335-36. This is nearly identical to the current situation, where the appropriations act at issue does not on its face amend the prior law and the legislative history behind the appropriation is, at best, ambiguous as to intent.

Gibney and *N.Y. Airways* (the latter of which, contrary to the Government's assertions, was not cited in the Class's opening brief) likewise have no important distinctions from this case. In *Gibney*, the Court of Claims noted the law has long been that an appropriation act, like here, that is just a "mere limitation on the expenditure of a particular fund" does not constitute a repeal

by implication. *Gibney*, 114 Ct. Cl. at 50-51. In *N.Y. Airways*, the question did not, as the Government claims (at 33-34), hinge on whether the payment obligation was contractual in nature. Rather, the question was whether a "mere failure of Congress to appropriate funds [to satisfy a payment obligation], without further words modifying or repealing, expressly or by clear implication, the substantive law" could act as a repeal by implication. *N.Y. Airways*, 369 F.2d at 810-11. Because, like here, there was no such additional language in the appropriations act at issue, and the evidence of legislative history included conflicting evidence, there was no "clear intent" to repeal. *Id.* at 813-816.

D. Congress's Failure To Appropriate Funds For Risk Corridor "Payments Out" Establishes The Government's Liability And Mandates Judgment In The Class's Favor

With the fallacies underlying the Government's cross-motion in mind, it becomes clear why the Court should reject the cross-motion and instead award judgment to the Class. When the Court denied the Government's motion to dismiss earlier this year, it found that Section 1342 is money-mandating and required the Government to make annual payments to QHP issuers for each of the 2014, 2015, and 2016 plan years. *See generally Health Republic*, 129 Fed. Cl. 757. Given these findings, the Court further concluded that the "only remaining issue" was whether the Government owed QHP issuers "full payment" of risk corridor amounts in each of the plan years covered by the program. *Id.* at 778.[15] HRIC, on behalf of itself and the QHP Issuer Class, subsequently filed a motion for summary judgment explaining at length why Section 1342's plain language, context, and purpose all require full, annual payments. *See generally* Dkt. 47.

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[15] Due to data submission deadlines, risk corridor amounts for the 2016 plan year are not yet due. However, Congress has already indicated it will not appropriate adequate funds to satisfy the Government's ongoing risk corridor obligations, so the Class expects claims for the 2016 plan year to become ripe soon.

In its opposition/cross-motion brief, the Government offers no real response to the Class's arguments. Instead, the Government hinges the bulk of its defense on the appropriations- and money mandating-related arguments addressed above. As noted, those arguments are completely without basis, as well as legally incorrect. To the extent it further responds to the Class's motion, the Government essentially rehashes the same *Chevron* deference and ripeness arguments the Court already rejected in denying the motion to dismiss. *Compare* Gov. Br. at 37-39; *with Health Republic*, 129 Fed. Cl. at 772-778. None of these arguments are sufficient to withstand summary judgment in the Class's favor, for the reasons the Court already articulated.

III. CONCLUSION

For the foregoing reasons, and given the Government's failure to identify any legal or factual defense to the Class's motion, HRIC respectfully requests that the Court enter judgment on behalf of the Class, finding that Section 1342 required full, annual payments for each of the 2014-2016 plan years, and that the Government currently owes QHP Issuer Class members the unpaid risk corridor amounts for the 2014 and 2015 plan years that it calculated and disseminated. Similarly, HRIC respectfully requests that the Court deny the Government's cross-motion in full.

Dated: May 15, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 15, 2017, a copy of the attached **PLAINTIFF HEALTH REPUBLIC INSURANCE COMPANY'S REPLY IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO THE UNITED STATES' CROSS-MOTION FOR SUMMARY JUDGMENT** was served via the Court's CM/ECF system on Defendant's counsel Charles Edward Canter.

/s/ Stephen Swedlow
Stephen Swedlow