**2017-1224**

In the

# United States Court of Appeals for the Federal Circuit

LAND OF LINCOLN MUTUAL HEALTH INSURANCE COMPANY,
*Plaintiff-Appellant*,

v.

UNITED STATES,
*Defendant-Appellee*.

**Appeal from the United States Court of Federal Claims, Case No. 16-744C, Judge Charles F. Lettow**

## BRIEF OF *AMICUS CURIAE* UNITED STATES HOUSE OF REPRESENTATIVES IN SUPPORT OF DEFENDANT-APPELLEE AND IN SUPPORT OF AFFIRMANCE

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May 1, 2017

## CERTIFICATE OF INTEREST

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

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

The United States House of Representatives

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

None

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

None

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

None

*/s/ Thomas G. Hungar*
Thomas G. Hungar

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

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

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

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

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

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

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

## INTRODUCTION AND SUMMARY OF ARGUMENT

In 2010, the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("ACA") (codified at 42 U.S.C. § 18001 *et seq.*) was

enacted into law. The ACA establishes "Health Benefit Exchanges" where individuals can obtain health insurance coverage, and contains certain risk mitigation provisions for Qualified Health Plans ("QHPs") that agreed to operate on these new exchanges. One of the risk mitigation provisions was the risk corridors program, a temporary measure that directed the Secretary of the Department of Health and Human Services ("HHS") to establish "a payment adjustment system" based on QHPs' expenses. If a QHP's expenses were higher than targeted, it would receive payments from the government; if a QHP's expenses were lower than targeted, it would make payments to the government.

Congress intended the risk corridors program to be self-funding and therefore budget-neutral—i.e., outgoing payments to QHPs would be offset by incoming receipts from other QHPs. HHS, in its final rule implementing the risk corridors program, determined that payments would be made on a pro rata basis for each year if incoming receipts were insufficient to fund outgoing payments under the program, and adjustments would be made at the end of the three-year program as needed and if available. In the first year of the program and beyond, outgoing risk corridors program payments were larger than anticipated, and HHS did not receive sufficient incoming receipts to fully fund outgoing payments pursuant to the formula established by the ACA.

Appellant Land of Lincoln, and several other QHPs, filed suit seeking immediate risk corridors program payments to cover the asserted shortfall under the statutory formula. Under well-settled principles of federal appropriations law, however, there must be both an "authorization" and an "appropriation" before federal funds may be paid. The ACA contains an authorization for outgoing payments to QHPs, but does not contain a corresponding appropriation to fund program payments in excess of incoming receipts. For the reasons explained below and in the brief for the United States, Land of Lincoln is not entitled to any excess risk corridors program payments because Congress, in the exercise of its constitutional authority over public expenditures, has determined that no appropriation will be made available for excess payments.

## ARGUMENT

### I. CONGRESS'S APPROPRIATIONS POWER

#### A. "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]"

The Appropriations Clause is an essential component of the Constitution's grant to Congress of the power of the purse. U.S. Const. art. I, § 9, cl. 7. The Appropriations Clause not only vests Congress with a particularized and exclusive legislative authority, but also affirmatively constrains the Executive and Judicial Branches by expressly barring the expenditure of any public funds absent enactment of a law appropriating such funds. *See Office of Pers. Mgmt. v.*

*Richmond*, 496 U.S. 414, 424 (1990) ("Our cases underscore the straightforward and explicit command of the Appropriations Clause. 'It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'" (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937))). The fundamental importance of the Appropriations Clause to our form of government cannot be overstated. As the Supreme Court has recognized, in order to preserve the proper balance of powers among the branches "'it is highly proper, that congress should possess the power to decide how and when any money should be applied,'" lest the executive "possess an unbounded power over the public purse of the nation … and … apply all its moneyed resources at his pleasure.'" *Richmond*, 496 U.S. at 427 (quoting 2 Joseph Story, Commentaries on the Constitution of the United States § 1348 (3d ed. 1858)).

The Appropriations Clause's grant of exclusive power to Congress is absolute in its operation. "However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned. Any other course would give to the fiscal officers a most dangerous discretion." *Reeside v. Walker*, 52 U.S. 272, 291 (1850); *see also United States v. MacCollom*, 426 U.S. 317, 321 (1976) ("[T]he expenditure of public funds is proper only when authorized by Congress…."); *Dep't of the Navy v. Fed. Labor Relns. Auth.*, 665 F.3d 1339, 1348 (D.C. Cir. 2012) ("Congress's

control over federal expenditures is 'absolute.'" (quoting *Rochester Pure Waters Dist. v. Envtl. Prot. Agency*, 960 F.2d 180, 185 (D.C. Cir. 1992))).

Rigorous enforcement of the principles embodied in the Appropriations Clause is essential to maintaining the separation of powers among the branches of our Nation's tripartite government. "Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury." *Richmond*, 496 U.S. at 425; *see also Cincinnati Soap*, 301 U.S. at 321 ("The [Appropriations Clause] was intended as a restriction upon the disbursing authority of the Executive department…."); *Dep't of the Navy*, 665 F.3d at 1347 ("The Appropriations Clause is thus a bulwark of the Constitution's separation of powers … [because it operates] as a restraint on Executive Branch officers … [who may seek] 'unbounded power over the public purse….'" (quoting 3 Joseph Story, Commentaries on the Constitution of the United States § 1342, at 213-214 (1833))).

As a result, permitting the Executive or the Judiciary, "on its own, [to] carve out an area of nonappropriated funding would create … [a] prerogative that offends the Appropriations Clause and affects the constitutional balance of powers," *Am. Fed'n of Gov't Emps. v. Fed. Labor Relns. Auth.*, 388 F.3d 405, 414 (3d Cir. 2004). As the District Court for the District of Columbia recently

recognized in an ACA case:

> Article I could not be more clear: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law…." U.S. Const. art. I, § 9, cl. 7…. Congress's power of the purse is the ultimate check on the otherwise unbounded power of the Executive…. The genius of our Framers was to limit the Executive's power "by a valid reservation of congressional control over funds in the Treasury."

*Burwell*, 130 F. Supp. 3d at 76-77 (quoting *Richmond*, 496 U.S. at 425) (internal citations omitted).

### B. Congress Exercises Its Appropriations Clause Authority By Enacting Appropriations Legislation.

The legal rules regarding what is and is not a constitutionally valid appropriation are precise and well-developed. Those rules begin with an important distinction between authorizing legislation and appropriations legislation.

"Authorizing legislation establishes or continues the operation of a federal program or agency, either indefinitely or for a specific period." *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 169 (D.D.C. 2016) (citing U.S. Gov't Accountability Office ("GAO"), GAO-05-734SP, A Glossary of Terms Used in the Federal Budget Process 15 (2005)). Authorizing legislation alone, however, does not provide the legal authority required by the Appropriations Clause to expend public funds to effectuate a program, agency, or function. Only an actual appropriation can do that. *See* GAO, Principles of Federal

Appropriations Law, 2-56 (4th ed. 2016) ("GAO Red Book") ("An authorization act is basically a directive to Congress itself, which Congress is free to follow or alter (up or down) in the subsequent appropriation act.").

Appropriations legislation has "the limited and specific purpose of providing funds for authorized programs." *Andrus v. Sierra Club*, 442 U.S. 347, 361 (1979) (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978)). An "appropriation" is "'an authorization by an act of the Congress that permits Federal agencies to incur obligations and to make payments out of the Treasury for specified purposes.'" *Andrus*, 442 U.S. at 360-61 n.18 (quoting Comptroller General of the United States ("Comp. Gen."), PAD-77-9, Terms Used in the Budgetary Process 3 (1977)). To qualify as an "appropriation," legislation must designate an amount and *source* of public funds to pay for a program, agency, or function that Congress has authorized, and must contain a specific direction to expend those designated funds in support of such program, agency, or function. *See Nevada v. Dep't of Energy*, 400 F.3d 9, 14 (D.C. Cir. 2005) ("[A] statute may 'be construed as making an appropriation if it contains a specific direction to pay . . . and a designation of the [f]unds to be used.'" (quoting 63 Comp. Gen. 331, 335 (1984))) (first alteration added).

Thus, as the *Burwell* court recently explained: "It is well established that 'a direction to pay without a designation of the source of funds is not an

appropriation.'" 185 F. Supp. 3d at 169 (quoting GAO, Principles of Federal Appropriations Law 2-17 (3d ed. 2004)). "The inverse is also true: the designation of a source, without a specific direction to pay, is not an appropriation. Both are required." *Id*. (citation omitted); *see also* GAO Red Book 2-24 (private relief act that contained authorization and direction to pay, but no designation of funds, was not an appropriation); 67 Comp. Gen. 332, 333 (1988) (designation of source of funds without specific direction to pay was not an appropriation).

Importantly, "the making of an appropriation must be expressly stated . . . [and] cannot be inferred or made by implication." GAO Red Book 2-23 (citation omitted). Indeed, Congress has expressly codified that interpretive principle, thereby eliminating any possible doubt regarding the strict requirements that must be satisfied before an appropriation may be deemed to exist: "A law may be construed to make an appropriation . . . *only* if the law specifically states that an appropriation is made . . . ." 31 U.S.C. § 1301(d) (emphasis added). Congress is deemed to legislate against the backdrop of established principles of statutory construction, *see McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991); *United States v. Bailey*, 444 U.S. 394, 415 n.11 (1980)—and doubly so with respect to those it has expressly codified.

Congress is free to decide not to appropriate funds for a program it has authorized and previously funded, or Congress may choose to authorize but never

appropriate a program. For example, in 1922, Congress enacted legislation provided that reenlistment bonuses "shall be paid" to soldiers who had been honorably discharged from the military. *United States v. Dickerson*, 310 U.S. 554, 554-55 (1940) (citation omitted). Several years later, Congress passed an appropriations bill declining to fund the reenlistment bonuses, but without expressly modifying the underlying authorization. *Id.* at 555. The Supreme Court held that the bonus was not payable to an eligible soldier who reenlisted after the enactment of the subsequent appropriations bill, because "[t]here can be no doubt that Congress could suspend or repeal [an] authorization . . . and it could accomplish its purpose by an amendment to an appropriation bill, or otherwise." *Id*. at 555, 561.

Similarly, in 1978, Congress permanently authorized Treasury to make prepayments to certain U.S. territories for amounts they were expected to collect from taxes, duties, and fees. Because neither that statute nor any other contained an appropriation, however, the prepayments could not be made. *See* GAO Red Book 2-24 (citing GAO, B-114808 (1979) (permanent authorization insufficient to constitute appropriation)).

### C. As A General Rule, No Statutory Obligation To Pay Money Arises In The Absence Of An Appropriation.

In light of the foregoing principles of appropriations law, it follows that, in general, Congress will not be deemed to have created a judicially enforceable

statutory obligation for the federal government to pay money unless Congress has also enacted an appropriation to fund that payment. Indeed, as the Supreme Court has made clear, this principle follows from the very definition of an "appropriation," which is an act of Congress "'that permits Federal agencies *to incur obligations* and to make payments out of the Treasury[.]'" *Andrus*, 442 U.S. at 360-61 n.18 (emphasis added; citation omitted). Absent an appropriation, therefore, a statute should not be construed to create a judicially cognizable obligation to pay statutory benefits; the mere authorization of a program contemplating the payment of federal benefits is insufficient as a matter of law to create an enforceable statutory obligation.[2]

Case law confirms this common-sense understanding. In *Nevada v. Department of Energy*, for example, the State of Nevada sought to enforce a statute providing that the Secretary of Energy "shall make grants to the State of Nevada" for specified purposes. 400 F.3d at 11 (quoting 42 U.S.C. § 10136(c)(1)(B) (repealed)). Notwithstanding the seeming clarity of that statutory mandate, the

[2] To be sure, when Congress specifies sums to be paid to identifiable persons for services rendered to the government, courts have sometimes discerned an obligation sufficient to support entry of judgment. *See, e.g.*, *United States v. Langston*, 118 U.S. 389, 394 (1886); *N.Y. Airways, Inc. v. United States*, 369 F.2d 743, 817 (Ct. Cl. 1966). But those cases are inapposite in the context of a statutory benefits program like the ACA, where "'there is greater room' . . . to find the government's liability limited to the amount appropriated." *Prairie Cty. v. United States*, 782 F.3d 685, 687 (Fed. Cir. 2015) (quoting *Star-Glo Assocs., L.P. v. United States*, 414 F.3d 1349, 1355 (Fed. Cir. 2005)).

D.C. Circuit held that, in light of Congress's "'exclusive power over the federal purse,'" "[f]or Nevada to prevail, … it must identify not just a command to make grants, but an appropriation of … money that DOE may use for that purpose." *Id*. at 13.

Similarly, in *Highland Falls–Fort Montgomery Central School District v. United States*, 48 F.3d 1166 (Fed. Cir. 1995), this Court rejected a school district's claim for benefits under a statute providing that the school district "*shall be entitled to receive*" certain amounts. *Id*. at 1168 (quoting 20 U.S.C. § 237(a) (repealed)) (emphasis added). In the fiscal years at issue, Congress had earmarked only a specific amount for payment of benefits under the relevant program, meaning that the school district received less than the full amount otherwise payable. *Id*. at 1169. Relying on the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(A), which prohibits federal officers from authorizing expenditures in excess of appropriations, this Court held that the school district had no right to the full statutory amount, "[i]n view of the language of the appropriations laws at issue here and the prohibition of § 1341(a)(1)(A) against an agency spending more money for a program than has been appropriated for that program." *Id.* at 1172.

Thus, as a general matter, a mere statutory authorization for distribution of federal benefits payments will not give rise to an enforceable statutory obligation to pay money. Appropriations law makes clear that "[a]gencies may not spend, or

commit themselves to spend, in advance of or in excess of appropriations." GAO Red Book 1-8 (citing 31 U.S.C. § 1341); *see also* GAO Red Book 2-55 ("Agencies may incur obligations only after Congress grants budget authority."); GAO, B-325630, Dept. of Health and Human Services – Risk Corridors Program 3 (2014) ("GAO Opinion") ("Agencies may incur obligations and make expenditures only as permitted by an appropriation.") (citations omitted).

## II. LAND OF LINCOLN IS NOT ENTITLED TO EXCESS RISK CORRIDORS PROGRAM PAYMENTS BECAUSE THERE HAS BEEN NO APPROPRIATION FOR THE PAYMENTS

Land of Lincoln contends that because Section 1342 of the ACA contains a statutory formula for outgoing risk corridors payments, Land of Lincoln must be paid in full (and on an annual basis) for such outgoing payments. But as explained above, and as Judge Lettow correctly recognized, Section 1342 of the ACA is merely an *authorization* for the risk corridors program, it is not an *appropriation* of funds to make excess program payments, and thus it did not give rise to an enforceable obligation to make such payments. Even if there were any doubt on that score, moreover, Congress eliminated it in the operative appropriations acts, which make unambiguously clear Congress's intent that risk corridors payments must be limited to offsetting receipts under that program. Accordingly, Land of Lincoln has failed to state a claim, and Judge Lettow correctly dismissed this case. *See, e.g.*, *Richmond*, 496 U.S. at 424 (denying recovery because "Congress ha[d]

appropriated no money for the payment of the benefits …[sought], and the Constitution prohibits that any money 'be drawn from the Treasury' to pay them").

### A. The ACA Did Not Appropriate Funds For Excess Risk Corridors Program Payments.

The federal government has no obligation to make payments in support of an authorized benefits program—even a program under which certain payments "shall" be made—unless Congress has enacted a corresponding appropriation. As explained below, there has been no appropriation for excess program payments.

#### *1. The Risk Corridors Program.*

The risk corridors program of the ACA directs the HHS Secretary to "establish and administer a program . . . for calendar years 2014, 2015, and 2016 under which a qualified health plan offered in the individual or small group market shall participate in a payment adjustment system based on the ratio of the allowable costs of the plan to the plan's aggregate premiums." ACA § 1342(a) (42 U.S.C. § 18062(a)). If a QHP's allowable expenses exceed a target figure by certain specified percentages, government payments to the issuer would increase. *See* ACA § 1342(b)(1) (42 U.S.C. § 18062(b)(1)). If a QHP's allowable expenses fall below the target figure by certain specified percentages, then funds would be remitted to the government. *See* ACA § 1342(b)(2) (42 U.S.C. § 18062(b)(2)).

The failure to include an appropriation for excess program payments was not mere oversight on the part of Congress. Notably, the temporary risk corridors program was modeled in many respects on a similar Medicare program, known as Medicare Part D. ACA § 1342(a) (42 U.S.C. § 18062(a)). Unlike Medicare Part D, however, which expressly obligates HHS to make payments, Congress intentionally *omitted* from the ACA *any* statutory language obligating HHS to make risk corridors payments in excess of the amounts collected. *Compare* 42 U.S.C. § 1395w-115(a)(2) (Medicare Part D) ("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."). Congress considered (and rejected) earlier health care bills that included an appropriation for excess risk corridors program payments. *See, e.g.*, Affordable Health Choices Act, S. 1679, § 3106(c)(1)(B) (111th Cong.) (providing "out of any moneys in the Treasury not otherwise appropriated an amount requested by the Secretary of Health and Human Services as necessary to," among other things, "make payments under" a risk corridors program in Section 3106(c)(3)).

In passing the ACA, Congress relied upon findings of the Congressional Budget Office ("CBO"), the nonpartisan legislative branch agency charged with providing objective cost estimates to Congress regarding the federal budgetary impact of proposed legislation. CBO "assumed [risk corridors] collections would

equal payments to plans in the aggregate," and therefore did not score (i.e., provide a cost estimate for) the program's impact on the budget. *See* 76 Fed. Reg. 41930, 41948 (July 15, 2011). Congress is not obligated to accept or rely upon CBO's analyses. But here, Congress explicitly did so—in Section 1563 of the ACA entitled "Sense of the Senate Promoting Fiscal Responsibility," the Senate made the finding that "[b]ased on Congressional Budget Office (CBO) estimates, this Act will reduce the Federal deficit between 2010 and 2019." *See* ACA § 1563(a)(1). The Congressional Record also demonstrates that Members of the House supported the Act due to its anticipated *reduction* in the federal deficit. *See* 156 Cong. Rec. H1894, H1901-02, H1905-06, H1909 (daily ed. Mar. 21, 2010).[3]

[3] "CBO also estimates that this bill will reduce the deficit by $138 billion over the 2010-2019 period." (Hon. Paul E. Kanjorski); "According to CBO enactment of this legislation is projected to reduce the federal deficit by $130 billion by 2020 and by over $1.2 trillion during the following decade." (Hon. Lois Capps); "[T]his legislation demonstrates fiscal sensibility and responsibility. It will reduce the deficit by $138 billion over the next decade . . . . [T]his bill is fully paid for. . . . It is not balanced on the backs of our children and our grandchildren." (Hon. Carolyn C. Kilpatrick); "The nonpartisan Congressional Budget Office has objectively analyzed the legislation and has determined that its enactment will reduce the deficit by $143 billion over the first decade. . . ." (Hon. James L. Oberstar); "Some people have asked how I could be a fiscally conservative Blue Dog Democrat and still support the health reform bill. I do not know how I could be a Blue Dog Democrat and not support this bill. According to the nonpartisan Congressional Budget Office, the bill will reduce the deficit by $138 billion over the next 10 years . . . ." (Hon. Sanford Bishop); "[T]his bill will reduce the federal deficit by more than $143 billion in the first ten years . . . ." (Hon. Nita Lowey).

In short, prior to the enactment of the ACA, CBO and Congress expected that incoming receipts from the risk corridors program would fund outgoing payments, and Congress intended the program to be budget neutral. Under these circumstances, the ACA cannot plausibly be construed to create an obligation to make additional payments beyond those funded by incoming receipts.

*2. HHS Implementing Regulations.*

In 2014, consistent with CBO's assumptions, HHS issued regulations stating its intent "to implement [the risk corridors program] in a budget neutral manner." *See* 79 Fed. Reg. 13744, 13787 (Mar. 11, 2014). Two months later, HHS issued another set of implementing regulations, and repeated that it "intend[s] to administer risk corridors in a budget neutral way," but also explained that the calculations would be made "over the three-year life of the program, rather than annually." 79 Fed. Reg. 30240, 30260 (May 27, 2014). HHS also opined that "the [ACA] requires the Secretary to make full payments to issuers," but that "[i]n the unlikely event of a shortfall for the 2015 program year . . . . HHS will use other sources of funding for the risk corridors payments, *subject to the availability of appropriations*." *Id*. (emphasis added).

In accordance with the clear import of the ACA and its implementing regulations, therefore, Congress did not appropriate—and has never appropriated—additional funds to make risk corridors payments in excess of those

funded by offsetting program receipts. As demonstrated in Part I.C. above, it necessarily follows that no statutory obligation to pay those additional benefits could have arisen. By definition, Congress's refusal to appropriate additional funds means that it did not authorize HHS to "'incur obligations'" for additional risk corridors payments. *Andrus*, 442 U.S. at 360-61 n.18 (citation omitted). "For [Land of Lincoln] to prevail, … it must identify not just a command to make grants, but an appropriation of … money that [HHS] may use for that purpose." *Nevada*, 400 F.3d at 13.

### B. The Relevant Appropriations Acts Confirm That No Statutory Obligation To Make Excess Risk Sharing Payments Exists.

Even if the ACA had originally been intended to create an obligation to make excess risk corridors payments—which it plainly was not—Congress's subsequent enactments would compel the conclusion that no such obligation exists. In 2014, the Honorable Fred Upton (then-Chairman of the House Committee on Energy and Commerce) and the Honorable Jeff Sessions (then-Ranking Member of the Senate Committee on the Budget) asked GAO whether any appropriated funds were available to make the upcoming risk corridors program payments, which would first become payable in FY 2015. *See* GAO Op. 1. GAO concluded, consistent with well-established principles of appropriations law, that the language of ACA § 1342(b)(1), authorizing the Secretary to make payments, is not sufficient

to constitute an appropriation. *See id.* at 3 ("It is not enough for a statute to simply require an agency to make a payment.") (citation omitted).

GAO determined, however, that two sources of funds in the Centers for Medicare and Medicaid Services ("CMS") Program Management account (as appropriated for FY 2014) would, if appropriated on the same terms in subsequent years, be available to pay amounts in excess of receipts under the risk corridors program. First, GAO concluded that the Program Management fund's lump sum appropriation would be available, because the lump sum was appropriated "[f]or carrying out . . . other responsibilities of [CMS]," which would include the risk corridors program. *See id.* at 3-4 (citing Consolidated Appropriations Act, 2014 ("2014 Appropriations Act"), Pub. L. No. 113-76, div. H, tit. II, 128 Stat. 5, 374 (2014)).

Second, GAO concluded that incoming risk corridors payments would qualify as "user fees" under established appropriations principles. *See id.* at 4-5. Because the 2014 appropriation statute provided that "sums . . . collected from authorized user fees" would be available in the CMS Program Management account until September 30, 2019, GAO concluded that incoming risk corridors user fees could, along with the lump sum appropriation, fund outgoing risk corridors program payments. *See id.* at 3-5 (citing 2014 Appropriations Act, 128 Stat. at 374).

In response to GAO's conclusions, Congress immediately took legislative action to ensure the intended budget neutrality of the risk corridors program. Specifically, for FY 2015—the first year in which risk corridors payments could be made—Congress barred the use of the lump sum CMS Program Management account funds to make risk corridors program payments. *See* Consolidated and Further Continuing Appropriations Act, 2015 ("2015 Appropriations Act"), Pub. L. No. 113-235, div. G, tit. IV, § 227, 128 Stat. 2130, 2491 (2014) ("None of the funds made available by this Act . . . or transferred from other accounts funded by this Act to the '[CMS]—Program Management' account, may be used for payments under section 1342(b)(1) of Public Law 111-148 (relating to risk corridors)."). Congress included identical language in the FY 2016 appropriations bill. *See* Consolidated Appropriations Act, 2016 ("2016 Appropriations Act"), Pub. L. No. 114-113, div. G, tit. IV, § 226, 129 Stat. 2242, 2624 (2015). The effect of these provisions is to ensure that the risk corridors program is funded exclusively through user fees (i.e., incoming payments from insurers under the program) and does not add to the budget deficit, as Congress intended when adopting the ACA.

Given the clarity with which Congress has spoken in refusing to permit the expenditure of federal funds to make excess risk corridors payments, the conclusion is inescapable that no statutory obligation to make such payments exists

(and if any such obligation had initially arisen, it would have been repealed by necessary implication). Case law is clear that the courts may not override express Congressional action regarding the use of appropriated funds.

This Court's decision in *Highland Falls* is particularly instructive in this regard. As discussed above, *Highland Falls* involved a statute mandating financial assistance to school districts. 48 F.3d at 1167-68. The statute established three separate entitlements to assist such school districts, each of which was to be paid pursuant to a statutory allocation formula. *Id.* at 1168. In particular, under the "Section 237" entitlement program, Congress mandated that qualifying districts "*shall be entitled to receive* for such fiscal year such amount as, in the judgment of the Secretary, is equal to the [financial burden imposed]" on the district. *Id.* (quoting 20 U.S.C. § 237(a) (repealed)) (emphasis added). In addition, Congress specified that if the Department of Education ("DOE") lacked sufficient funds to meet all of its obligations under the various entitlement programs, it must nonetheless "allocate to each local educational agency which is entitled to a payment under section 237 of this title an amount equal to 100 percentum of the amount to which it is entitled as computed under that section for such fiscal year." *Id.* (quoting 20 U.S.C. § 240(c)(1)(A) (repealed)).

In certain years, rather than appropriating a lump sum for all of the entitlement programs, Congress earmarked a specific amount for Section 237

payments and separately earmarked additional funds for the other entitlements under the statute. *Id.* at 1169. In those years, "DOE followed Congress's specific funding directives instead of applying the allocation formula." *Id.* As a result, the Highland Falls school district received less than 100% of the payments due under the Section 237 statutory formula, and brought suit to recover the shortfall. *Id.*

Notwithstanding the express mandate of Section 237(a) that school districts "shall be entitled to receive" the full amount of funds provided under that program, and despite the express statutory directive that the Section 237 program was to be funded at 100% in the event of a shortfall, this Court rejected the school district's argument that DOE was obligated to make full payments under Section 237. *Id.* at 1170-72. The Court explained that "we have great difficulty imagining a more direct statement of congressional intent than the instructions in the appropriations statutes at issue here." *Id.* at 1170. In the Court's view, Congress had made its intent to limit the Section 237 payment obligation clear by providing a specific but limited appropriation for Section 237 payments, and thus DOE's refusal to pay the full amount that otherwise would have been due under Section 237 "gave effect to both the provisions of the Act and the appropriations laws." *Id.* at 1171; *see also id.* (discussing 31 § U.S.C. 1341(a)(1)(A) (prohibiting an officer from authorizing an expenditure in excess of an appropriation) and 31 U.S.C. § 1532 (providing that

an agency may only use money appropriated for one program to fund a separate program when expressly authorized by law to do so)).

Numerous other cases are to the same effect. Even where (unlike here) Congress has initially created and funded an obligation to make particular payments, subsequent appropriation enactments that reveal Congress's intent to limit the scope of any obligation will be deemed to have impliedly repealed the prior obligation. *See, e.g., Dickerson*, 310 U.S. at 555-56; *United States v. Will*, 449 U.S. 200, 222 (1980) ("[W]hen Congress desires to suspend or repeal a statute in force, [t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriation bill, or otherwise. The whole question depends on the intention of Congress as expressed in the statutes.") (second alteration and ellipsis in original; citations and quotation marks omitted); *Star-Glo Assocs.*, 414 F.3d at 1351-52, 1354-55 (obligation to make statutorily mandated payments of $26 per citrus tree held capped by fixed appropriation that was insufficient to fund full payments).

*Highland Falls* and similar cases compel dismissal of Land of Lincoln's claims, because they confirm that a subsequent appropriations bill specifying and limiting the funds available to fulfill a particular statutory obligation will preclude a claim that the full amount of the underlying obligation is nonetheless due to the beneficiary. Here, just as in *Highland Falls*, the FY 2015 and FY 2016

appropriations laws contain a "direct statement of congressional intent": "None of the funds made available by this Act . . . or transferred from other accounts funded by this Act to the '[CMS]—Program Management' account may be used for payments under section 1342(b)(1) of Public Law 111-148 (relating to risk corridors)." 2015 Appropriations Act, 128 Stat. at 2491; 2016 Appropriations Act, 129 Stat. at 2624 (same). It is undisputed that the CMS Program Management Account is the only potential source of funds to make risk corridors payments in excess of risk corridors receipts, and that the effect of the FY 2015 and FY 2016 appropriations bills is to limit all future payments to a single source: user fees generated under the program. Accordingly, just as in *Highland Falls*, Congress has specified an exclusive and limited source of funds for this particular program, and Land of Lincoln's claim for full payments under the statutory formula in excess of the funds appropriated by Congress must fail.

### C. The Permanent Appropriation Established By The Judgment Fund Is Not Available to Override Express Congressional Appropriation Determinations.

Contrary to Land of Lincoln's suggestion, moreover, the fatal import of Congress's refusal to fund excess risk corridors payments cannot be evaded by resort to the Judgment Fund, 31 U.S.C. § 1304. *See* Appellant Br. 23 (ECF No. 20) ("Monetary relief is available under the Tucker Act even when the obligation cannot be paid from existing agency appropriations because Congress has made a

separate fund—known as the Judgment Fund—available for payment of Tucker Act judgments.").

In the first place, the Judgment Fund is not a fallback appropriation for claims pursuant to authorized, but not fully appropriated, programs. By its plain terms, the Judgment Fund is available only to pay "final judgments, awards, [and] compromise settlements," 31 U.S.C. § 1304(a); it is not available to make payments *under existing programs*, and hence cannot supply a basis for inferring the existence of an enforceable obligation in the absence of an applicable appropriation. This common-sense understanding has long been accepted. As GAO recognized nearly 20 years ago, "the Judgment Fund is only available to pay judgments that, by their terms, require the payment of 'specified sums of money to certain parties.'" GAO, B-279886, Comments on Availability of Federal Funds to Pay Expenses of Supervising a Rerun of Teamsters Election 10 (Apr. 28, 1998) (citation omitted). Accordingly, if Congress has chosen to bar the use of federal funds, there is no "open invitation to convert the Judgment Fund … to a program account to circumvent congressional restrictions." *Id.* at 11. Land of Lincoln's reliance on the Judgment Fund constitutes impermissible bootstrapping, since in the absence of an appropriation for excess risk corridors program payments there is no basis for finding an obligation sufficient to give rise to a judgment that could potentially render the Judgment Fund available.

In any event, even if a judgment could be entered for Land of Lincoln here—which it plainly cannot—the Judgment Fund would be unavailable as a matter of law. This is plain from the language of the statute creating the Fund, which provides a permanent appropriation only if, *inter alia*, "payment *is not otherwise provided for*." 31 U.S.C. § 1304(a)(1) (emphasis added). The requirement that payment not be "otherwise provided for" cannot be satisfied, because outgoing risk corridors program payments have been "otherwise provided for" through the appropriation of incoming program payments. Well-settled principles of appropriations law confirm the conclusion that the Judgment Fund is, therefore, unavailable for additional amounts:

> Payment is otherwise provided for when another appropriation or fund is legally available to satisfy the judgment. . . . Whether payment is otherwise provided for is a question of legal availability rather than actual funding status. *In other words, if payment of a particular judgment is otherwise provided for as a matter of law, the fact that the defendant agency has insufficient funds at that particular time does not operate to make the Judgment Fund available*. The agency's only recourse in this situation is to seek additional appropriations from Congress, as it would have to do in any other deficiency situation.

GAO, Principles of Federal Appropriations Law, 14-39 (3d ed. 2004) (emphasis added) (citations omitted).

> The Judgment Fund does not become available simply because an agency may have insufficient funds at a particular time to pay a judgment. If the agency lacks

> sufficient funds to pay a judgment, but possesses statutory authority to make the payment, its recourse is to seek funds from Congress. Thus, if another appropriation or fund is legally available to pay a judgment or settlement, payment is "otherwise provided for" and the Judgment Fund is not available.

U.S. Dep't of Justice, Office of Legal Counsel, "Appropriate Source for Payment of Judgment and Settlements in *United States v. Winstar Corp.*" (July 22, 1998) (citations omitted).[4]

Land of Lincoln's argument, if adopted by this Court, would fundamentally alter the separation of powers enshrined in the Constitution. If, notwithstanding Congress's express decision to limit funds for a particular program or expenditure to a specified source and its unambiguous refusal to appropriate other funds, the hopeful beneficiary could recover from the Judgment Fund by way of a Tucker Act suit, a sympathetic Executive (or Judicial) Branch could circumvent the exclusive Congressional appropriations power through friendly settlements. The Executive and Judicial Branches may not usurp Congress's "absolute control of the moneys of the United States" in this manner. *See Hart's Adm'r v. United States*, 16 Ct. Cl. 459, 484 (1880), *aff'd sub nom. Hart v. United States*, 118 U.S. 62 (1886).

[4] *Available at* https://www.justice.gov/file/19646/download.

The cases relied upon by Land of Lincoln, *see* Appellant Br. 23-25, do not compel a different result. None of the cases involved an express *denial* of appropriated funds by Congress, as is true here. Nor do the cases support the notion that a statutory claim for payments pursuant to an authorized benefits program can succeed absent an appropriation.[5] Rather, the cases reflect the foundational principles of appropriations law based on Constitutional mandates—

[5] *See, e.g.*, *Salazar v. Ramah Navaho Chapter*, 132 S. Ct. 2181, 2189, 2190-91 (2012) (Under "well-established principles of Government contracting law," Government's promise to pay the "full amount of funds to which the contractor [was] entitled" was binding even if the "total lump-sum appropriation … will not prove sufficient to pay all similar contracts.") (alteration retained and emphasis omitted); *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 636-37 (2005) (rejecting Government's argument that certain *contract* costs were not payable because there was an unrestricted appropriated fund for the agency's contract payments); *Langston*, 118 U.S. at 394; *Prairie Cty.*, 782 F.3d at 689-90 (reaffirming *Greenlee*, below, and holding that *Ramah* does not extend to payments authorized by statutory benefits programs); *Samish Indian Nation v. United States*, 657 F.3d 1330, 1340 (Fed. Cir. 2011) (noting that a lapsed congressional appropriation would not limit the Court of Claim's jurisdiction under the Tucker Act to hear the claim, and "disagree[ing] with the government's assertion that the [relevant] Act was capped in a manner that restricts the government's liability for damages" but not reaching the merits as to whether the lapsed appropriation would defeat the underlying cause of action), *vacated in part as moot*, 133 S. Ct. 423 (2012); *Slattery v. United States*, 635 F.3d 1298, 1321 (Fed. Cir. 2011) ("[T]he jurisdictional foundation of the Tucker Act is not limited by the appropriation status of the agency's funds or the source of funds by which any judgment may be paid."); *Greenlee Cty. v. United States*, 487 F.3d 871, 880 (Fed. Cir. 2007) (holding government's liability limited to the amount appropriated by Congress under statutory benefits program); *N.Y. Airways*, 369 F.2d at 749-51 (concluding, based on legislative history, that Congress did not intend the relevant appropriation restriction to limit the amounts owed to the claimants); *Gibney v. United States*, 114 Ct. Cl. 38, 53-54 (1949) (appropriation restriction, "as worded" did not prevent the payment sought by claimant).

(i) there can be no payment by the Treasury in excess of an appropriation, and (ii) there can be no payment by the Treasury without Congressional approval and in contravention of Congressional will.

## CONCLUSION

This Court should affirm the judgment below, thereby giving effect to the separation of powers and preserving Congress's exclusive authority under the Appropriations Clause.

Respectfully submitted,

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May 1, 2017

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32 and Federal Circuit Rule 32 because this brief contains 6,927 words excluding the parts exempted by Fed. R. App. P. 32(f) and Federal Circuit 32(b).

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

*/s/ Thomas G. Hungar*
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## CERTIFICATE OF SERVICE

I certify that on May 1, 2017, I filed the foregoing document by the U.S. Court of Appeals for the Federal Circuit's CM/ECF system.

*/s/ Thomas G. Hungar*
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