No. 2017-1994

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MODA HEALTH PLAN, INC.,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

On Appeal from the United States Court of Federal Claims
in case no. 1:16-cv-00649, Judge Thomas C. Wheeler

REPLY BRIEF FOR APPELLANT

CHAD A. READLER
Acting Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
CARLEEN M. ZUBRZYCKI
Attorneys, Appellate Staff
Civil Division, Room 7235
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-1597
alisa.klein@usdoj.gov

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ARGUMENT

I. Insurers Have No Right To Risk-Corridors Payments Beyond Amounts Paid Into The Program By Insurers.

A. Congress Appropriated User Fees Collected Under the Risk-Corridors Program as the Sole Source of Funding for Payments to Insurers.

The Patient Protection and Affordable Care Act ("ACA") appropriated funds for many programs. But section 1342 of the ACA, which established the risk-corridors program, appropriated no funds for risk-corridors payments. Instead of enacting an appropriation as part of the ACA, Congress deferred the issue of appropriations for risk-corridors payments until the time to make such payments drew near.

The relevant appropriations provision was first enacted in the appropriations legislation for fiscal year ("FY") 2015. In anticipation of the appropriations process, Congress asked the Government Accountability Office ("GAO") to identify the sources of funding that would potentially be available for risk-corridors payments. The GAO opinion identified only two possible sources: (1) the user fees that insurers would pay into the risk-corridors program, and (2) a lump sum appropriation for Centers for Medicare & Medicaid Services ("CMS") program management. "The GAO report did not mention any other sources of funding as available to the program." *Maine Community Health Options v. United States*, 133 Fed. Cl. 1, 6 (2017) (Bruggink, J.). Congress then enacted legislation that appropriated user fees but

explicitly barred the Department of Health and Human Services ("HHS") from using other funds. Congress thus "made clear its intention that no public funds be spent to reimburse risk corridor participants beyond their user fee contributions." *Id.* at 13.

Indeed, the bar could not have been more explicit: "None of the funds made available by this Act from [CMS trust funds], or transferred from other accounts funded by this Act . . . may be used for payments under section 1342(b)(1) of Public Law 111–148 (relating to risk corridors)." Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. G, title II § 227, 128 Stat. 2130, 2491. As the trial court in *Maine* noted, the plain terms of the enactment are echoed in the statement of the Chairman of the House Appropriations Committee recounting the relevant background. The Chairman explained that "[i]n 2014, HHS issued a regulation stating that the risk corridor program will be budget neutral, meaning that the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect." *Maine*, 133 Fed. Cl. at 6 (quoting 160 Cong. Rec. H9838 (daily ed. Dec.11, 2014)). The appropriations legislation thus locked HHS into keeping the program budget neutral.

B. The Trial Court's Reasoning, as Elaborated in Its Recent *Molina* Opinion, Reflects a Basic Misunderstanding of Congress's Appropriations Power.

1. Judge Wheeler, who issued the opinion in this case, recently issued an opinion in another risk-corridors case, where he elaborated on his reasoning. In *Molina Healthcare of California, Inc. v. United States*, 133 Fed. Cl. 14 (2017), Judge Wheeler

concluded that Congress's explicit limitation on appropriations for risk-corridors payments achieved nothing because those payments could, instead, be made from the Judgment Fund, which he regarded as a "third option" for funding risk-corridors payments. *Id.* at 35.

But as Judge Bruggink correctly recognized in another risk-corridors case, the existence of the Judgment Fund is "immaterial" because "[r]etreat to the Judgment Fund assumes a liability in the first instance." *Maine*, 133 Fed. Cl. at 13 (citing *OPM v. Richmond*, 496 U.S. 414, 432 (1990)). There is no substantive basis for liability here. "Congress was presented with two potential pools of money for [risk-corridors] payments and clearly eliminated one of them, thus expressly limiting payments to the other pool—user fees." *Id.* "Once those funds were exhausted, the government's liability was capped." *Id.*

Judge Wheeler's contrary ruling is especially misguided because he recognized that it was "highly unlikely that Congress actively contemplated the availability of the Judgment Fund, let alone intended its use to make risk corridor payments." *Molina*, 133 Fed. Cl. at 35. Thus, Judge Wheeler's own understanding of the legislation made clear that there was no conceivable basis for resort to the Judgment Fund, which appropriates funds only to "pay final judgments." 31 U.S.C. § 1304(a)(1).

2. Judge Wheeler's liability rulings reflect a basic misunderstanding of the Appropriations Clause and the federal statutes that implement it. Under the "straightforward and explicit command of the Appropriations Clause," "no money

can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Richmond*, 496 U.S. at 424. The Appropriations Clause is not self-defining, and Congress has plenary power to implement it. *See U.S. Dep't of the Navy v. FLRA*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (citing *Harrington v. Bush*, 553 F.2d 190, 194–95 (D.C. Cir. 1977)). Congress has implemented the Appropriations Clause through longstanding statutes. *Id.*

First, "[a]ppropriations shall be applied only to the objects for which the appropriations were made," 31 U.S.C. § 1301(a), and a "law may be construed to make an appropriation out of the Treasury or to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states that an appropriation is made or that such a contract may be made," *id.* § 1301(d). Once made, annual appropriations are generally only available for obligation until the end of the fiscal year, unless the appropriation "expressly provides that it is available after the fiscal year." *Id.* § 1301(c)(2).

Second, the Anti-Deficiency Act prohibits any officer or employee of the United States from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A). Moreover, federal law bars federal officers from withdrawing "from one appropriation account and credit[ing] to another [except] when authorized by law." *Id.* § 1532.

Third, except as otherwise specifically provided by law, the Miscellaneous Receipts Act requires that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. § 3302(b). This statutory requirement ensures that all money received "for the Government," such as risk-corridors collections, is deposited into the United States Treasury, unless the law specifically provides otherwise. Once deposited into the Treasury, the Appropriations Clause requires an appropriation from Congress to pay the money out.

Congress permits agencies to incur financial obligations and spend federal funds by providing the agency with "budget authority," such as through "provisions of law that make funds available for obligation and expenditure." 2 U.S.C. § 622(2)(A)(i). "Congress' power to spend, or not, is unimpeded by its earlier actions." *Maine*, 133 Fed. Cl. at 8; accord *Manigault v. Springs*, 199 U.S. 473, 487 (1905) ("[A] general law . . . may be repealed, amended, or disregarded by the legislature which enacted it," and "is not binding upon any subsequent legislature."). Thus, where Congress indicates in its appropriations acts "a broader purpose" beyond "something more than the mere omission to appropriate a sufficient sum," *United States v. Vulte*, 233 U.S. 509, 515 (1914), the Supreme Court and this Court have given effect to Congress's intent and held that the United States is not liable for payments in excess of those limitations.

Judge Wheeler nevertheless declared that statutory language stating that an agency "shall pay" specified amounts imposes "discretionless obligations." *Molina*, 133 Fed. Cl. at 36 (quoting *Lopez v. Davis*, 531 U.S. 230, 241 (2001)). But the cases on which he relied did not involve the payment of money. In *Lopez*, for example, the statute provided that the Bureau of Prisons "shall designate the place of the prisoner's imprisonment" without "favoritism given to prisoners of high social or economic status." *Lopez*, 531 U.S. at 241.

Judge Wheeler was simply wrong to declare that "[t]he test for determining whether a statute obligates the Government does not change simply because" the directive is for "the payment of money." *Molina*, 133 Fed. Cl. at 36. No further action by Congress is necessary when a statute directs an agency to house prisoners without special favoritism. By contrast, the statutes that implement the Appropriations Clause make it unlawful for an agency to implement a payment directive unless and until Congress appropriates the necessary funds. It is "not enough for a statute to simply require an agency to make a payment," because "[a]gencies may incur obligations and make expenditures only as permitted by an appropriation." *Dep't of Health and Human Servs.-Risk Corridors Program*, B-325630, 2014 WL 4825237, at *2 (Comp. Gen. Sept. 30, 2014) ("GAO Op."). Accordingly, until Congress provided budget authority for HHS to make risk-corridors payments, HHS was not permitted (much less required) to do so.

3. Plaintiff asserts that the text of section 1342 of the ACA, which established the risk-corridors program, provided "no hint" that the program would be self-funded. Moda Br. 10. But as discussed in our opening brief (at 6), section 1342 contained no reference to any source of funds other than user fees collected under the program. That was an ample "hint" even for entities that are far less sophisticated than insurance companies. Moreover, as our opening brief explained (at 7), the contemporaneous report of the Congressional Budget Office indicated that the risk-corridors program would not adversely affect the federal deficit.[1] And in any event, even unsophisticated actors (such as the applicant for disability benefits in *OPM v. Richmond*) are bound by the principle that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Richmond*, 496 U.S. at 424.

As discussed in our opening brief (at 6-7, 18 n.3), the absence of an appropriation for risk-corridors payments in section 1342 of the ACA contrasts sharply with dozens of other ACA provisions for which Congress appropriated or authorized the appropriation of funds. Likewise, as our opening brief explained (at 19-20, 29-31), the text of section 1342 contrasts sharply with the statute that established the preexisting risk-corridors program for Medicare Part D (on which the ACA program was generally modeled), which provided that "[t]his section constitutes

[1] The subsequent CBO report cited by Judge Wheeler projected that risk-corridors collections would *exceed* payments by $8 billion. *See Molina*, 133 Fed. Cl. at 22-23. Nothing in that report suggested that HHS could make payments without an appropriation.

budget authority in advance of appropriations Acts and represents the obligation of the Secretary to provide for the payment of amounts provided under this section." 42 U.S.C. § 1395w-115(a)(2). Section 1342 contains no comparable language.

Plaintiff's reliance on regulations stating that "HHS *will pay*" risk-corridors amounts to insurers, Moda Br. 10, turns the Appropriations Clause on its head. The Appropriations Clause is "particularly important as a restraint on Executive Branch officers," *U.S. Dep't of the Navy*, 665 F.3d at 1347, and it is implicit in any payment regulation that implementation depends on appropriations. HHS did not commit to make payments without an appropriation, which would have been unlawful. "A regulation may create a liability on the part of the government only if Congress has enacted the necessary budget authority." GAO, *Principles of Federal Appropriations Law* 2–2 (4th ed. 2016 rev.).

4. This Court's decision in *Highland Falls-Fort Montgomery Central School District v. United States*, 48 F.3d 1166 (Fed. Cir. 1995), recognized that payment directives must be understood in light of the applicable appropriation and the constraints of the Anti-Deficiency Act. In *Highland Falls*, this Court held that earmarked amounts in annual appropriations acts limited the government's liability for payments to which school districts were otherwise entitled under section 237 of the Impact Aid Act. This Court explained that, by making pro rata reductions in the amounts to which school districts were entitled, the Secretary of Education "harmonized the requirements of [the Impact Aid Act] and the appropriations statutes with the requirements of" the Anti-

Deficiency Act, which prevents an agency from making expenditures that exceed appropriations. *Id.* at 1171. This Court likewise noted that the agency's approach harmonized the Impact Aid Act with the requirements of 31 U.S.C. § 1532, which states that "[a]n amount available under law may be withdrawn from one appropriation account and credited to another . . . only when authorized by law." *Id.*

Judge Wheeler's attempts to distinguish *Highland Falls* do not bear even cursory scrutiny. First, he declared that "[u]nlike the appropriation laws in *Highland Falls*," the appropriations laws at issue here did "not specifically and affirmatively appropriate any funds whatsoever to satisfy Section 1342(b)(1)," *Molina*, 133 Fed. Cl. at 39, and that "Congress merely pointed to funds which *could not* be used to make risk corridor payments." *Id.* Even if that description of the appropriations laws were correct, Congress can limit the government's liability through an explicit bar on the use of funds. In any event, Judge Wheeler's description was incorrect. The 2015 legislation *did* appropriate funds: it appropriated user fees. Absent that appropriation, HHS could not have retained and used risk-corridors collections to make risk-corridor payments because such amounts would have been deposited into the Treasury pursuant to the Miscellaneous Receipts Act. GAO thus advised Congress that reenactment of the user-fee appropriation would allow HHS to use "payments in" as a funding source for "payments out." Congress then appropriated funds collected from user fees. *See, e.g.,* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. G, title II, 128 Stat. 2130, 2477 (appropriating "such

sums as may be collected from authorized user fees"). Congress thus allowed HHS to use risk-corridors collections to fund risk-corridors payments, but in the same appropriations law, explicitly prohibited the use of other funds.

As in *Highland Falls*, there is "great difficulty imagining a more direct statement of congressional intent than the instructions in the appropriations statutes at issue here." 48 F.3d at 1170. Indeed, insurers are on even weaker footing than were the school districts in *Highland Falls*, because the Impact Aid Act provided that school districts were "entitled" to receive the section 237 payments and specified that in the event of a shortfall of appropriations, the section 237 entitlements shall be paid at 100 percent. *Id.* at 1168. By contrast, nothing in section 1342 provides for an "entitlement" to risk-corridors payments or specifies 100 percent payment.

Judge Wheeler was on no firmer ground in attempting to distinguish *Highland Falls* by observing that the Impact Aid Act required the Secretary of Education to determine, based on statutory criteria, "whether a school district should receive payment and how much payment they should receive." *Molina*, 133 Fed. Cl. at 40. Judge Wheeler declared those threshold determinations "important" to this Court's reasoning. *Id.* In reality, they were irrelevant to the legal issue before this Court, because the Secretary had found the school district entitled to a specific and undisputed amount. The Tucker Act suit was filed because "the money Highland Falls received under the Act was less than its § 237 entitlement, as determined by the Secretary of DOE." *Highland Falls*, 48 F.3d at 1169. This Court did not suggest that

the Impact Aid Act gave the Secretary discretion to withhold the amounts to which the Secretary had determined a school district to be entitled. The point of this Court's decision was that the subsequent appropriations legislation limited the government's liability to the amounts that Congress appropriated, notwithstanding the mandatory language of the Impact Aid Act.

Although plaintiff asserts that the statute at issue in *Highland Falls* was not "money mandating," Moda Br. 48-49, this Court said no such thing. The government moved to dismiss the complaint in *Highland Falls* for failure to state a claim on which relief could be granted, *see* 48 F.3d at 1167, 1169, and this Court affirmed the trial court's dismissal on the merits, *id.* at 1172. The Impact Aid Act provided that a school district "shall be entitled to receive" 100% of the amounts calculated by the Secretary of Education. *Id.* at 1168; *see also* 20 U.S.C. § 240(b)(1) (1988) (repealed) (providing that the Secretary of Education "shall pay" those amounts once determined). This Court has "repeatedly recognized that the use of the word 'shall' generally makes a statute money-mandating" for purposes of jurisdiction. *Greenlee County v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007). Accordingly, this Court's *Highland Falls* decision did not question the existence of Tucker Act jurisdiction. As explained below, however, the existence of jurisdiction is distinct from the merits, and plaintiff's brief incorrectly conflates these distinct issues.

C. Plaintiff Incorrectly Conflates the Question of Jurisdiction with the Merits.

Plaintiff asserts that "[t]his Court's recent decisions confirm that money-mandating obligations are enforceable in the CFC, *unless* Congress explicitly limited the obligation when creating it." Moda Br. 23-24 (relying on *Greenlee County* and *Prairie County v. United States*, 782 F.3d 685 (Fed. Cir. 2015)). That assertion has no support in the case law and confuses the question of jurisdiction with the merits of a claim.

In *Greenlee County*, this Court held that statutory language stating that an agency "shall pay" (or words to that effect) typically suffices to make a statute "money-mandating" for purposes of jurisdiction under the Tucker Act. 487 F.3d at 875. At the same time, this Court admonished that the jurisdictional and merits inquiries are distinct, and explicitly rejected the contention that "whether a statute is money-mandating for purposes of Tucker Act jurisdiction depends on whether the plaintiff on the merits can make out a claim under the statute." *Id.* On the contrary, in both *Greenlee County* and *Prairie County*, this Court found jurisdiction under a money-mandating statute but went on to reject the claims on the merits.

On the merits, plaintiff's reliance on section 1342 as a "money-mandating" statute fails for two independent reasons. First, although plaintiff refers to section 1342 as creating "money-mandating *obligations*," Moda Br. 23-24 (emphasis added), Congress did *not* make risk-corridors payments an "obligation" of the government, in contrast to provisions in the Medicare Part D statute and elsewhere in the ACA which

expressly create "obligations" of the government. *See* Opening Br. 19-20, 29-31; *see also Prairie County*, 782 F.3d at 691 (explaining that "if Congress had intended to obligate the government to make full . . . payments, it could have used different statutory language" stating that a school district "shall be entitled to payment under this chapter" and that "sums shall be made available to the Secretary of the Interior for obligation or expenditure in accordance with this chapter").

Second, even if section 1342 had made risk-corridors payments an "obligation" of the government, Congress has plenary power to limit a preexisting statutory obligation to amounts appropriated, and, as discussed above, the acts appropriating funds for risk-corridors payments clearly limited any such obligation to the user fees that Congress appropriated. *See Maine*, 133 Fed. Cl. at 13.

As with any matter that is subject to Congress's plenary control, the touchstone of the merits inquiry is Congress's intent. Plaintiff misapprehends fundamental principles of appropriations law and statutory interpretation when it asserts that "money-mandating obligations are enforceable in the CFC, *unless Congress explicitly limited the obligation when creating it*." Moda Br. 23-24 (emphasis added). Indeed, that contention cannot be squared with *Highland Falls*. The appropriations acts in *Highland Falls* were not enacted contemporaneously with the Impact Aid Act, *see* 48 F.3d at 1169, yet this Court held that the subsequent appropriations acts capped the government's liability at the amounts appropriated, *id.* at 1170-71. Likewise, in the Supreme Court cases discussed in our opening brief, the Court held that subsequent

appropriations acts capped preexisting payment obligations. *See* Opening Br. 24, 38-39 (discussing *United States v. Dickerson*, 310 U.S. 554, 554-55 (1940); *United States v. Will*, 449 U.S. 200, 223-24 (1980); and *United States v. Mitchell*, 109 U.S. 146, 148 (1883)).

Plaintiff relies heavily on a line of cases in which the Court of Claims declined to infer, from a mere failure to appropriate sufficient funds, that Congress intended to deny federal officers the salaries for which they had worked. *See* Moda Br. 27-29. Far from supporting plaintiff's position, those cases confirm that Congress's intent is dispositive. For example, in *Miller v. United States*, 86 Ct. Cl. 609 (1938), the underlying statute provided that "there shall be one disbursing clerk in the Bureau of Pensions . . . who shall receive a salary at the rate of four thousand dollars per annum." *Id.* at 611. Although the disbursing clerk initially was paid at the $4,000 rate, in several fiscal years the disbursing clerk received only $3,000 as a result of language in appropriations acts stating: "Disbursing clerk for the payment of pensions, $3,000." *Id.* The disbursing clerk then brought suit under a special act of Congress that waived the statute of limitations and gave him the right to sue for any unpaid part of his salary for the three years above stated. *Id.* (citing Private L. No. 75-158, 50 Stat. 994 (1937)). In holding that the disbursing clerk was entitled to recover the difference between the salary fixed by statute and the amount appropriated, the Court of Claims explained that it would not infer from the mere failure to appropriate the full amount that Congress intended to deny the disbursing clerk the salary set by statute. 86 Ct.

Cl. at 612-14. The court distinguished the cases on which the government relied because, in those cases, "there was something more than the mere omission to appropriate a sufficient sum." *Id.* at 613.

In the risk-corridors context, "Congress did not merely fail to address the source of funding." *Maine*, 133 Fed. Cl. at 13. As discussed above, the ACA did not appropriate funds for risk-corridors payments and instead reserved Congress's full budget authority over such payments. Then, when the time drew near for HHS to make the first round of risk-corridors payments, Congress appropriated "payments in" but barred HHS from using other funds. In enacting that legislation, Congress explained that it ensured that the federal government will not pay out more than it collects from insurers over the three-year period the risk-corridors program is in effect. Thus, in contrast to *Miller* and the other cases on which plaintiff relies, Congress's intent to limit the government's liability at the amounts appropriated is abundantly clear.

Judge Wheeler's own reasoning confirms that his liability rulings are contrary to Congress's intent. He opined that "the function of the risk corridor program requires that risk corridor payments be made on an annual basis." *Molina*, 133 Fed. Cl. at 30. And he declared that "[i]f HHS were allowed to delay payments until the end of the program, the purpose of protecting financial loss annually would be thwarted." *Id.* But there is no dispute that Congress, in its annual appropriations acts, explicitly

barred HHS from paying out more than HHS collected from insurers each year. The court had no choice but to give effect to Congress's intent.[2]

Plaintiff's reliance on a "presumption against retroactivity," Moda Br. 49-50, is wholly misplaced. The legislation that appropriated funds for risk-corridors payments did not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006). As discussed, section 1342 did not appropriate *any* funds for risk-corridors payments, much less obligate the taxpayer to indemnify unprofitable insurers for their business losses. The very first time that Congress appropriated funds for risk-corridors payments, Congress appropriated "payments in" and barred HHS from using other funds. That is not retroactive legislation. In any event, the presumption against retroactivity is overcome when Congress's intent is clear, *id.*, and Congress clearly intended to limit payments to the amounts collected.[3]

[2] As discussed below, Judge Wheeler erred in stating that the lump sum in the FY 2014 appropriation was available for risk-corridors payments, and he retreated from that statement in his *Molina* opinion. *See infra* pp. 23-25; Opening Br. 33-35.

[3] Indeed, Congress is free to "upset[] otherwise settled expectations" in a statutory program. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976).

II. The Implied-In-Fact Contract Claim Fails On Multiple, Independent Grounds.

A. Section 1342 of the ACA Did Not Create Contracts for Risk-Corridors Payments.

As our opening brief explained (at 46-50), the precedents of this Court and the Supreme Court foreclose Judge Wheeler's effort to derive an implied-in-fact contract from the text of section 1342 of the ACA. "[A]bsent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *Brooks v. Dunlop Mfg.*, 702 F.3d 624, 630 (Fed. Cir. 2012) (quoting *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-66 (1985)). "This well-established presumption is grounded in the elementary proposition that the principal function of the legislature is not to make contracts, but to make laws that establish the policy of the state." *Brooks*, 702 F.3d at 630 (quoting *Atchison*, 470 U.S. at 466). Accordingly, "the party asserting the creation of a contract must overcome this well-founded presumption and [courts should] proceed cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation." *Brooks*, 702 F.3d at 630-31 (quoting *Atchison*, 470 U.S. at 466).

The purported "contract" that plaintiff posits has no grounding in the statutory text. Plaintiff proposes to treat the full panoply of statutory conditions and benefits attendant to selling qualified health plans ("QHPs") as if they formed an "intricate

exchange" of contractual obligations by insurers and the government. Moda Br. 57. For example, plaintiff asserts that insurers committed themselves contractually to "utilize specified enrollment periods," to "terminate coverage only under Government standards," and to "establish a health care provider network that met federal standards," and that Congress committed itself contractually to pay insurers "advance premium tax credits," to make "payments to implement cost-sharing reductions for eligible individuals," and to make risk-corridors payments. *Id.*

None of the statutory provisions on which plaintiff relies evince an intent to bind the government *in contract*. There is nothing unusual about a statutory scheme that includes both requirements and incentives. And as our opening brief explained (at 47-50), that structure does not transform statutory provisions into contractual offers. *See also Blue Cross & Blue Shield of N.C. v. United States*, 131 Fed. Cl. 457, 478-79 (2017) (Griggsby, J.); *Land of Lincoln Mut. Health Ins. Co. v. United States*, 129 Fed. Cl. 81, 110-13 (2016) (Lettow, J.)).

In his *Molina* opinion, Judge Wheeler retreated from his suggestion that an implied-in-fact contract can be derived from the text of the ACA. Instead, he opined that the "circumstances surround[ing] the passage of the ACA . . . clearl[ly] indicat[e] . . . an intent to contract." *Molina*, 133 Fed. Cl. at 45 (internal quotation marks and citations omitted). To derive a contract from legislative history of a regulatory program would be a perilous venture even if the trial court were, in fact, relying on the legislative history of the statute. Instead, however, the court relied entirely on

post-enactment statements by HHS. *Id.* (citing HHS statements in Federal Register notices issued in 2012, 2013, and 2014). Post-enactment statements by an agency cannot manifest an "intent *by Congress* to bind itself contractually." *Id.* at 42 (emphasis added) (quoting *Brooks*, 702 F.3d at 631); *see also Blue Cross & Blue Shield of N.C.*, 131 Fed. Cl. at 479 (rejecting the insurer's reliance on post-enactment statements).

B. The ACA Did Not Authorize HHS to Make Contracts for Risk-Corridors Payments in Excess of Appropriations.

Equally clearly, HHS's post-enactment statements cannot themselves be the basis for an implied-in-fact contract.

As a threshold matter, for the reasons already discussed, HHS had no authority to bind the government in contract for risk-corridors payments in excess of appropriations. Federal law provides that "[a] law may be construed to make an appropriation out of the Treasury *or to authorize making a contract for the payment of money in excess of an appropriation* only if the law specifically states that an appropriation is made or that such a contract may be made." 31 U.S.C. § 1301(d) (emphasis added). Nothing in section 1342 authorized HHS to make contracts for risk-corridors payments in excess of appropriations. Indeed, nothing in section 1342 gave HHS any contracting authority with respect to risk-corridors payments at all.

Plaintiff's implied-in-fact contract claim thus fails as a matter of law. An implied-in-fact contract cannot arise without "actual authority" on the part of the government's representative to bind the government. *Schism v. United States*, 316 F.3d

1259, 1278 (Fed. Cir. 2002) (en banc). "As to 'actual authority,' the Supreme Court has recognized that any private party entering into a contract with the government assumes the risk of having accurately ascertained that he who purports to act for the government does in fact act within the bounds of his authority." *Id.* (citing *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947)). "The oft-quoted observation . . . that 'Men must turn square corners when they deal with the Government,' does not reflect a callous outlook." *Merrill*, 332 U.S. at 385. "It merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury." *Id.*

The cases on which plaintiff relies underscore the absence of contracting authority here. For example, the statute at issue in *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 185 (2012), expressly directed the Secretary of the Interior to enter into contracts with willing tribes, and specifically mandated that the Secretary pay in full the "contract support costs" incurred by tribes in performing their contracts.

Zoubi v. United States, 25 Cl. Ct. 581, 587 (1992), involved a procurement contract, and the procuring agency's authority to enter into such contracts was not in dispute. The disputed issue was whether a particular individual could exercise that contracting authority even though he was not the agency's contracting officer ("CO"), and *Zoubi* made the unremarkable point that "a procuring agency's CO is not the only person capable of binding the agency in contract." *Id.*

Fifth Third Bank of Western Ohio v. United States, 402 F.3d 1221 (Fed. Cir. 2005), was a *Winstar*-related case, and the agency's contracting authority was not in dispute. Indeed, in light of the Supreme Court's decision in *United States v. Winstar Corp.*, 518 U.S. 839 (1996), the government had conceded liability in *Fifth Third Bank* for breach of contract; the only disputed issue was whether, "because of particular circumstances in the transactions at issue," the agency "and the thrift understood that supervisory goodwill would be part of the transaction." 402 F.3d at 1225.

Nothing in those cases provides any support for plaintiff's assertion that HHS had statutory authority to bind the government contractually for risk-corridors payments in excess of appropriations.[4]

C. HHS Did Not Purport to Enter into Risk-Corridors Contracts, Nor Was There a Meeting of the Minds with Respect to the Terms of the Risk-Corridors Program.

Insofar as HHS had no authority to bind the government contractually for risk-corridors payments in excess of appropriations, it is unsurprising that HHS did not enter into such contracts. Indeed, there are no contracts that relate to risk-corridors payments. The only agreements that insurers have identified have nothing to do with the risk-corridors program, as Judge Wheeler recognized in *Molina*. *See* 133 Fed. Cl. at 45-46 (dismissing the express contract claim because the QHP agreements concern

[4] Other cases on which plaintiff relies are inapposite for reasons discussed in our opening brief (at 49-50).

the rules of conduct for maintaining access to the CMS Data Services Hub Web Services) (following *Land of Lincoln*, 129 Fed. Cl. at 109).

The various HHS statements on which plaintiff relies did not describe risk-corridors payments as contractual undertakings. For example, plaintiff relies on "HHS's implementing regulations," Moda Br. 55, but those regulations simply restate the terms of the statute, which has no contractual language. *See* 45 C.F.R. § 153.510. Plaintiff does not identify any statement by HHS that treated the implementation of section 1342 as a contractual undertaking.

Moreover, HHS's statements show that there was no meeting of the minds with respect to the key terms of the agency's risk-corridors payments. The premise of the insurers' contract claims is that HHS committed itself contractually to paying amounts calculated under the statutory formula—in full and on an annual basis—regardless of appropriations. But as Judge Wheeler recognized, "HHS stated repeatedly that it 'intend[ed] to administer risk corridors in a budget neutral way over the three-year life of the program, rather than annually.'" Appx22 (quoting 79 Fed. Reg. 30,240, 30,260 (May 27, 2014)). HHS thus made clear that "it intended to pay out only what it took in from profitable QHPs over the program's three years." *Id.* "In other words, HHS announced that it would *not* make full annual payments." *Id.*

(emphasis added; other emphasis omitted). And HHS repeatedly recognized that its ability to make risk-corridors payments was subject to appropriations.[5]

Despite these statements, plaintiff and other insurers chose to offer QHPs on the Exchanges for the 2015 and 2016 calendar years. Moreover, they did so even after Congress enacted legislation in December 2014 that prohibited HHS from using funds other than "payments in" to make risk-corridors payments. Insurers cannot now claim to have formed implied-in-fact contracts whose terms contradict HHS's statements and the express funding restrictions enacted by Congress.

D. HHS Did Not Have Authority to Obligate the FY 2014 Lump Sum for Risk-Corridors Payments and, in Any Event, HHS Did Not Purport to Do So.

Plaintiff argues that HHS could have chosen to obligate all or part of the $3.67 billion lump-sum appropriation in the *FY 2014* appropriation for risk-corridors payments, before Congress enacted the express restriction on risk-corridors funding in December 2014. *See* Moda Br. 35-39. That assertion is legally incorrect, and Judge Wheeler disclaimed reliance on this proposition in his *Molina* opinion. *See Molina*, 133 Fed. Cl. at 35 ("While the ruling in *Moda Health Plan* identified some funds available to make 2014 risk corridor payments, this finding was not necessary for the holding").

[5] *See* 79 Fed. Reg. at 30,260 (stating that if collections are insufficient to fund payments, "HHS will use other sources of funding for the risk corridors payments, *subject to the availability of appropriations*") (emphasis added); 80 Fed. Reg. 10,750, 10,779 (Feb. 27, 2015) (same); CMS, Risk Corridors Payments for 2015 (Sept. 9, 2016) (Appx546) (similar).

The lump sum in the FY 2014 appropriation was available "[f]or carrying out" enumerated programs such as Medicare, Medicaid, and the Public Health Service Act, and for "other responsibilities of [CMS]." Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, div. H, title II, 128 Stat. 5, 374 (Jan. 17, 2014). As our opening brief explained (at 33-35), that catch-all language did not include risk-corridors payments, because such payments were not among the "other responsibilities" of CMS in FY 2014. The plain text of section 1342 made risk-corridors collection and payment amounts dependent on insurers' cost-to-premium ratios for an entire calendar year. Therefore, those amounts were unknowable until FY 2015 at the earliest. The lump sum in the FY 2014 appropriation expired at the end of that fiscal year, and the appropriations legislation for FY 2015 (and subsequent years) expressly barred HHS from using funds other than collections for risk-corridors payments.

In arguing that HHS could have chosen to use the FY 2014 lump sum for risk-corridors payments, plaintiff misunderstands the reasoning of the GAO opinion. *See* Moda Br. 35-36. The GAO understood that HHS would not actually begin making collections or payments until FY 2015 at the earliest. GAO Op., 2014 WL 4825237, at *2. The GAO reasoning on which plaintiff relies addressed a counter-factual scenario under which collections and payments occurred in FY 2014. In parallel language, the GAO stated that the FY 2014 appropriation "*would have* appropriated to CMS user fees collected pursuant to section 1342(b)(2) in FY 2014," and that the "CMS PM appropriation for FY 2014 *would have* been available to CMS to make the

payments specified in section 1342(b)(1)." *Id.* at *5 (emphases added). The GAO did not suggest that the language actually made the appropriation available. Nor could it: the plain text of section 1342 made it impossible for there to be any "user fees collected pursuant to section 1342(b)(2) in FY 2014." *Id.* Thus, the GAO emphasized that "for funds to be available for this purpose in FY 2015, the CMS PM appropriation for FY 2015 must include language similar to the language included in the CMS PM appropriation for FY 2014." *Id.*

In any event, Moda's argument that HHS would have had discretion to obligate the FY 2014 lump sum for risk-corridors payments is academic, because HHS did not in fact obligate the lump sum for such payments. When the GAO asked HHS to identify potential funding sources for risk-corridors payments, HHS identified user fees as the sole source of funding for risk-corridors payments. *See* Letter from HHS to GAO (May 20, 2014) (Appx231-233); GAO Op., 2014 WL 4825237, at *5 (noting HHS's position).

Salazar v. Ramah Navajo Chapter, 567 U.S. 182 (2012), on which plaintiff relies, *see* Moda Br. 61-62, bears no resemblance to this case. The Indian Self-Determination and Education Assistance Act ("ISDA") at issue in *Ramah* directed the Secretary of the Interior to enter into specified contracts with willing tribes and mandated that the Secretary pay the full amount of "contract support costs" incurred by tribes in performing their contracts. *Ramah*, 567 U.S. at 185. The Secretary entered into contracts with the respondent Tribes, which the Tribes performed. *Id.* at 187. And

Congress specifically appropriated funds "for payments to tribes and tribal organizations for contract support costs" under ISDA. *Id.* Although those funds were sufficient to pay in full any individual contractor's contract support costs, they were insufficient to cover the aggregate amount due every contractor. *Id.* at 185. Applying "longstanding principles of Government contracting law," the Supreme Court held that the government must pay each tribe's contract support costs in full. *Id.*

As our opening brief explained (at 36-37), this Court explicitly rejected the contention that *Ramah*'s reasoning extends to statutory claims. *See Prairie County*, 782 F.3d at 689-90. And in contrast to the statute at issue in *Ramah*, section 1342 did not even authorize—much less require—HHS to enter into contracts with insurers for risk-corridors payments. Accordingly, HHS did not enter into any such contracts. No principle of government contracting law requires the government to pay damages for an alleged breach of a nonexistent contract.

Finally, plaintiff's brief notes that Congress did appropriate amounts collected from insurers under the risk-corridors program. Moda Br. 62. There is no dispute, however, that HHS distributed those funds to insurers. Plaintiff and other insurers are collectively seeking billions of dollars in risk-corridors payments *beyond* the amounts collected from insurers. For the reasons already discussed, their claims fail as a matter of law.

CONCLUSION

The judgment of the trial court should be reversed.

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

MARK B. STERN
s/ Alisa B. Klein
ALISA B. KLEIN
CARLEEN M. ZUBRZYCKI
Attorneys, Appellate Staff
Civil Division, Room 7235
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-1597
Alisa.klein@usdoj.gov

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Alisa B. Klein
ALISA B. KLEIN
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,515 words, excluding parts of the brief exempted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(b), according to the count of Microsoft Word 2013.

s/Alisa B. Klein
Alisa B. Klein
Counsel for Appellant