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 OPPOSITION TO THE UNITED STATES HOUSE OF REPRESENTATIVES' MOTION FOR LEAVE TO FILE AMICUS CURIAE

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Plaintiff Health Republic Insurance Company ("HRIC") respectfully requests that the Court deny the motion of the United States House of Representatives (the "House") for leave to file a brief as *amicus curiae* (Dkt. 17).

I. PRELIMINARY STATEMENT

More than a month after briefing closed on Defendant The United States of America's (the "Government") motion to dismiss, the House now seeks to file an *amicus* brief introducing to this case additional arguments for dismissal the Government did not raise in its Motion to Dismiss. The House's motion should be denied for this simple and straightforward reason—the arguments the House attempts to offer in support of the Motion to Dismiss were not raised by the Government and cannot now be raised for the first time a month after the Motion to Dismiss is fully briefed.

The House bases its motion for leave by combining two unrelated facts. First, on September 9, 2016, a statement from the Department of Health and Human Services ("HHS")—not the Department of Justice ("DOJ")—contained the following language: "As in any lawsuit, the Department of Justice is vigorously defending those claims on behalf of the United States. However, as in all cases where there is litigation risk, we are open to discussing resolution of those claims." *See* Dkt. 17, at 2; *see also* Dkt. 14-1 (Sept. 9, 2016 HHS Notice), at 2. Second, the DOJ has raised different arguments in this case than those raised in ***other*** litigation regarding unpaid risk corridors amounts. But the House does not identify any actual deficiencies regarding the DOJ's representation of the Government in this case; nor does the House indicate why the discretionary decisions of the DOJ, as the statutorily mandated legal representative for the Government in this case, should be called into question. Instead, the House simply claims that it has an interest in this case and that the Court should be made aware of dismissal arguments not raised in this case that are based on a different Rule of the Court of Federal Claims ("R.C.F.C.")

than the motion to dismiss the Government filed here.

HRIC opposes the House's request. The Government's Rule 12(b)(1) motion to dismiss has been fully briefed for over a month. Allowing the Government, through an *amicus*, to raise new arguments under Rule 12(b)(6), as the House wishes to do, would prejudice HRIC by effectively allowing an entirely new motion into the record through an *amicus* brief. This is fundamentally unfair to the Plaintiff and the Class both procedurally and substantively. Further, to the extent this would delay a determination in this case, it would cause continuing harm to the Class because the Government's continuing failure to pay has already damaged HRIC and the Class by what appears to be over $5 billion and counting.[1]

Even apart from being untimely, the request should be denied because the House has not demonstrated why its request satisfies any of the factors this Court considers when deciding whether to permit an *amicus* brief. The House failed even to discuss all of these factors in its motion, and the arguments that it did put forward are unpersuasive. Each factor weighs against granting the House's request: (1) HRIC, as noted above, opposes the House's motion; (2) the Government is well represented by an excellent team of DOJ attorneys; (3) the request appears to be influenced by partisan politics; and (4) the arguments the House seeks to add to this dispute do not change the result. Finally, fairness dictates that this *amicus* motion be denied because HRIC previously moved to file a timely *amicus* brief in another risk corridors case, and that motion was denied.

For these reasons and the others discussed below, the House's motion should be denied.

II. ARGUMENT

In the Court of Federal Claims, "there is no right to participate as an *amicus curiae*; the

[1] This failure has similarly had cascading, negative effects in the form of rising insurance premiums on at least hundreds of thousands—and, likely, millions—of people.

decision 'is left entirely to the discretion of the court.'" *Wolfchild v. United States*, 62 Fed. Cl. 521, 536 (2004), *rev'd on other grounds*, 559 F.3d 1228 (Fed. Cir. 2009) (quoting *Fluor Corp. v. United States,* 35 Fed. Cl. 284, 285 (1996)). "In exercising this discretion, courts have considered such factors as: whether the parties oppose the motion, the strength of information and argument presented by the potential *amicus curiae's* interests, the partisanship of the moving entity, the adequacy of the current representation, the timeliness of the motion, and, perhaps most importantly, the usefulness of information and argument presented by the potential *amicus curiae* to the court." *Id.* at 536. The House mentions and addresses only some of these factors in its motion. *See* Dkt. 17 at 6-8. As discussed below, each factor weighs against the House's request for leave to file an *amicus* brief.

A. HRIC Opposes the Motion

"Opposition by the parties is a factor militating against allowing participation." *Am. Satellite Co. v. United States*, 22 Cl. Ct. 547, 549 (1991); *see also Fluor*, 35 Fed. Cl. at 285 (recognizing that while parties to an action cannot bar the filing of an *amicus* brief, their "opposition should be given great weight by a court."). The Government filed a motion to dismiss pursuant to R.C.F.C. 12(b)(1), and the parties finished briefing on that motion five weeks ago. The House now seeks to move as a "friend of the court" under R.C.F.C. 12(b)(6) to offer additional arguments that the Government elected not to make here. Neither party has invited the House's motion, and HRIC opposes it.

B. The Government's Interests Are Already Protected

The DOJ is already protecting the Government's interests, and the House has no standing or ability to raise new arguments or otherwise direct the Government's defense of this litigation. The "conduct of litigation in which the United States . . . is a party . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516; *see*

also id. §§ 518-19. "Courts have consistently upheld the basic principle that the Attorney General is given power over, and general supervision of, all litigation to which the United States or an agency thereof is a party." *Favell v. United States*, 27 Fed. Cl. 724, 750 (Cl. Ct. 1992). This power is "exclusive" and "plenary." *Hughes Aircraft Co. v. United States*, 534 F.2d 889, 901 (Ct. Cl. 1976) (stating "there can be no dispute that, unless otherwise provided by law, the Attorney General is charged by statute with exclusive and plenary power to supervise and conduct all litigation to which the U.S. is a party").

Although the House has portrayed itself as an *amicus curiae*, in reality it is seeking to assert new arguments and invade the DOJ's exclusive and plenary authority over this litigation. *Hughes Aircraft*, 534 F.2d at 901. The House's attempt to raise new arguments under Rule 12(b)(6), which the DOJ in its strategic discretion chose not to make, has no basis in law. The House is effectively asking the Court to validate a non-party's ability, ostensibly as an *amicus curiae,*[2] to file an entirely new motion to dismiss, premised on different rules than those the party movant actually raised, five weeks after the briefing on the motion to dismiss has concluded. This is impermissible. 28 U.S.C. §§ 516-19; *Favell*, 27 Fed. Cl. at 750; *Hughes Aircraft*, 534 F.2d at 901. *Cf. Amoco Oil Co. v. United States*, 234 F.3d 1374, 1377 (Fed. Cir. 2000) (holding that an "*amicus* may support the appellant" but the appellant itself "must raise in its opening brief all issues it wishes to challenge").

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[2] The House cites several cases supporting its claim that it "regularly appears as amicus curiae in cases in which its institutional powers are implicated." Dkt. 17, at 6 n.6. But in *every* case the House cites, one or more of the following is true: (1) the parties consented to the House's filing; (2) the House filed the brief under Federal Rule of Appellate Procedure 29(a), or D.C.D.C. LCvR 7(o)(1), both of which state that that the United States may file an *amicus curiae* brief without consent or permission; (3) the House was invited by the court to file an *amicus*. *See* Dkt. 17, at 6 n.6 (listing cases). None of those circumstances apply here.

C. The House's Request Appears Motivated By Partisan Interests

This Court "'frown[s] on participation which simply allows the *amicus* to litigate its own views' or present 'its version of the facts.'" *Fluor*, 35 Fed. Cl. at 286 (citing *Am. Satellite*, 22 Cl. Ct. at 549); *see also New England Patriots Football Club, Inc. v. Univ. of Colorado*, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979) (an *amicus* should not be partisan). Although "an adversary role of *amicus curiae* has become accepted . . . there are, or at least there should be, limits." *Ryan v. Commodity Future Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997).

Here, the House "make[s] no pretense at impartiality,"[3] which weighs against permitting it to file an *amicus* brief. *Fluor*, 35 Fed. Cl. at 286. On page 1 of its motion, the House admits that the three Republican members of the five-member Bipartisan Legal Advisory Group ("BLAG") authorized this filing over the opposition of the Democratic members of that same group. *See* Dkt. 17 at 1 n.1. Although the motion purports to speak for the House of Representatives and makes arguments regarding contemporaneous Congressional intent with respect to the statutes at issue in this case, the current partisan makeup of the House is not the same as it was at the time Congress passed the Affordable Care Act ("ACA"), in 2010. *Compare* 124 Stat. 119 (the ACA) (Mar. 23, 2010); *with* Paul Kane, *Resurgent Republicans take back control of the House*, WASH. POST, (Nov. 3, 2010), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/11/03/AR2010110308842.html. The House's motion potentially represents a partisan subset of the House advancing arguments about the interpretation of a statute passed when that political party was in the minority. The potential injection of party politics into the Government's fully briefed motion to dismiss is

[3] For example, the House's motion makes reference to the risk corridor payments as "government handouts" and this lawsuit as a "scheme" to "engineer[] a massive giveaway of taxpayer money." Dkt. 17, at 1, 2.

unnecessary and weighs against permitting the proposed *amicus* brief.

D. Both Parties To This Lawsuit Have Capable Representation

"Trial courts have allowed *amicus* filings when the court was 'concerned that one of the parties is not interested in or capable of fully presenting one side of the argument.'" *Fluor*, 35 Fed. Cl. at 286 (quoting *Am. Satellite*, 22 Cl. Ct. at 549). Here, the lack of capability is not an issue. The attorneys that make up the Department of Justice (including but not limited to the attorneys responsible for this case) are among the finest in the nation, and the filings they have made thus far demonstrate capable representation of the Government's interests. It is beyond dispute that the DOJ has, in fact, sought to dismiss this case, which is the exact result the House wants, on the grounds DOJ determined, in its discretion and under its authority as counsel, appropriate on behalf the Government. The House does not offer any unique perspective that DOJ is unable to provide. In reality, the House's motion for leave and proposed *amicus* brief does nothing more than offer arguments that the DOJ made in other risk corridors-related cases pending before different Judges. *See generally* Dkt. 17 at 4-8.

E. The House's *Amicus* Brief Is Untimely

"The parties before the court should have their dispute resolved without any unnecessary delay. It would be unacceptable for an *amici* brief to cause a prolonged delay in the litigation." *Fluor*, 35 Fed. at 286 (citing *Leigh v. Engle*, 535 F. Supp. 418, 420 (N.D. Ill. 1982)). The Government filed its motion to dismiss pursuant to R.C.F.C. 12(b)(1) on June 24, 2016, Dkt. 8, after first requesting and receiving a 60-day extension on its time to respond to HRIC's Complaint. Dkt. 7. HRIC filed its opposition on August 15, 2016, Dkt. 11, and the Government replied on September 9, 2016. Dkt. 14. It has now been over a month since briefing on the Government's motion to dismiss closed, yet the House wishes to add new issues under a different Rule—12(b)(6) versus 12(b)(1)—at this late date. Given the time-sensitive nature of

the claims in this case and the widespread harm the Government's continuing failure to pay risk corridors amounts has caused, and is continuing to cause, to the Class and those covered by individual and small group Exchange policies, the untimely nature of House's motion weighs against the request for leave.

F. The *Amicus* Arguments Are Neither Useful Nor Correct

Finally, and "perhaps most importantly" (*see* Dkt. 17 at 6), inquiring into whether the arguments presented by the *amicus* brief are actually useful again weighs strongly against allowing the *amicus* brief. In essence, the House argues that Section 1342 of the ACA is a "budget neutral" statute, and that subsequent appropriations bills—what the parties have called the "2015 Spending Bill" and "2016 Spending Bill" in the motion to dismiss papers, *see* Dkt. 11 at 14-15—somehow demonstrate the ACA's original statutory intent on budget neutrality for the risk corridors program. Below is an in-depth discussion explaining why these arguments fail.[4]

1. Section 1342 is not a "budget neutral" statute

The Government's first argument[5] is that Congress planned the risk corridors program to be self-funding and therefore budget neutral. Dkt. 17-2, at 22-24. Arguing that Section 1342 of the ACA only describes the methodology for determining "payments in" and "payments out," the Government concludes there is no way Congress meant for HHS to be the "uncapped insurer of the insurance industry itself." *Id.* at 23.

[4] HRIC previously analyzed the same contentions in the context of seeking to file an *amicus* brief in *Land of Lincoln Mutual Health Ins. Co. v. United States*, No. 1:16-cv-744 (Fed. Cl.), Oct. 5, 2016, ECF No. 23-1. That *amicus* brief (although rejected by the Court in *Land of Lincoln*) is provided in the Appendix. However, in the event this Court permits the House to file its own *amicus* brief in this case, HRIC respectfully requests the opportunity to respond directly to the arguments raised in that brief.

[5] All references to the Government's "merits arguments" are to those raised in the *Moda* motion to dismiss, which the House filed as Exhibit 1 to their proposed *amicus* brief. *See* Dkt. 17-2. That brief raises nearly identical jurisdictional arguments as the Government raised in this case, *id.* at 13-21, but also raises arguments on "the merits" that the House repeats in its *amicus* brief. *Id.* at 21-30. It is these latter arguments that this and the following sections address.

The House contends this position is supported by three indirect pieces of evidence: (1) the ACA never expressly states that the Government is obligated to pay monies outside those available "under the program"; (2) Congress omitted the language from the Medicare Part D statute that expressly obligated the Government for liabilities collected under the Act; and (3) when the Congressional Budget Office performed a cost estimate contemporaneously with the ACA's passage, it omitted the Risk Corridors program from its scoring. *Id*. at 22-24. As set forth below, there is no merit to the House's argument.

(a) The plain language of the ACA requires HHS to pay

First, the House's position is at odds with the plain language of the statute. The ACA unequivocally states that HHS "shall pay" compensable losses for insurers in 2014, 2015, and 2016. *See* 42 U.S.C. § 18062. There are no restrictions on the "shall pay" requirement, thus making it an unavoidable Government obligation with respect to QHP issuers and enforceable under the Tucker Act. *See 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."). When interpreting a statutory provision, the Court will (and must) assume Congress intends the understood legal meaning of that phrase and its implication on the statute. *Tenaska Washington Partners II, L.P. v. United States*, 34 Fed. Cl. 434, 441 (1995) ("In determining the plain meaning of statutory language, the court must assume legislative purpose is expressed by the ordinary meaning of the words used.") (internal quotation marks and citation omitted); *Cardiosom, L.L.C. v. United States*, 115 Fed. Cl. 761, 774 (2014) ("The case law instructs that words with a fixed legal or judicially settled meaning, where the context so requires, must be presumed to have been used in that sense.") (alteration and citation omitted); *Byrnes v. United States*, 70 Ct. Cl. 261, 266 (1930) ("The framers of a statute are presumed to intend that the words used be accorded their ordinary meaning and recognized legal

significance.")

Moreover, while the ACA does not expressly say HHS will pay amounts beyond those available under the program, it does not limit payment to those funds either. Congress knew how to limit the amount of monies due under the statute. It could have limited the risk corridors payments to those available "under the program" as the Government[6] argues. It did not do so. Those words never appear in the operative portion of the statute.[7] Instead, Congress mandated that HHS "shall pay" the amounts due—words that are statutorily money-mandating for all amounts in question. As such, the plain language of the statute obligates the Government to pay all compensable losses under the risk corridors program regardless of funds available "under the program." Where Congress intended a risk-mitigation provision of the ACA to be budget-neutral, it knew how to include limiting language. *See* 42 U.S.C. § 18061(b)(1) ("[T]he applicable reinsurance entity collects payments under subparagraph (A) and uses amounts so collected to make reinsurance payments to health insurance issuers described in subparagraph (A)") (reinsurance program).

Second, the Government's current interpretation of the statute is not only inconsistent with its plain text, but its structure and purpose as well.[8] As CMS has explained, risk corridors

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[6] Because the House *amicus* includes as an Appendix the Government's Motion to Dismiss in the *Moda v. United States* action, HRIC refers to the arguments and contentions of the "House" interchangeably as the "Government's."

[7] As discussed above, the Government's proposed limitation is contrary to CMS's own statements and constitutes another "*post-hoc* rationalization" advanced for purposes of litigation to attempt to avoid liability, and it is not entitled to any deference. *Parker v. Office of Pers. Mgmt.*, 974 F.2d 164, 166 (Fed. Cir. 1992) ("*[P]ost-hoc* rationalizations will not create a statutory interpretation deserving of deference.") (emphasis added).

[8] The Government's argument is directly contrary to the language in the proposed rule implementing the risk corridors. Proposed Rule, HHS Notice of Benefit and Payment Parameters for 2015, 78 Fed. Reg. 72,322, 72,325 (Dec. 2, 2013) ("Section 1342 of the Affordable Care Act directs the Secretary to establish a temporary risk corridors program that provides for the *sharing in gains or losses resulting from inaccurate rate setting* from 2014 through 2016 *between the Federal government and certain participating plans*.") (emphases

were intended to "permit issuers to lower rates [they charge to enrollees] by not adding a risk premium to account for perceived uncertainties in the 2014 through 2016 markets," HHS Notice of Benefit and Payment Parameters for 2014, 78 Fed. Reg. 15,410, 15,413 (Mar. 11, 2013). In other words, the risk corridor payments were intended to protect insurers, in part, from the risk of underpricing their plans. However, given the statutory methodology for calculating risk corridors payments and charges, whereby the calculation for charge amounts is entirely separate than the calculation for payment amounts, it would be a coincidence if the funds collected under the program matched the payments owed.[9] The intended protection against potential underpricing would not be provided, and no premium stabilization could be achieved, if such risk corridor payments were contingent upon the entirely speculative question of whether other insurers would be so profitable as to result in payments by them to the Government sufficient to satisfy the payments owed by the Government to unprofitable insurers.

"If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). To determine the intent of Congress, the court looks not only to the language of the statute itself, but also to its structure and purpose. *Delverde, SrL v. United States*, 202 F.3d 1360, 1363 (Fed. Cir. 2000). The stated purpose of risk corridors—to mitigate the risk that the Government was asking health insurers to undertake—is wholly undercut by an interpretation that would make a risk corridor payment to a given plan dependent not only on the Qualified Health Plan's own experience, but

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added).

[9] *See e.g.*, Doug Norris, Mary van der Heijde and Hans Leida, Risk Corridors Under the Affordable Care Act—A Bridge Over Troubled Waters, But the Devil's In the Details, p. 6, Society of Actuaries, Health Section Health Watch (October 2013), available at http://us.milliman.com/uploadedFiles/insight/2013/Risk-corridors-under-the-ACA.pdf.

on the financial results of other insurers' Qualified Health Plans as well, about which a given plan would have no knowledge or control. Such an interpretation would reinforce, rather than reduce, the very uncertainty that the risk corridor payments were meant to ameliorate.

(b) Even if the ACA were ambiguous, *Chevron* deference to HHS's interpretation of the ACA mandates payment

While Health Republic submits that this "shall pay" language is unambiguous and obligates HHS to pay the full amounts due, even if it were ambiguous, HHS's interpretation of the statute on this point highly persuasive. HHS's contemporaneous and, indeed, most recent interpretations of its own obligations demonstrate that the full risk corridors payments are owed by HHS. *See*, *e.g.*, 78 Fed. Reg. at 15,473 (Mar. 11, 2013) ("***The Risk Corridors program is not statutorily required to be budget neutral. Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act.***") (emphasis added); CMS, *Risk Corridors Payments for 2015* (Sept. 9, 2016), *available at* https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/ Downloads/Risk-Corridors-for-2015-FINAL.PDF#sthash.F6vymHRx.dpuf ("HHS will record risk corridors payments ***due*** [to unprofitable insurers] ***as an obligation of the United States Government for which full payment is required***.") (emphasis added).

(c) Medicare Part D

The Government argues in the *Moda* motion that the ACA does not expressly make HHS liable for payments in excess of QHP contributions under its risk corridors program as it does with the Medicare Part D risk corridors program. Because of this purported difference between the two statutes, the Government argues it is reasonable to infer that Congress did not intend the Government to be liable for these costs. The Government misinterprets the difference between the ACA and Medicare Part D because statutes requiring the Government to pay money to an

individual or entity need not (and generally do not) expressly specify that they "represent an obligation" of the Government, in order that they be treated as such.

Indeed, unlike Section 1342, the Medicare Part D risk corridors provision does not provide that the Secretary "shall pay," but only that the Secretary "shall establish a risk corridor." 42 U.S.C. § 1395w-115(e)(3). The Court of Federal Claims has repeatedly found that payments mandated by statute, using language almost identical to Section 1342, are sufficient to support a claim under the Tucker Act, even if the statute does not also contain express additional language that the statute represents an obligation of the United States. *See, e.g.*, *ARRA Energy Co. I v. United States*, 97 Fed. Cl. 12, 14 (2011) (finding that statute stating the government "shall . . . provide" certain amounts to qualified candidates constituted a monetary obligation of the Government subject to Tucker Act jurisdiction); *District of Columbia v. United States*, 67 Fed. Cl. 292 (2005) (holding that government had a statutory obligation to pay the plaintiff; statute did not expressly specify that payments made pursuant to it were an "obligation" of the Government). The fact that Congress included such language in the Medicare Part D statute does not mean Section 1342 of the ACA (enacted seven years later) means anything other than exactly what it says—that HHS "shall pay" the amount calculated under the statutory formula.

(d) The CBO's statements do not affect the construction of the ACA

The Government's argument that the CBO did not apply a cost to the ACA when it analyzed the statute prior to enactment is also unavailing. It is well settled that the CBO's analysis of the costs associated with a statute is irrelevant to the statute's construction. As the Seventh Circuit has expressly held in an analogous case, "[a]lthough 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." *Ameritech Corp. v. McCann*, 403 F.3d 908, 913 (7th Cir. 2005). This holding was adopted by the Federal Circuit and is controlling here. *See Sharp v. United States*, 80 Fed. Cl. 422, 436 (2008) ("The Court notes with approval the Seventh Circuit's statement that the 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.*).

Moreover, the CBO recognized that there could be costs imposed on the Government that are not offset by collections under the risk corridors program. 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/113th-congress-2013-2014/reports/45010/45010-breakout-AppendixB.pdf ("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.") The CBO simply indicated that cost overruns were not anticipated. As such, the CBO's statements reflect confidence in HHS's own belief at that time that the risk corridors program would not result in overruns. The Government implicitly acknowledges this fact in the *Land of Lincoln* motion to dismiss, noting that the CBO simply miscalculated the risks involved with the risk corridors program. *Land of Lincoln* Motion to Dismiss at 8-9 ("Centers for Medicare & Medicaid Services, Preliminary Regulatory Impact Analysis (CMS-9989-P2) (July 2011), A.R. 31 "CBO . . . *assumed* aggregate collections from some issuers would offset payments made to other issuers.") (emphasis added).

Indeed, it was assumed at the time of enactment that the ACA program would also be a

net positive for HHS, since Medicare Part D's risk corridors program has been revenue-positive for the Government. In his testimony before Congress in 2014, noted health care expert Professor Jost of Washington and Lee University observed:

> The CBO did not originally assign a cost to the ACA risk corridor program, presumably because it expected contributions from insurers with below projected costs would balance out pay-outs to insurers with above projected expenses. In fact, however, the Part D drug plan risk corridor program has turned out to be a net money maker for the federal government. In every year since 2006, the federal government has received more from the program than it has paid out, with annual receipts ranging from $100 million to $2.6 billion. For the first two years, at least, far more insurers paid in that [sic] received payments. Simulations developed by actuaries for discussion by a National Association of Insurance Commissioner actuarial group last year suggested that the same thing might happen with the ACA risk corridor program.

Obamacare: Why the Need for an Insurance Company Bailout?: Hearing before the H. Comm. on Oversight and Government Reform, 113th Cong. 38-43 (2014) (statement of Timothy Stoltzfus Jost, Professor of Law, Washington and Lee University).

Although the assumption that the ACA risk corridors program would result in similar windfalls to the Government as Medicare Part D ultimately proved incorrect, that does not alter the Government's obligation to make risk corridors payments under Section 1342. Nor could it, as the Government admits that HHS has consistently construed the ACA as obligating HHS to pay any monies due under the risk corridors program. *See* Government's *Land of Lincoln* Motion to Dismiss at 8-9 (*citing* Exchange and Insurance Market Standards for 2015 and Beyond Final Rule, 79 Fed. Reg. 30,240, 30,260 (May 27, 2014) ("HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers[.]"); HHS Notice of Benefit and Payment Parameters for 2016 Final Rule, 80 Fed. Reg. 10,750, 10,779 (Feb. 27, 2015) ("HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers[.]"); HHS Notice of Benefit and Payment Parameters for 2014 Final Rule, 78 Fed. Reg. at 15,473 (Mar. 11, 2013) ("***The risk corridors program is not statutorily required to be budget***

neutral. Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act.") (emphasis added); CMS, *Risk Corridors Payments for 2015* (Sept. 9, 2016), *available at* https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/Risk-Corridors-for-2015-FINAL.PDF#sthash.F6vymHRx.dpuf ("HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers. HHS will record risk corridors payments due as an obligation of the United States Government for which full payment is required."). The CBO offered no opinion on the issue of whether HHS was obligated to make payments under the risk corridors program in excess of program revenues, but merely agreed with the view of HHS at the time of enactment that such payments would not likely be required.

2. The 2015 and 2016 Spending Bills do not alter the Government's obligations to pay QHP issuers full risk corridors payments

The Government also contends again that the 2015 and 2016 Spending Bills' limitations on the funds HHS and CMS may use to pay the risk corridors somehow change the money-mandating language of Section 1342. Dkt. 17-2, at 24-29. Not only is that position directly contrary to positions recently taken in response to litigation concerning separate cost sharing reimbursements under the ACA,[10] but the law is clear that "the 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." *Slattery v. United States*, 635 F.3d 1298, 1321 (Fed. Cir. 2011) (*en banc*). As *Slattery* and a long line of decisions make clear, Congress's failure to appropriate funds for an agency to meet an obligation under a money-mandating statute "does

[10] As the Government argued in *United States House of Representatives v. Burwell*, No. 14-1967 (RMC) (D.D.C.), "the absence of an appropriation would not prevent the insurers from seeking to enforce that statutory right through litigation." Defendant's Memorandum In Support of Its Motion for Summary Judgment, Dkt. No. 55-1, at 20.

not in and of itself defeat a Government obligation created by statute." *Greenlee Cty. v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007).

In reality, these Spending Bills are what gives rise to plaintiffs' jurisdiction to bring suit for payment in the Court of Federal Claims. *See, e.g.*, *United States v. Langston*, 118 U.S. 389 (1886) (holding that Congress owed Haitian ambassador $2,500 where statute mandated that he be paid $7,500 annually and Congress only appropriated $5,000 for that purpose); *Slattery*, 635 F.3d at 1321 (failure to appropriate funds did not absolve the Government of its obligation to pay amounts owed under money-mandating statute); *District of Columbia v. United States*, 67 Fed. Cl. 292 (2005) (holding that government had a statutory obligation to pay the plaintiff; statute did not expressly specify that payments made pursuant to it were an "obligation" of the Government); *Gibney v. United States*, 114 Ct. Cl. 38, 50-51 (1949) (requiring payment of overtime wages to government workers where such overtime was mandated by statute, but Congress forbade the employing agency from using appropriated funds for that purpose). A limitation on agency appropriations may mean that the agency cannot itself comply with the statutory mandate by making payment, but that does not mean that the money is not due and payable by the Government, nor does it change the jurisdiction of the Court of Federal Claims to entertain claims against the United States to honor its statutory payment obligations and to provide relief.

The standard for finding that language within appropriations legislation eliminates a preexisting statutory right (and thus cuts off access to the Tucker Act) is stringent and is not met in this circumstance. While Congress may have the legal authority prospectively to amend substantive preexisting statutory obligations, it must do so "expressly or by clear implication." *Prairie Cty. v. United States*, 782 F.3d 685, 689 (Fed. Cir.), *cert. denied*, 136 S. Ct. 319 (2015).

Moreover, and of direct relevance here, "[t]his 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) (emphasis added). Because appropriations laws "have the limited and specific purpose of providing funds for authorized programs," the statutory instructions included in them are presumed not to impact substantive law. *See TVA v. Hill*, 437 U.S. 153, 190 (1978). "The intent of Congress to affect a change in the substantive law via provision in an appropriation act must be ***clearly manifest***." *New York Airways, Inc. v. United States,* 369 F.2d 743, 749 (Ct. Cl. 1966) (emphasis added); *accord District of Columbia*, 67 Fed. Cl. at 335 (quoting *New York Airways*).

As *Slattery*, *Greenlee*, *Langston*, *District of Columbia*, and *Gibney* establish,[11] Congress's failure to appropriate funds for the Government's monetary obligations—even with language near identical to the 2015 and 2016 Spending Bills—is insufficient to avoid those obligations. None of the Government's case citations in *Land of Lincoln* or the Class Action hold otherwise.

The Government relies heavily on three cases in the *Moda* motion to support its argument that the appropriations riders suspended the statutory mandate to make full risk corridors payments to QHP issuers, and the House relies heavily on one more in its proposed *amicus* brief: *United States v. Dickerson*, 310 U.S. 554 (1940); *United States v. Will*, 449 U.S. 200 (1980); *Republic Airlines v. U.S. Department of Transportation*, 849 F.2d 1315 (10th Cir. 1988); and *Highland Falls-Fort Montgomery Central School District v. United States*, 48 F.3d 1166 (Fed. Cir. 1995). *See* Dkt. 17-2, at 25-29 (discussing *Dickerson*, *Will*, and *Republic Airlines*); Dkt. 17-

[11] None of the following cases were cited in the Government's *Moda* Motion: *United States v. Langston*, 118 U.S. 389 (1886); *Gibney v. United States*, 114 Ct. Cl. 38 (1949); and *District of Columbia v. United States*, 67 Fed. Cl. 292 (2005).

1, at 10 (discussing *Highland Falls-Fort Montgomery*). All four of these decisions are readily distinguishable and irrelevant to Section 1342 and the claims in this litigation. *Dickerson*, *Will*, *Republic Airlines*, and *Highland Falls-Fort Montgomery* all involved appropriations language that clearly altered a statutory obligation, whereas the language in the 2015 and 2016 appropriations riders here did nothing more than limit the use of specific funding for risk corridors payments.

In *Dickerson*, a statute obligated Congress to make bonus payments to individuals who re-enlisted in the military. In each appropriations bill from 1933 through 1937, Congress expressly suspended this requirement with the following language: the statute that "provides for the payment of enlistment allowance to enlisted men for reenlistment . . . is hereby suspended as to reenlistments made during the fiscal year." 310 U.S. at 556. In appropriations bills for 1938 and 1939, Congress changed this language to read: "no part of any appropriation contained in this ***or any other Act*** for the fiscal year . . . , shall be available for the payment . . . during the fiscal year . . . notwithstanding the applicable provisions of" the statute that required the bonus payments be made. *Id.* at 556-57 (emphasis added). The plaintiff sued the government to receive a bonus for re-enlisting in 1938. The Supreme Court held that the 1938 appropriations language carried forward the longstanding suspension of the Government's statutory obligation to pay bonuses to individuals re-enlisting in the military. *Id.* at 561-62. This holding was based in part on the Court's conclusion, after a careful examination of the legislative history, that Congress intended the 1938 and 1939 appropriations language "as a continuation of the suspension [of the statutory obligation] enacted [by the appropriations bills] in each of the four preceding years." *Id.* at 561.

The appropriations language at issue in *Dickerson* is meaningfully different than the

language of the appropriations riders limiting the sources of funding for risk corridors payments. The *Dickerson* language prohibited funding for the statutory obligation from the appropriations bill in which it was contained ***and "any other Act for the fiscal year,"*** and the provision expressly stated that bonus payments were defunded ***"notwithstanding the applicable portions of" the underlying substantive law***. That language was deemed to be a continuation of appropriations acts that had explicitly suspended the underlying statutory obligation. In contrast, the risk corridors appropriations language: (1) does not suspend the underlying statutory obligation; (2) does not prohibit the use of funding from "any other Act"; and (3) does not specify that the funding limits were imposed "notwithstanding" the substantive risk corridors obligation. Rather, the risk corridors appropriations language is "a simple withholding of funds" from a specified source, "unaccompanied by other expressed or implied purpose[]" of altering the underlying statutory obligation. *See New York Airways*, 177 Ct. Cl. at 814 (explaining that the "language in the appropriation proviso in the *Dickerson* case" was "'a legislative provision under the guise of a withholding of funds' which suspended the legal obligation, rather than a simple withholding of funds unaccompanied by other expressed or implied purposes" (quoting *Gibney*, 114 Ct. Cl. at 51).

Unlike *Dickerson,* there is no indication in the legislative history or otherwise to support the view that the risk corridors appropriations language was intended to reflect a change or suspension in the statutory obligation. While some members of Congress may well support an elimination of risk corridors payments, the appropriations bills only limit certain sources of appropriations available for these payments. The spending bills did not eliminate or suspend the risk corridors statutory obligation itself, and, indeed, the President has repeatedly threatened to

veto any bill that eliminates the programs enacted as part of the ACA.[12] If the spending bills were an attempt to eliminate the Government's liability under Section 1342 of the ACA, these bills did not accomplish their purpose. *See, e.g., Gibney*, 114 Ct. Cl. at 55 (Whitaker, J. concurring) (if Congress wanted the appropriations language to suspend the Government's obligation to pay overtime, "they did not accomplish their purpose; they merely prohibited the use of certain funds to discharge the obligation under that Act," and "[t]his did not repeal the liability the Act created").

In *United States v. Will*, plaintiffs-judges sued to obtain pay increases to which they argued they were statutorily entitled. They based their claim on a statutory scheme in which the President was directed to make cost-of-living increases to judges and other federal employees based on several considerations. In four consecutive fiscal year appropriations bills, Congress blocked those pay increases for judges through the following four provisions: "[n]o part of the funds appropriated in this Act ***or any other Act*** shall be used"; the salary increase that "would be made after the date of enactment of this Act under the following provisions of law [listing the provisions giving rise to the obligation]. . . ***shall not take effect***"; "No 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 . . ."; "funds available for payment . . . shall not be used to pay any such employee or elected or appointed official any sum in excess of 5.5 percent increase in existing pay and such

[12] *See* Executive Office of the President, Office of Management and Budget, Statement of Administration Policy, *H.R. 596 - Repealing the Affordable Care Act* (Feb. 2, 2015) ("If the President were presented with H.R. 596 [Repealing the Affordable Care Act], he would veto it.") *available at* https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr596r_20150202.pdf; *see generally* Peter Sullivan, *White House Issues Veto Threat on ObamaCare Repeal*, THE HILL, Dec. 2, 2015 ("Both [Republicans and Democrats] have long known that Obama would veto a bill to gut his signature domestic achievement . . . ."); Gregory Korte, *Obama Uses Veto Pen Sparingly, But Could That Change?*, USA TODAY, Nov. 19, 2014 (President Obama has threated to veto twelve different bills that would have repealed all or part of the ACA).

sum if accepted shall be in lieu of the 12.9 percent due for such fiscal year." *Will*, 449 U.S. at 205-08 (emphasis added). The Court held that each of these provisions "block[ed] the increases the [Act] otherwise would generate." *Id.* at 223.

None of the four appropriations provisions at issue in *Will* are similar to the provisions limiting risk corridors appropriations. Here again, the appropriations language in *Will* clearly indicated an alteration of the statutory obligation, because it either expressly stated that the underlying statute "shall not take effect," or prohibited the Government from using *any* appropriations source in the year at issue. In contrast, the risk corridors appropriations riders only prevent the Government from making payments out of certain specified sources of funding. The Federal Circuit also noted in *Will* that any additional pay increases the plaintiffs-judges sought to collect would be determined through an "uncertain, discretionary process." *Beer v. United States*, 696 F.3d 1174, 1183 (Fed. Cir. 2012) (analyzing *Will*). As a result, the plaintiffs-judges in *Will* did not have a clear right to a payment increase, unlike the QHP Issuers in this case, who have a clearly-defined statutory right to specific payment amounts calculated by a non-discretionary statutory formula.

Republic Airlines similarly fails to support the Government's position. There, the plaintiffs sought a subsidy to which they alleged an entitlement under Section 406 of the Federal Aviation Act of 1958. The Government contended that the following language in an appropriations bill relieved it of the obligation to pay the subsidy specified in Section 406:

> ***[N]otwithstanding any other provision of law***, none of the funds appropriated by this Act shall be expended under Section 406 for services provided after ninety-five days following the date of enactment of this Act to points which, based on reports filed with the Civil Aeronautics Board, enplaned an average of eighty or more passengers per day in the fiscal year ended September 30,

> 1981: Provided further, ***That [sic] notwithstanding any other provision of law***, payments under Section 406, exclusive of payments for services provided within the State of Alaska, shall not exceed a total of $14,000,000 for services provided during the period between March 31, 1982, and September 30, 1982, and, ***to the extent it is necessary to meet this limitation, the compensation otherwise payable by the Board under Section 406 shall be reduced by a percentage which is the same for all air carriers receiving such compensation*** . . . .

849 F.2d at 1317 (emphasis added). The court ruled in favor of the Government, holding that this language "altered any 'entitlement'" the airlines may have had under Section 406. *Id.* at 1319.

As an initial matter, *Republic Airlines* is not a Tucker Act case, and the plaintiffs in *Republic Airlines* were not seeking a monetary judgment for the Government's failure to meet a statutory payment obligation, but petitioning for review of an order of the Civil Aeronautics Board.[13] Thus, the well-developed case law regarding the heavy scrutiny that applies when the Government seeks to rely upon an appropriations rider to avoid Tucker Act liability was simply not presented in *Republic Airlines*. Further, the language in the appropriations bill at issue in *Republic Airlines* is again meaningfully different from the language limiting risk corridors appropriations. The *Republic Airlines* appropriations language specifically caps all "payments under Section 406" at $14 million, ***"notwithstanding any other provision of law,"*** and expressly directs the Government that to "the extent it is necessary to meet this limitation, the compensation otherwise payable by the Board under Section 406 shall be reduced by a percentage which is the same for all air carriers receiving such compensation." In contrast, the

[13] *Republic Airlines* was decided by the Tenth Circuit and does not bind the Court of Federal Claims.

risk corridors appropriations riders only limit the sources of funding that the Government may use to fulfill its statutory obligation to make risk corridors payments.[14]

In *Highland Falls-Fort Montgomery*, the statute at issue in that case expressly "recognize[d] that Congress may choose to appropriate less money for entitlements under the Act than is required to fund those entitlements fully." 48 F.3d at 1168. Under those underfunding circumstances, the Department of Education was ***instructed*** to decrease payments under the program and allocate them in a different way than if the program was fully funded. *Id.*at 1168-69. Thus, contrary to the House's proposed *amicus* argument (*see* Dkt. 17-1, at 10), at issue in *Highland Falls-Fort Montgomery* was ***not*** whether the Government owed full amounts under the program when it intentionally underfunded the program (like here), but whether the federal agency facing the underfunding properly ***allocated entitlements between recipients*** in those years where Congress underfunded the program. *Id.* at 1170 ("The 'precise question at issue' in this case is whether, in the face of underfunding by Congress, DOE erred in allocating funds…"). The appropriations Bills relevant to the opinion in *Highland Falls-Fort Montgomery* clearly indicated how appropriated funds could be allocated under the program. *Id.* at 1170-72. Given that the implementing statute explicitly allowed for underfunding—contrary to Section 1342 of the ACA—the result in *Highland Falls-Fort Montgomery* is unsurprising and, more importantly, irrelevant to the resolution of HRIC's and putative class's claims.

Finally, it should also be noted that Congress limited the funding source available for risk

[14] The Government cites several additional cases that are also easily distinguishable. *See Bickford v. United States*, 228 Ct. Cl. 321 (1981) (underlying statute establishing the alleged government obligation actually prohibited the payments the plaintiff sought); *United States v. Mitchell*, 109 U.S. 146 (1883) (both the underlying statutory obligation and the alteration of that obligation were contained in appropriations acts, and both involved the special case of appropriations to Native Americans); *Mathews v. United States*, 123 U.S. 182, 185 (1887) (appropriations act explicitly amended the underlying statutory provision, and used additional language such that the case "does not come within [the] rule" created by *Langston*).

corridors payments only ***after*** Class Members had: (1) relied upon the Government's statutory obligation to pay risk corridors payments if their costs exceeded their revenue by 3 percent, (2) agreed to offer Qualified Health Plans through the Health Benefit Exchanges established by the Act, (3) priced their 2014 plans, (4) obtained state regulatory approval of their 2014 plans and rates, and (5) provided the underlying health care coverage for almost a full year. All of this occurred *before* Congress enacted the 2015 appropriations rider in December 2014. Class Members had also obtained state regulatory approval for their 2015 plans and rates, and begun selling those plans to consumers once open enrollment began on October 1, 2014, before Congress enacted the 2015 appropriations rider in December 2014. Any Government effort to take Class Members' rights to risk corridors payments, after they had chosen to deliver insurance for over a year pursuant to (and in reliance upon) a statutory scheme in which such risk corridors payments had been guaranteed through money mandating statutory language, would constitute a retroactive application of law, because it "'would impair rights a party possessed when [it] acted . . . .'" *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)). Retroactive application of statutes is "disfavored," and thus "it has become 'a rule of general application' that 'a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication.'" *Id.* (quoting *United States v. St. Louis, S.F. & Tex. Ry. Co.*, 270 U.S. 1, 3 (1926)). No such language or necessary implication is presented by the appropriations riders.

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III. CONCLUSION

For the above reasons, the House's request for leave to file an *amicus* brief should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 17, 2016, a copy of the attached Plaintiff Health Republic Insurance Company's Opposition to the United States House of Representatives' Motion for Leave to File Amicus Curiae was served via the Court's CM/ECF system on all counsel of record.

s/ Stephen Swedlow
Stephen Swedlow