No. 18-1028

In the Supreme Court of the United States

MODA HEALTH PLAN, INC.,
Petitioner,
v.

UNITED STATES,
Respondent.

BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA,
Petitioner,
v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION FOR COMMUNITY AFFILIATED PLANS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Association for Community Affiliated Plans (ACAP) is a national trade association representing community-based not-for-profit health plans, many of whom participate in health insurance marketplaces pursuant to the Affordable Care Act. Collectively, ACAP's 62 Medicaid, Medicare, and ACA marketplace plans serve more than 21 million enrollees in 29 states. Many enrollees are among the nation's poorest and sickest people, who lack access to other health insurance. In contrast to many other insurers, ACAP member health plans primarily participate in the low-margin Medicaid market and do not participate in the higher-margin large group employer market.

ACAP's members are owed hundreds of millions under the risk corridors program. These unpaid debts will have severe impacts on community-based health insurers and their insureds.

ACAP files this brief to inform the Court of the harm that the decision below would wreak on smaller insurers that operate outside of the District of Columbia's halls of power. Most obviously, the ruling below would turn the risk-corridors program into an enormous cautionary tale about why the business community cannot trust the United States government

[1] Counsel of record received timely notice of the intent to file this brief under the Court's Rule 37.2(a). All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no one other than *amicus*, its members, and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

to make good on its statutory promises. Sadly, that lesson would hit Main Street much harder than Wall Street. ACAP's members are smaller than other insurance carriers and rely more on the ACA marketplaces as their profit centers. As a result, they are less able to gamble on uncertain government promises of payment. In addition, the ruling below starkly illustrates the disadvantages that smaller businesses face when courts rely on obscure snippets of legislative history about later-enacted appropriations bills to re-write existing statutory obligations.

The Court should grant certiorari to correct these problems.

SUMMARY OF THE ARGUMENT

The Petition explains how, when it comes to payments from the federal coffers, the Federal Circuit has licensed Congress to "promise boldly [and] renege obscurely". (Pet. 3.) Worse yet, it has licensed Congress to renege obscurely *after* an entire industry has entered a new line of business, relying on an assurance of government support.

As a result, this case warrants comparison to Lucy Van Pelt pulling the football away from Charlie Brown—with our nation's government cast as the capricious bully. And while most of the health-insurance industry relied on Congress' statutory promise that it would hold the risk-corridors payments for them, the best fit for the role of Charlie Brown is small community-based insurers like ACAP's members.

That is true in at least two ways. First, small community-based insurers were the least able to guess

that Congress was pulling the football away. The Federal Circuit's mode of analysis here was to infer "what … could Congress have intended?" from obscure legislative history. That especially disadvantages small businesses—who have few ways to guess 'what could Congress have intended' beyond reading the statutes that Congress passes. Thus, the Court of Appeals' abandonment of the traditional presumption against implied repeal—especially by way of appropriations riders—systematically biases outcomes against Main-Street interests.

Second, when the government pulled risk-corridors payments away from small insurers, many of them went tumbling onto their backs. Unlike larger insurers, ACAP's members do not offer employer-provided group insurance, but instead focus on the low-margin Medicaid market. As a result, if they lose money on the ACA marketplaces they have no other lines of business to cushion the loss. The risk corridors were supposed to provide a backstop that would allow insurers like this to compete in the marketplaces. Their absence has devastated small community-based insurers.

ARGUMENT

I. Procedural Background.

The Petition describes how the ACA incentivized health plans to offer coverage on its newly-created individual marketplaces, by offering a backstop of government funding to limit potential losses in these brand-new markets. (Pet. 4-8.) But having made this promise, both political parties began treating the risk-corridors program as a political football.

The executive branch's last-minute "keep your plan" initiative excused many healthy individuals from migrating to the marketplaces—leading to smaller, sicker marketplace risk pools than insurers had expected. (*Id.* 8-9.) Throughout 2014, this phenomenon increased insurers' losses and the government's risk-corridors obligations. But after the end of the year, Congress limited the funding sources available to cover those obligations. (*Id.* 9-10.) Congress repeated that limitation for each of the next two years of the program. The result was a wave of lawsuits by insurers who had received, at most, pennies on the dollar that the ACA's text promised them.

The Federal Circuit agreed with the insurers that the ACA's promise of payment is "unambiguously mandatory". App-16. But it went on to find that most of this promise of payment in the U.S. Code had been implicitly repealed, based on the legislative history of later appropriations riders. The panel majority relied on two legislators' correspondence with the GAO months before the first rider was passed. In the court's view, these two members had somehow spoken for the entire Congress. Through them, Congress "asked GAO what funding would be available to make risk corridors payments, and" then in the appropriations riders "it cut off the *sole* source of funding [that the GAO] identified beyond payments in." App-26.

The panel further cited one paragraph from a 697-page "Explanatory Statement" from Representative Rogers, regarding a House amendment to a Senate amendment to the House's appropriations bill. App-12-13, 26. This paragraph incorrectly claimed that, in

2014, HHS had issued a regulation stating that the risk-corridors program would be budget neutral. (HHS had made public statements that it anticipated the program would wind up being budget neutral, but its regulations actually reiterated the statutory obligation to make full risk corridors payments without regard to budget neutrality.) *See* App-48-49 (Newman, J., dissenting). Without mentioning the previous correspondence with the GAO, the chairman then simply summarized the risk-corridors amendment, stating that it would "prevent the CMS Program Management appropriation account from being used to support risk corridors payments." *Id.* at 48 (citation omitted).

From this the panel inferred that the appropriations rider limited not just this source of funds, but also the government's very *obligation* to pay. "What else," the court asked, "could Congress have intended?" App-27. The panel rejected, apparently as unthinkable, the possibility that Congress "intend[ed] to consign risk corridors payments to the fiscal limbo of an account due but not payable." *Ibid.* (quotation marks and citation omitted). Instead, the panel majority inferred that in enacting each annual rider, Congress must have meant to wipe out the remainder of the risk-corridor payment obligation—even though the riders did not say so.

II. The Panel Majority's Departure From Long-Settled Law Is Systematically Biased Against Smaller Parties.

The Petition explains how the panel majority departed from multiple long-settled principles of statutory interpretation. The panel cast aside the long-

settled presumption against implied repeals, as well as the even stricter presumption against implied repeals in appropriations laws.

There is a strong policy basis for this presumption. Appropriations measures are massive documents that must be passed on a regular basis; it would be "absurd" if Members of Congress had "to review exhaustively the background of every authorization before voting on an appropriation," to make sure it did not implicitly change preexisting law. *Tennessee Valley Auth'y v. Hill*, 437 U.S. 153, 190 (1978). It would be even more absurd to force them (or the President) to threaten a government shutdown as the only recourse for stopping such implicit changes. Moreover, as Judge Newman recognized in this case, "clever legislators" should not be able to do "an end-run around the substantive debates that a repeal might precipitate" by "burying a repeal in a standard appropriations bill". App-47 (citation omitted): *cf. Hill*, 437 U.S. at 191 ("We venture to suggest that the House Committee … and the Senate Committee … would be somewhat surprised to learn that their careful work on the substantive legislation had been undone by the simple—and brief—insertion of some inconsistent language in Appropriations Committees' Reports.") Nor should the American people at large be forced to guess what changes to our laws the federal bench might infer from voluminous appropriations bills. The long-settled presumption against implied repeals in appropriations measures avoids these problems.

Here, these settled principles should have led to the outcome that the panel rejected as unthinkable: that

the appropriation was not enough to pay what the government owed but did not repeal the "unambiguously mandatory" statutory obligation. The sparse legislative history cited by the panel could not have overcome the presumption against implied repeal through appropriations measures. This Court, and various members of it, have repeatedly observed that legislative history cannot override substantive canons of statutory interpretation, such as the clear-statement requirement for waivers of sovereign immunity. *F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012). Justice Scalia "kn[e]w of no precedent for the proposition that legislative history can satisfy" *any* "clear-statement requirement imposed by this Court's opinions." *Gonzalez v. Thaler,* 565 U.S. 134, 164-65 (2012) (Scalia, J., dissenting). And the Chief Justice has observed that "[i]f the rule of lenity means anything, it is that an individual should not go to jail for failing to … comb through obscure legislative history." *United States v. Hayes*, 555 U.S. 415, 437 (2009) (Roberts, C.J., dissenting). Businesses that have expanded or developed in reliance on a statutory promise of government payments should receive the same treatment.

But instead of applying the recognized rules against implied repeal, the panel below relied on legislative history—and in its weakest form. It relied not on a report from a relevant committee, but letters and statements from individual legislators. From these, the panel purported to divine that Congress actually meant to *repeal* the payment obligation, to the extent that the appropriation did not meet it.

Other parties and commentators have explained how using legislative history to interpret statutes is unreliable (since the history is almost always vague and conflicting), is in tension with the Constitution (since Congress can make law only by passing statutes, not by forming intentions), and is potentially incoherent (because a multi-member body cannot have intentions as an individual can). All these concerns apply here. But this case sharply illustrates a more practical defect in overreliance on legislative history: it is systematically biased in favor of large sophisticated litigants like the government, and against smaller litigants like ACAP's members.

More than half a century ago, Justice Jackson warned that the courts must not try to determine "what Congress probably had in mind" by "put[ting] ourselves in the place of a majority of Congressmen and act[ing] according to the impression we think this [legislative] history should have made on them." *United States v. Public Utils. Comm'n of Cal.*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring). Unfortunately, the panel majority here embarked on that "weird endeavor." *Ibid.* The panel recited that, months "[a]fter GAO identified only two sources of funding for the risk corridors program … Congress cut off" one of those sources, and one Representative made a confused remark about HHS's prediction that the program would be budget-neutral. App-34. So, asked the panel majority, "[w]hat else could Congress have intended" but to eliminate the legal obligation to pay beyond what was appropriated? App-27.

That approach systematically tilts the playing field against smaller litigants, who are less able to parse millions of lines of legislative history in order to psychoanalyze Congress. *Cf. Public Utils. Comm'n of Cal.*, 345 U.S. at 319 (Jackson, J., concurring). Again, Justice Jackson explained why:

> Laws are intended for all of our people to live by …. Here is a controversy which affects every little merchant in many States. [But] the materials of legislative history are not available to the lawyer who can[not] afford … the cost of repeatedly examining the whole congressional history. Moreover, if he could, he would not know any way of anticipating what would impress enough members of the Court to be controlling. To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country.

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 396–397 (1951) (Jackson, J., concurring).

Indeed, it "takes enormous effort" to research all the "committee reports, conference reports, records of committee hearings, floor statements, Presidential signing statements, and all previous legislation or documents of any nature to which any of the foregoing refer." Movsesian, *Severability in Statutes and Contracts*, 30 Ga. L.Rev. 41, 68 (1995) (citation omitted). "[T]he executive branch and some larger private organizations may keep [such] a close watch on Congress," but almost no one else "ha[s] the resources to follow a statute's 'negotiation' [that] closely." *Ibid.* Some recent commentators have argued that electronic

access to legislative history has eliminated this disadvantage, but that is badly mistaken: it "ignore[s] the problems of identifying the relevant documents and of wading through their unindexed vastness." Parrillo, *Leviathan and Interpretive Revolution,* 123 Yale L.J. 266, 388 (2013).

As a result, the more obscure and esoteric a piece of legislative history is, the more judicial willingness to consider it favors the wealthiest and most powerful litigants, such as the government. "[T]he asymmetrical incentives" in this respect "are quite dramatic," Sinclair, *Statutory Reasoning*, 46 Drake L.Rev. 299, 338 (1997), and "this disparity can skew the law systematically in favor of" the largest, savviest litigants. Desai, *Heterogeneity, Legislative History, and the Costs of Litigation*, 2013 Wis. L.Rev. Online 15, 18 (2013).

The panel majority's approach would create exactly this problem. The text of the appropriation rider, on its face, "do[es] not address *whether the obligation remains payable*" but only "*from whence the funds to pay the obligation may come*." App-76 (Wallach, J., dissenting from denial of reh'g en banc). Nevertheless, the majority inferred that the rider wipes out the payment obligation itself. It did this based on an exchange of letters between two legislators and the GAO years after the ACA was enacted and months before the appropriations rider passed and on two muddled sentences buried in a 697-page chairman's statement. It is unfair to expect any party dealing with the government to track every letter sent to or from every Senator and Representative, on the off-chance that one

of them will implicitly cancel a statutory right to payment. Nor should a party be expected to look for non-existent agency regulations that are vaguely referenced in the legislative history. But that is what the panel would require.

Moreover, even if a party could *track* legislative history at this level of detail, it would be hard pressed to *decipher* it reliably. Indeed, federal judges in this case disagreed about the legal effect of the rider. If the goal is (as the panel said) to survey the mass of legislative history and decide "What else could Congress have intended?", then the answer will be best known to those who have access to Congress—that is, the executive branch and a small number of D.C. law firms. Others will be left to speculate.

This case is again an excellent example. Someone monitoring Congress' activity would have known that, within months of the initial appropriations rider at issue here, Congress twice declined to enact permanent legislation that would have required the risk corridors to be budget-neutral. App-80-81 (Wallach, J., dissenting from denial of reh'g en banc). That would indicate that Congress did *not* intend to repeal the payment obligation. Nothing in the riders indicated otherwise. Although the panel stated that "the appropriations riders directly responded to GAO's identification of only two sources of funding for the program", App-32, in fact it "point[ed] to no statement in the legislative history suggesting that the rider was enacted in response to the GAO's report." App-48 (Newman, J., dissenting). Without that paper trail, perhaps the connection could be discernible to some

lawyers and judges who work inside the Beltway. To most of the rest of the country, however, it would be invisible.

In short, smaller litigants cannot comb through the legislative history in the way the panel below contemplated. Nor can busy judges reasonably be expected to do so in every statutory-interpretation case that comes before them. That is precisely why the courts have presumed that appropriations measures do not implicitly change preexisting law. The result of the panel's contrary approach would be unseemly: the courts would hear about the finest details of legislative history only when those details favor the government, or a small number of other large litigants. That would confirm Justice Jackson's fear that "judicial reliance on legislative history made litigation more of an 'insider's game,' privileging the bureaucratic state and the few law firms able to approach that level of administrative capacity." Parrillo, *supra*, at 285.

III. Community-Based Insurers Were Among Those Hit Hardest By The Lack Of Risk-Corridors Funding.

Not only were community-based insurers among the least able to see the risk-corridors defunding coming, but also they have been among those hit the hardest by it.

ACAP's members are just the type of companies that risk corridors were supposed to entice into the individual marketplaces. None of them sell group insurance to employers—which is one of the most lucrative markets for health coverage. Instead, before

the ACA was enacted, most of these insurers operated only in the low-margin markets for Medicaid plans. This meant, however, that they had long experience in offering cost-effective health coverage to limited-income people—exactly the profile the government wanted for marketplace insurers.

Under normal circumstances, most of these insurers would not have been interested in expanding into the individual health-insurance market. Although the potential for profit was greater than in the Medicaid space, so was the risk of loss—and with such low profit margins in their core businesses, that risk was magnified.

For many insurers of this sort, the risk-corridors program made the difference. The program assured these community-based insurance companies that they would have three years to gain confidence in pricing marketplace plans before they would be exposed to substantial losses. Relying on this assurance, many of ACAP's members expanded their business into the marketplaces, offering affordable coverage as the ACA intended. Indeed, small insurers like ACAP's members often were able to offer the lowest rates in their individual marketplaces.[2] But when the government failed to make the required risk-corridors payments, these small insurers suffered precisely the drastic losses they thought they had avoided through the risk

[2] *See* Hempstead & Seirup, *Medicaid MCOs In The Individual Market*, Health Affairs Blog (Aug. 30, 2018), https://www.healthaffairs.org/do/10.1377/hblog20180823.490433/full/

corridors program. With the leg already in motion, the football was pulled away.

CONCLUSION

The dissent below was correct: "the government's position that it can renege on its legislated and contractual commitments is hardly worthy of our great government." App-68 (quotation marks and citation omitted). "[A] contractor's right to payment" should not "var[y] based on a future court's uncertain interpretation of legislative history". *Salazar v. Ramah Navajo Chapter,* 567 U.S. 182, 200 (2012). If the Federal Circuit's rule stands, then from now on no business can trust a statutory promise of payment from the government. In particular, smaller businesses will be pushed to regard dealing with the government as too uncertain a venture to risk. Congress' ability to incentivize private behavior will be severely eroded. So will an important part of the national community's faith in our government.

The Court should grant certiorari.

Respectfully submitted,

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