No. 18-1038

IN THE
Supreme Court of the United States

LAND OF LINCOLN MUTUAL HEALTH INSURANCE COMPANY, AN ILLINOIS NONPROFIT MUTUAL INSURANCE CORPORATION,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DANIEL P. ALBERS
MARK E. RUST
BARNES & THORNBURG LLP
One N. Wacker Drive
Suite 4400
Chicago, IL 60606
Tel. (312) 357-1313
dalbers@btlaw.com
mrust@btlaw.com

JONATHAN S. MASSEY
Counsel of Record
MASSEY & GAIL LLP
1000 Maine Ave. SW
Suite 450
Washington, D.C. 20024
Tel: (202) 652-4511
jmassey@masseygail.com

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BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Government's Brief in Opposition ("BIO") reads like a merits brief, rather than one filed at the certiorari stage. It does not contest the importance of or the far-reaching effects of the decision below. It does not deny that the judgment will have disastrous consequences for millions of Americans who purchase insurance from Qualified Health Plans. Land of Lincoln's own experience illustrates the consequences of the Government's failure to honor its risk-corridors obligations: Land of Lincoln entered liquidation on October 1, 2016, three months prior to the end of the policy year, and 50,000 policyholders in Illinois immediately lost their health insurance as a result. *See* Petition at 36.

Nor does the Government deny that the decision below will imperil the ability of private parties to rely on clear statutory promises. It will discourage them from doing business with the Government and implementing public programs. It will also undermine democratic accountability, permitting individual members of Congress to manipulate legislative history to thwart the will of Congress as a whole. This is not a partisan issue — all Americans suffer when there is a decline in democratic accountability and the predictable application of federal law.

The BIO (1) relies on legislative history in a manner directly at odds with this Court's decisions, (2) ignores this Court's precedent regarding the clarity required to effect a repeal, especially via an appropriations rider, (3) mischaracterizes as

prospective what is plainly a retroactive repeal of a statutory entitlement on which private parties have relied to their detriment in performing their end of Congress's bargain, and (4) urges denial based on an alternative ground for affirmance even though such a course would leave in place, and binding, the dangerous new legal regime created by an erroneous decision of a divided panel of the Federal Circuit.

1. The Government does not argue that the text of the appropriations riders amended the risk-corridors statutory formula in Section 1342, 42 U.S.C. § 18062, or expressly extinguished the Government's obligation to pay. For good reason: the riders provided merely that "[n]one of the funds made available by *this Act*" should be used for risk corridors payments. Pet. App. 20a (emphasis added.) The riders simply limited the potential destinations of the particular funds appropriated.

Instead, the BIO argues that the Court should look to "legislative context and history to ascertain Congress's intent in enacting funding restrictions," including "floor statements and other legislative history." BIO 20. The BIO points (BIO 8, 12, 17-18) to a *two-sentence* snippet within an explanatory statement spanning some *677 pages* inserted into the Congressional Record by Rep. Harold Rogers. 160 Cong. Rec. H9307-9984 (Dec. 11, 2014). The statement covered *eleven* appropriations bills for fiscal year 2015, plus continuing appropriations for the Department of Homeland Security. The Government also relies on a September 2014 report by the Government Accountability Office ("GAO") responding to a request by two Members of Congress (BIO 6, 7, 16), released some *three months prior* to

the enactment of the first appropriations rider in December 2014.

Such material (involving only *three* Members of Congress) is precisely the kind of unenacted legislative history about which this Court has expressed serious concerns. *See NLRB v. SW General, Inc.*, 137 S.Ct. 929, 943 (2017) ("floor statements by individual legislators rank among the least illuminating forms of legislative history"; also dismissing reliance on GAO reports). Even if *some* forms of legislative history are permissible bases of statutory interpretation, the Government's approach stretches the use of legislative history to the breaking point. The Government would empower individual members of Congress to smuggle in snippets of legislative history in the appropriations context surreptitiously to repeal clear statutory obligations (contrary to longstanding House and Senate procedural rules, Petition at 23) — and to do so after private actors have accepted Congress's invitation and performed their end of the bargain in reliance on clear statutory language. The permissibility of such an approach should be resolved by this Court after plenary review, not by a divided panel of the Federal Circuit.

The BIO's reading of Congress's intent ignores the contemporaneous understanding of Congress itself, the President, and the agency charged with implementing the statute. After enacting the appropriations riders, Congress as a whole repeatedly considered, and failed to approve, bills that would have expressly limited risk corridor "payments out" to "payments in" — i.e., the very thing that the Government now asserts the riders

had already accomplished. *See* Pet. App. 165a; Petition at 32. President Obama signed the riders into law without any acknowledgement he was eviscerating an essential ACA program. *Id.* CMS and HHS continued to reassure health insurers that "the ACA requires the Secretary to make full payments to issuers," and "HHS will record risk corridor payments due as an obligation of the United States Government for which full payment is required." *Id.* This reassurance was repeated in September 2016 congressional testimony, which DOJ approved. *Id.* It was codified in regulations (*id.*) subject to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Even HHS's proposed FY2019 budget listed risk-corridors payments as obligations. *See* Petition at 33.

2. In attempting to portray the decision below as a garden-variety search for legislative intent, the Government omits the central requirement of this Court's precedent in the specialized appropriations context: that any repeal or amendment must be "clear and manifest." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189 (1978) (internal quotation marks and citation omitted). This Court warned of "the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation." *Id.* at 190. The Government would take this "absurd result" to another level – requiring private parties to review every conceivable scrap of legislative history that might be assembled, after the fact, to concoct a revisionist history that could deny them, retroactively, the benefit of the bargain promised by Congress.

In the very cases cited by the Government, this Court has repeatedly emphasized that an appropriation measure cannot alter a substantive mandate "unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation." *United States v. Vulte*, 233 U.S. 509, 515 (1914); *see also United States v. Will*, 449 U.S. 200, 224 (1980) ("clear intent" required); *United States v. Dickerson*, 310 U.S. 554, 562 (1940) ("ambiguous" evidence insufficient); *United States v. Mitchell*, 109 U.S. 146, 148 (1883) ("clearly reveal the purpose of congress").

The Government's proffered legislative history is precisely what this Court's clear-statement standard is designed to prevent. The Government offers no response to Judge Wallach's observation that Rep. Rogers' floor statement did not say that the 2015 *appropriations rider* sought to make the risk corridors program budget-neutral; rather, he referred to a 2014 HHS regulation. Pet. App. 164a-165a. Moreover, Rep. Rogers was in error; there was no 2014 regulation "stating that the risk corridor program will be budget neutral." 160 Cong. Rec. at H9838. The March 2014 regulation to which the Government points (BIO 18 n.4) did not require that the risk-corridor program be budget-neutral. Rather, it adopted a series of benefit and payment parameters, such as amendments to the definitions of "adjustment percentage," risk corridors "profits," and "allowable administrative costs," 79 Fed. Reg. at 13,787 (Mar. 11, 2014), none of which automatically provided that the program would be budget-neutral. In accompanying commentary, HHS explained that "[w]e intend to implement this program in a budget neutral manner." *Id.* But that intention was not a

legal requirement. Before and after the March 2014 commentary, HHS recognized that 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." 78 Fed. Reg. 15,410 (Dec. 11, 2013) (final rule); 79 Fed. Reg. 30,260 (May 27, 2014) ("HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers.") (final rule); 80 Fed. Reg. 10,779 (Feb. 27, 2015) (same) (final rule). And HHS repeated that assurance *after* the appropriations riders were enacted. *See* p. 4, *supra.*

Similarly, the Government's reliance on the GAO report (BIO 16, 18-19) is misplaced. As Judge Newman noted, there is no proof Congress enacted the appropriations riders in response to the report. Pet. App. 57a. Nor is the Government correct in asserting the GAO had identified CMS program management appropriations as the "only potential source of funds to make payments out" besides "payments in" collected from profitable insurers. (BIO 14). GAO did not state its analysis of the funding sources was exhaustive. GAO simply addressed the questions posed by Senator Sessions and Representative Upton in requesting the report. When Judge Wheeler examined the issue after GAO's response, he found continuing resolutions during the first two-and-a-half months of FY 2015 provided an additional $750 million in risk-corridors appropriations available before enactment of the December 16, 2014 rider. Pet. App. in No. 18-1028, at 129 n.13. The Federal Circuit did not disagree with Judge Wheeler on this point.

Reinforcing the conclusion that the Government is addressing the wrong question is its assertion that "Petitioners' contrary reading of Congress's intent is implausible." BIO 19. If this case turns on what Congress could "plausibly" have intended in the appropriations riders, then the question properly framed by this Court's precedent has been answered. Unless Congress took the affirmative step of repealing or amending Section 1342 – through express language or by clear implication – it does not matter what any particular members of Congress intended or whether different members of Congress had different views.

3. Even under the Government's interpretation of the appropriations riders, this case merits this Court's review of the certworthy question whether a temporary[1] cap on appropriations authority from specified funding sources abrogates the Government's payment obligations under a money-mandating statute. The appropriations riders did not cut off all risk-corridors funding; the Government concedes they did not affect "payments in collected from profitable insurers under the risk-corridors program itself" (BIO 14), which amounted to some $484 million, or substantially more than enough to pay Land of Lincoln's claims.

The Government acknowledges that in *Will* and *Dickerson* (unlike here), Congress used

[1] The Government criticizes Land of Lincoln's use of the word "temporary." BIO 21. The Federal Circuit used that term in describing the appropriations riders. Pet. App. 38a.

comprehensive language expressly to prohibit the use of "*any*" funds to pay the specified obligations. BIO 21 (emphasis in original). But the Government insists this case can be treated the same as *Will* and *Dickerson* because "Congress's objective in enacting the appropriations provisos was not to eliminate all funding for risk corridors and thereby prohibit any payments out, as language like that in *Dickerson* and *Will* would accomplish," but rather "to cap payments out at the amounts collected from insurers as payments in." BIO 22.

This Court's review is warranted to decide whether the Government's new category of partial-repeal-by-implication is legally permissible. The Government's approach is not consistent with this Court's precedent establishing that merely limiting the sources or amounts of funding for an obligation does not alter the substantive obligation to pay. Under that precedent, there are only two ways in which Congress can change a substantive payment obligation through the appropriations process: (1) it may repeal the obligation by clearly cutting off all funding sources (as in *Will* and *Dickerson*), or (2) it may expressly alter the statutory formula for calculating the entitlement via similarly clear language (as in *Vulte* and *Mitchell* where Congress altered the base and bonus formula for translators and certain military officials). *See* Petition at 24-26.

The Government concedes that Congress did neither of those things here. It left intact both the "shall pay" obligation in Section 1342 and the formula for calculating what HHS "shall pay." It provided appropriations in the form of "payments in," which ultimately amounted to $484 million. The

appropriations riders merely restricted the availability of one potential funding source. Congress never enacted legislation substantively amending Section 1342 or expressly providing that "payments in" would be the exclusive funding source.

The Government struggles mightily to distinguish this Court's precedent. In *United States v. Langston*, 118 U.S. 389 (1886), this Court held that "subsequent enactments which merely appropriated a less amount" than a statutory promise did not relieve the Government of its payment obligation. *Id.* at 393. Even the Federal Circuit read *Langston* that way. Pet. App. 26a-27a. Other circuits have, too. *E.g.*, *In re Aiken Cnty.*, 725 F.3d 255, 260 (D.C. Cir. 2013) (Kavanaugh, J.) ("[C]ourts generally should not infer that Congress has implicitly repealed or suspended statutory mandates based simply on the amount of money Congress has appropriated.") (citing *Langston*); *see also* GAO, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-63 (4th ed. 2016) "(The mere failure to appropriate sufficient funds is not enough"; it may "prevent administrative agencies from making payment, but, as in *Langston* and *Vulte*, is unlikely to prevent recovery by way of a lawsuit.").

The Government says that *Langston* is different because Section 1342 did not create statutory entitlements to risk-corridors payments. BIO 24. The Federal Circuit held otherwise. Pet. App. 24a-29a. The Government also contends that this case involves a "precisely calibrated" action by Congress. BIO 24. But *Langston* involved an even more "precisely calibrated" measure: an appropriation of exactly $5,000 in the face of a statutory obligation of

$7,500. The Government cites *Belknap v. United States*, 150 U.S. 588 (1893), but that case opined that "mere failure to appropriate" is "not, in and of itself alone, sufficient to repeal the prior act." *Id.* at 594.

This Court has reaffirmed that an appropriations measure "merely imposes limitations upon the Government's own agents," but does not "cancel its obligations." *Salazar v. Ramah Navaho Chapter*, 567 U.S. 182, 197 (2012) (quoting *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892)). And this Court has favorably cited *New York Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966) (per curiam),[2] which held that an appropriations measure capping payments at "$3,358,000" did not extinguish the Government's obligation to pay a greater sum. *Id.* at 749. "We know of no case in which any of the courts have held that a simple limitation in an appropriation bill of the use of funds has been held to suspend a statutory obligation." *Id.* at 750 (internal quotation marks and citation omitted).

4. The Government contends the appropriations riders were not "retroactive" because the first was enacted on December 16, 2014, before risk-corridors payments were actually due. BIO 22-23. But the riders certainly "impair[ed] already-existing rights." BIO 23. The Government does not deny that, in reliance on the Government's binding risk-corridors obligation, Land of Lincoln had already covered insureds for the entirety of 2014, bound itself to

[2] *See Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 642-43 (2005).

cover those insureds for the entirety of 2015 at prices already fixed based on the risk-corridor program, and obligated itself to CMS to remain on the exchange for 2016. Petition at 29. That is why Land of Lincoln was driven into insolvency when the Government reneged.

If permitted to stand, the decision below would be the first instance ever where a court has construed an appropriations statute to repeal a statutory obligation after Congress induced private-party performance, and after private parties relied on Congress's promises to their detriment and fulfilled their end of the bargain. Such a momentous result should rest on more than the votes of two members of a divided Court of Appeals panel reading legislative history created by three Members of Congress.

5. The Government suggests that, even if the Federal Circuit's decision is wrong, it can be affirmed on an alternative ground. BIO 25-30. But this suggestion only reinforces the need for this Court's review. The Government is wrong that affirmance on its alternative ground "would have no practical effect." BIO 30. If the Court were to grant certiorari and affirm on the alternative ground suggested by the Government, it would set a very different precedent. Instead of enabling Members of Congress to renege on clear statutory obligations via legislative history attached to appropriations riders, such a decision would establish that statutory obligations, no matter how clear on their face, cannot be relied upon by private parties in the first place unless they are accompanied by express, simultaneous appropriations authority. Such a

decision would be just as significant a departure from this Court's longstanding appropriations precedent, but at least the Government's new approach would provide clear ground rules for Congress and private parties regarding what Congress must do to create a money-mandating obligation.

Moreover, the Government's argument provides a further reason for certiorari. The Anti-Deficiency Act permits payment on a "contract or obligation" "before an appropriation is made" where "authorized by law." 31 U.S.C. § 1341(a)(1)(B). Section 1342 would appear to provide the requisite authorization. Further, this Court rejected Anti-Deficiency Act objections in *Ramah Navajo*, 567 U.S. at 198, and *Cherokee Nation*, 543 U.S. at 642. The Government argues this rejection was confined to the context of contracts, BIO 29-30, but this Court's language was not so limited, and in any event Land of Lincoln has asserted a contract claim. Petition at 12. Notably, the Government's position here contradicts its views in other litigation,[3] providing a further indication

[3] *See United States House of Representatives v. Burwell*, No. 1:14-cv-01967-RMC, Defendants' Memorandum in Support of Summary Judgment, Dkt. 55-1, at 20 (D.D.C. Dec. 12, 2015) ("The absence of an appropriation would not prevent [QHP issuers] from seeking to enforce that statutory right through litigation."); *United States House of Representatives v. Mnuchin*, No. 1:19-cv-00969, Defendants' Opposition to Motion for Preliminary Injunction, Dkt. 36, at 33-34, 45-46 (D.D.C. May 8, 2019) (Executive may fund a substantive program (there, a border wall) so long as Congress does not expressly prohibit it).

that the Government's Anti-Deficiency Act argument should not be credited absent plenary review by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

DANIEL P. ALBERS
MARK E. RUST
BARNES & THORNBURG LLP
One N. Wacker Drive
Suite 4400
Chicago, IL 60606
Tel. (312) 357-1313
dalbers@btlaw.com
mrust@btlaw.com

JONATHAN S. MASSEY
Counsel of Record
MASSEY & GAIL LLP
1000 Maine Ave. SW
Suite 450
Washington, D.C. 20024
Tel: (202) 652-4511
jmassey@masseygail.com

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