IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FIRST PRIORITY LIFE INSURANCE COMPANY, INC., HIGHMARK INC. F/K/A HIGHMARK HEALTH SERVICES, HM HEALTH INSURANCE COMPANY D/B/A HIGHMARK HEALTH INSURANCE COMPANY, HIGHMARK BCBSD INC., HIGHMARK WEST VIRGINIA INC., AND HIGHMARK SELECT RESOURCES INC.,	:	Case No. 16-587C
Plaintiffs,	:	Judge Wolski
v.	:	
THE UNITED STATES OF AMERICA,	:	
Defendant.	:	

THE UNITED STATES' SUPPLEMENTAL BRIEF REGARDING
MAINE COMMUNITY HEALTH OPTIONS V. UNITED STATES AND
MOLINA HEALTHCARE OF CALIFORNIA V. UNITED STATES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

Introduction 1

I. Congress has plenary power over the federal Treasury 2

A. Congress has implemented its Appropriations Clause powers in permanent legislation that retains congressional control over the public fisc 3

B. Controlling precedent dictates that congressional intent in its appropriations acts governs the extent of the federal financial obligations 5

II. Because Congress intended that risk corridors payments would be made solely from risk corridors collections, insurers have no right to receive risk corridors payments beyond their pro rata share of collections 14

A. The appropriations acts limit the government's liability to the amounts collected under the risk corridors program 14

B. Contrary to Judge Wheeler's suggestion, Congress did not inadvertently leave the Judgment Fund available for risk corridors payments 15

1. A payment directive must be interpreted in light of Congress's exercise of its Appropriations power 15

2. No judicially-created legal requirements constrain Congress's exercise of its Appropriations power 17

C. Congress retained authority to define the extent of the government's liability for risk corridors payments 20

III. Congress did not intend to contract for risk corridors payments 23

IV. Plaintiffs' remaining claims also fail as a matter of law 27

Conclusion 28

TABLE OF AUTHORITIES

Cases

Bay View, Inc. v. United States,
278 F.3d 1259 (Fed. Cir. 2001).. 24

Blue Cross and Blue Shield of N.C. v. United States,
131 Fed. Cl. 457 (2017).. 21, 22, 25

Brooks v. Dunlop Manufacturing, Inc.,
702 F.3d 624 (Fed. Cir. 2012).. 23

Cessna Aircraft Co. v. Dalton,
126 F.3d 1142 (Fed. Cir. 1997).. 25

Cherokee Nation of Okla. v. Leavitt,
543 U.S. 631 (2005).. 25

Dellew Corp. v. United States,
855 F.3d 1375 (Fed. Cir. 2017).. 24

Department of the Navy v. FLRA,
665 F.3d 1339 (D.C. Cir. 2012).. 2

Dickerson v. United States,
310 U.S. 554 (1940).. 6

Ferris v. United States,
27 Ct. Cl. 542 (1892).. 7

Gibney v. United States,
114 Ct. Cl. 38 (1949).. 6

Greenlee Cty., Ariz. v. United States,
487 F.3d 871 (Fed. Cir. 2007).. 8, 12, 13

Hanlin v. United States,
316 F.3d 1325 (Fed. Cir. 2003).. 23, 24

Harrington v. Bush,
553 F.2d 190 (D.C. Cir. 1977).. 2

Hart's Case,
16 Ct. Cl. 459 (1880).. 2

Health Republic Ins. Co. v. United States,
129 Fed. Cl. 757 (2017) 20, 21

Highland Falls-Fort Montgomery School Dist. v. United States,
48 F.3d 1166 (Fed. Cir. 1995).......... 8, 9, 10, 17

Home Liquidating Trust v. United States,
581 F.3d. 1350 (Fed. Cir. 2009).......... 26

Kizas v. Webster,
707 F.2d 524 (D.C. Cir. 1983) 22

Land of Lincoln Mut. Health Ins. Co. v. United States,
129 Fed. Cl. 81 (2016) 20, 21, 22, 25

Langston v. United States,
118 U.S. 389 (1886).......... 5

Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,
523 U.S. 26 (1998).......... 16

Lopez v. Davis,
531 U.S. 230 (2001).......... 15

Maine Cmty. Health Options v. United States,
2017 WL 3225050 (July 31, 2017) .... passim

Manigault v. Springs,
199 U.S. 473 (1905).......... 4

Moda Health Plan Inc. v. United States,
130 Fed. Cl. 436 (2017) .... passim

Molina Healthcare of Cal. v. United States,
2017 WL 3326842 (Aug. 4, 2017).......... passim

Nat'l R.R.Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Co.,
470 U.S. 451 (1985).......... 23

New York Airways v. United States,
369 F.2d 743 (Ct. Cl. 1966) 7, 23

Office of Pers. Mgmt. v. Richmond,
496 U.S. 414 (1990).......... 3, 19, 20

Prairie Cty., Mont. v. United States,
782 F.3d 685 (Fed. Cir. 2015).. 7, 12, 13

Radium Mines, Inc. v. United States,
153 F.Supp. 403 (Ct. Cl. 1957).. 23

Richardson v. Belcher,
404 U.S. 78 (1971).. 22

Star-Glo Associates, L.P., v. United States,
414 F.3d 1349 (Fed. Cir. 2005).. 11, 12, 13

United States v. Mitchell,
109 U.S. 146 (1883).. 4, 5, 19

United States v. Schism,
316 F.3d 1259 (Fed. Cir. 2002).. 2, 3

United States v. Vulte,
233 U.S. 509 (1914).. 4

Usery v. Turner Elkhorn Mining Co.,
428 U.S. 1 (1976).. 21

Westfed Holdings, Inc. v. United States,
52 Fed. Cl. 135 (2002).. 27

Will v. United States,
449 U.S. 200 (1980).. 7, 8, 22

Constitution

U.S. Const. art. I, § 9, c. 7.. 2

Statutes

2 U.S.C. § 622(2)(A)(i).. 4

20 U.S.C. § 237(a).. 8

20 U.S.C. § 240(b)(1).. 8, 11

31 U.S.C. § 1301(a).. 3

31 U.S.C. § 1304.. 19

31 U.S.C. § 1341(a)(1)(A) 3, 9

31 U.S.C. § 1532 .... 3, 9

31 U.S.C. § 3302(b) 3, 10

42 U.S.C. § 18062(b) 21

Pub. L. No. 103-382 12

Pub. L. No. 106-387 11

Pub. L. No. 113-235 10

Miscellaneous

Dept. of Health and Human Servs.- Risk Corridors Program, B-325630 (Comp. Gen.)
2014 WL 4825237 (Sept. 30, 2014) 16, 21

160 Cong. Rec. H9307-01, 2014 WL 7005990 (Dec. 11, 2014) 15

S. Rep. No. 114-74 (2015) 15

Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343 (1988) 2, 4

Introduction

These cases are about Congress's Constitutional exercise of its plenary power over the federal fisc. In contrast to other provisions of the Affordable Care Act ("ACA") and the Medicare Part D program on which the risk corridors program is based, Congress did not appropriate funds, authorize appropriations, or include any budget authority for risk corridors payments when it enacted the ACA in 2010. Instead, Congress deferred the issue of appropriations for risk corridors payments to a later date.

Then, when the time to make risk corridors payments drew near, Congress appropriated risk corridors "payments in" but expressly barred the U.S. Department of Health and Human Services ("HHS") from using other funds for risk corridors "payments out." Thus, "Congress did not merely fail to address the source of funding" for risk corridors payments. *Maine Cmty. Health Options v. United States ("Maine")*, __ Fed. Cl. __, 2017 WL 3225050, at *12 (July 31, 2017), *appeal docketed*, No. 17-2395 (Fed. Cir. Aug. 7, 2017). Instead, Congress specifically inquired as to potential sources of funds available for risk corridors payments, and, the very first time that it appropriated funds for payments, Congress enacted a law that appropriated only risk corridors collections and expressly forbade the use of the only other potential source of funds identified by the Government Accountability Office ("GAO"). Congress reenacted this affirmative restriction the following year and has carried it through appropriations laws in effect through the end of the current fiscal year.

Congress thus made clear that it intended the risk corridors program to be self-funded. Only by subverting this unequivocal congressional intent can insurers prevail on their claims. Indeed, Judge Wheeler has acknowledged that by "cutting off" the only other potential source of funds Congress "forced the administration to operate the program in a budget-neutral manner."

Moda Health Plan Inc. v. United States ("Moda"), 130 Fed. Cl. 436, 461 (2017), *appeal pending*, No. 17-1994 (Fed. Cir.). In his most recent decision, Judge Wheeler conceded that "[i]t is highly unlikely that Congress actively contemplated the availability of the Judgment Fund, let alone intended its use to make risk corridors payments." *Molina Healthcare of Cal. v. United States ("Molina")*, __ Fed. Cl. __, 2017 WL 3326842, at *19 (Aug. 4, 2017). Despite this recognition that Congress did not intend either general funds of the Treasury or the Judgment Fund to be used for risk corridors payments, Judge Wheeler ruled in favor of insurers anyway. But Congress has plenary control over appropriations, and its intent to make the risk corridors program self-funded is dispositive. Because Congress intended that only risk corridors collections be used to make risk corridors payments, "[o]nce those funds were exhausted, the government's liability was capped." *Maine*, 2017 WL 3225050, at *12.

Argument

I. Congress has plenary power over the federal Treasury

"No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Courts have long recognized that Congress's control over federal expenditures is "absolute," that Congress "is responsible for its exercise of this great power only to the people," and that Congress "can refuse to appropriate for any or all classes of claims." *Hart's Case*, 16 Ct. Cl. 459, 484 (1880), *aff'd sub nom. Hart v. United States*, 118 U.S. 62 (1886); *see also Department of the Navy v. FLRA*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (citing *Harrington v. Bush*, 553 F.2d 190, 194-95 (D.C. Cir. 1977)). Congress's constitutional authority to prescribe limitations on the use of public funds—and its corresponding accountability to the public for its exercise of that authority—is an essential feature of the Constitution's separation of powers. *See United States v. Schism*, 316 F.3d 1259, 1288 (Fed. Cir.

2002) (en banc); *see generally* Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1352-63 (1988). By reserving to Congress the authority to approve or prohibit the payment of money from the Treasury, the Appropriations Clause serves the "fundamental and comprehensive purpose" of assuring "that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 427-28 (1990).

A. Congress has implemented its Appropriations Clause powers in permanent legislation that retains congressional control over the public fisc

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

Second, the Anti-Deficiency Act prohibits any officer or employee of the United States from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A). Moreover, Congress has barred federal officers from withdrawing "from one appropriation account and credit[ing] to another [except] when authorized by law." 31 U.S.C. § 1532. Finally, except as otherwise specifically provided by law, the Miscellaneous Receipts Act requires that "an official or agent of the Government receiving money for the Government from any source

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

Congress permits agencies to incur financial obligations and spend federal funds by providing the agency with "budget authority," such as through "provisions of law that make funds available for obligation and expenditure." 2 U.S.C. § 622(2)(A)(i). "Appropriations" under the Constitution, as well as "budget authority" under federal statutes, does not merely entail a specification of amounts for expenditure. Rather, "[t]he extent or amount of funding modifies and shapes the object funded." Stith, 97 Yale L.J. at 1354. Thus, in denying or limiting appropriations, "Congress decides that, under our constitutional scheme, for the duration of the appropriations denial, the specific activity is no longer within the realm of authorized government actions." *Id.* at 1361.

As Judge Bruggink recognized, "Congress' power to spend, or not, is unimpeded by its earlier actions." *Maine*, 2017 WL 3225050, at *7; *accord Manigault v. Springs*, 199 U.S. 473, 487 (1905) ("a general law . . . may be repealed, amended or disregarded by the legislature which enacted it," and "is not binding upon any subsequent legislature"). Thus, where Congress indicates in its appropriations acts "a broader purpose" beyond "something more than the mere omission to appropriate a sufficient sum," *United States v. Vulte*, 233 U.S. 509, 515 (1914), the Supreme Court and the Federal Circuit have given effect to Congress's limitations on the expenditure of funds and concluded that the United States is not liable for payments in excess of those limitations.

B. Controlling precedent dictates that congressional intent in its appropriations acts governs the extent of the federal financial obligations

Contrary to the approach taken by Judge Wheeler, Congress is not constrained to use particular words or phrases to define or modify the financial obligations of the United States. As long as Congress makes its intent clear, that intent is controlling. "The whole question depends on the intention of Congress as expressed in the statutes." *United States v. Mitchell*, 109 U.S. 146, 150 (1883). In *Mitchell*, for example, the Supreme Court concluded that, by appropriating salaries at the rate of $300 per year for five consecutive years instead of the $400 provided in permanent legislation, Congress "reveal[ed] a change in the policy" with the "purpose" "to suspend the law fixing the salaries . . . at $400 per annum." *Id.* Judge Bruggink correctly recognized that *Mitchell* was not a "simple case of a failure to appropriate sufficient funds." *Maine*, 2017 WL 3225050, at *7. Thus, the plaintiff was entitled to no more than $300 per year in salary because "the intention of Congress [was] to fix, by the appropriations act . . . the annual salaries of interpreters for the time covered by those acts at $300 each" even though those appropriations acts did not expressly amend the permanent legislation setting salaries at $400. *Mitchell*, 109 U.S. at 150.

Cases since *Mitchell* demonstrate that congressional intent is the touchstone for determining the effect of an appropriations act on permanent legislation. In *Langston v. United States*, 118 U.S. 389 (1886), permanent legislation provided that the minister to Haiti would be paid $7,500 per year. Congress appropriated that full amount for several consecutive years and included a provision in those appropriations acts specifying that the salary should continue beyond 1878. *Langston*, 118 U.S. at 390. Then in 1882, Congress changed the manner in which it appropriated funds for certain ambassadors, appropriating a lump sum of $25,000 for the salaries of ministers in five countries, including Haiti, "at $5,000 each." *Id.* at 391. Noting that

"the case is not free from difficulty," because the appropriation acts "contained no words that expressly, or *by clear implication*, modified or repealed the previous law," the Supreme Court concluded that Congress did not intend, by a mere failure to appropriate sufficient funds, to deny a federal officer the salary for which he had worked. *Id.* at 394 (emphasis added).

In *Dickerson v. United States*, 310 U.S. 554 (1940), the Court concluded that Congress's repeated restriction on the use of appropriated funds to pay reenlistment bonuses, notwithstanding permanent legislation providing for such bonuses, evinced an intent to suspend payment of them. As Judge Bruggink noted, although the appropriations restriction "was not phrased in a clear enough manner to warrant setting aside the bonus," "[a] review of the legislative history of the provision persuaded the Court that Congress' intent [to suspend reenlistment bonuses] was clear." *Maine*, 2017 WL 3225050, at *7; *see also*, *Dickerson*, 310 U.S. at 561-62. Nothing in the Supreme Court's opinion, however, supports Judge Wheeler's reliance on language providing that "'*no part* of *any* appropriation'" was available to pay reenlistment bonuses. *Molina*, 2017 WL 3326842, at *17 (Court's emphasis). Instead, the Supreme Court emphasized that "words when used in an appropriation bill are [not] words of art or have a settled meaning" and noted the central role of legislative history in determining congressional intent in appropriations acts. *Dickerson*, 310 U.S. at 561-62.

In *Gibney v. United States*, 114 Ct. Cl. 38 (1949), Congress had, for a single year, included a provision that prohibited funds "appropriated for the Immigration and Naturalization Service" from being used "to pay compensation for overtime services other than as provided in the Federal Employees Pay Act of 1945 . . . and the Federal Employees Pay Act of 1946." But the Federal Employees Pay Act of 1945 expressly permitted the payment of overtime services sought by the plaintiff, so the restriction by its own terms did not prohibit the payments sought,

and the Senator who offered the rider had conceded the following year that he was mistaken as to the underlying law. *Id.* at 53-54. Thus, as Judge Bruggink noted, the Court of Claims distinguished *Dickerson* on the grounds that Congress did not intend to deny payment of the overtime compensation at issue in *Gibney*. *Maine*, 2017 WL 3225050, at *9.

And in *New York Airways v. United States*, 369 F.2d 743 (Ct. Cl. 1966), Congress merely appropriated an insufficient sum for "Payments to Air Carriers (Liquidation of Contract Obligations)" to cover subsidies and compensation for helicopter companies required to carry U.S. Mail at rates set by an administrative board. The Court of Claims emphasized that Congress itself recognized that the statute providing for those subsidies created a judicially enforceable payment obligation. *Id.* at 751-52. And as Judge Bruggink notes, Congress viewed the obligations as contractual in nature. *Maine*, 2017 WL 3225050, at *10 n.7 (citing *N.Y. Airways*, 369 F.2d at 747). Indeed, the Court of Claims invoked cases arising out of contract claims in prefatory discussion of the United States' liability under statute. *N.Y. Airways*, 369 F.2d at 748 (citing *Ferris v. United States*, 27 Ct. Cl. 542 (1892)). The Federal Circuit has since distinguished statutory claims for payment of money. *Prairie Cty., Mont. v. United States*, 782 F.3d 685, 690 (Fed. Cir. 2015).

Will v. United States, 449 U.S. 200 (1980), involved four differently-phrased appropriations restrictions in four different fiscal years, yet the Supreme Court had no trouble concluding that each restriction expressed the same congressional intent not to raise judicial pay. In one of those years—"Year 4"—Congress merely provided that "funds available for payment [to the plaintiff-judges] shall not be used to pay any sum in excess of 5.5 percent increase in existing pay." *Will*, 449 U.S. at 208. Judge Wheeler ignored that restriction, *Molina*, 2017 WL 3326842, at *17 (quoting only the restrictions in three of the four relevant years), and reiterated

his prior incorrect reasoning that because "Congress did not use the 'this or any other act' language . . . Congress meant only to prevent HHS from using the CMS Program Management account for risk corridors payments," *id.* at *18 (quoting *Moda*, 130 Fed. Cl. at 461). Judge Bruggink, in contrast, correctly recognized that Congress had used different phrasing in the appropriations acts at issue in *Will*, and rightly noted that the Supreme Court's holding was not grounded in a particular phrase but in congressional intent and the Court's recognition that "'[t]o say that Congress could not alter a method of calculating salaries before it was executed would mean the Judicial Branch could command Congress to carry out an announced future intent as to a decision the Constitution vests exclusively in the Congress.'" *Maine*, 2017 WL 3225050, at *8 (quoting *Will*, 449 U.S. at 228).

As we have previously explained, *Highland Falls-Fort Montgomery School Dist. v. United States*, 48 F.3d 1166 (Fed. Cir. 1995), conclusively demonstrates that an appropriations act may limit or modify the government's liability under a statute providing that the government "shall pay" according to a formula. There, the Impact Aid Act provided that school districts substantially burdened by the federal government's large real property holdings "shall be entitled" to payment equal to the burden imposed, as determined by the Secretary of Education. 20 U.S.C. § 237(a) (1988 & Supp. V 1993), *repealed by* Pub. L. No. 103-382, title III, pt. C, § 331(b), 108 Stat. 3518, 3965. The statute provided that the Secretary "shall pay" those amounts once determined. 20 U.S.C. § 240(b)(1).[1] In the event appropriations were insufficient

[1] There is no merit to the suggestion that the Federal Circuit concluded that the statute was not money-mandating. *See*, *e.g.*, *Molina*, 2017 WL 3326842, at *23 n.17. As the opinion makes clear, the government moved to dismiss for failure to state a claim on which relief could be granted, *Highland Falls*, 48 F.3d at 1167, 1169, and the Federal Circuit affirmed the trial court's dismissal on the merits, *id.* at 1172. Nothing in the opinion suggests that the Federal Circuit was making a jurisdictional ruling. And the Federal Circuit's precedent confirms that 20 U.S.C. § 240(b)(1)'s "shall pay" language is money-mandating. *See*, *e.g.*, *Greenlee Cty., Ariz. v. United*

to pay all Impact Aid Act subsidies, the statute required that the Secretary "shall first allocate to each [school district] which is entitled to a payment under section 237 . . . an amount equal to 100 per centum of the amount to which it is entitled as computed under that section." 20 U.S.C. § 240(c)(1)(A). Nevertheless, when Congress earmarked specific sums for section 237 payments that proved insufficient to pay the amounts to which the plaintiff school districts were "entitled," the Federal Circuit concluded that the Secretary's pro rata distribution of payments was permissible, and the government was not liable for the shortfall. 48 F.3d at 1171-72.

Judge Bruggink correctly recognized that the Federal Circuit relied, in part, on the Anti-Deficiency Act and 31 U.S.C. § 1532 to conclude that Congress, in appropriating only a portion of the necessary funds, did not intend the government to pay more in total subsidies than what it appropriated. *Maine*, 2017 WL 3225050, at *10.[2] The Federal Circuit in *Highland Falls* thus explicitly recognized that payment directives must be interpreted in light of both Congress's annual appropriations decisions and in context with the broader statutory scheme in which Congress exercises its power of the purse. *See* 48 F.3d at 1171 (by making pro rata reductions in the amounts to which school districts were found entitled, the Secretary of Education "harmonized the requirements of [the Impact Aid Act] and the appropriations statutes with the requirements of 31 U.S.C. §§ 1341(a)(1)(A) and 1532").

Judge Wheeler's attempt to distinguish *Highland Falls* does not survive even cursory scrutiny.[3] First, Judge Wheeler was wrong to declare that with respect to risk corridors

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States, 487 F.3d 871, 877 (Fed. Cir. 2007).

[2] Judge Bruggink mistakenly referred to the Impact Aid Act as the Payment in Lieu of Taxes Act, though this does not affect his analysis. *See Maine*, 2017 WL 3225050, at * 9-*10.

[3] Although the case was cited in the government's briefs, Judge Wheeler did not address *Highland Falls* in the *Moda* opinion.

payments, "Congress merely pointed to funds which *could not* be used to make risk corridors payments," and that "[u]nlike the appropriation laws in *Highland Falls*," the appropriations laws at issue here did "not specifically and affirmatively appropriate any funds whatsoever to satisfy Section 1342(b)(1) [of the ACA]." *Molina*, 2017 WL 3326842, at *23. Judge Wheeler simply disregarded the appropriation for user fees. The GAO advised Congress that reenactment of the user-fee appropriation would allow HHS to use "payments in" as a funding source for "payments out." Thus, by appropriating "user fees," Congress appropriated funds—risk corridors collections—"to satisfy Section 1342(b)(1)." *Molina*, 2017 WL 3326842, at *23; *see*, *e.g.*, Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. G, title II, 128 Stat. 2130, 2477 (appropriating "such sums as may be collected from authorized user fees"). Absent the appropriation of user fees, HHS could not have used risk corridors collections to make payments because those monies, once collected, are funds in the Treasury under 31 U.S.C. § 3302(b) and cannot be spent absent an appropriation under the Anti-Deficiency Act and the Appropriations Clause.

In the same legislation, Congress prohibited the use of the lump sum appropriation in the CMS Program Management Appropriation, which was the only other potential funding source that the GAO had identified in its opinion. As Judge Bruggink correctly recognized, "Congress was presented with two potential pools of money for risk corridors payments and clearly eliminated one of them, thus expressly limiting payments to the other pool—user fees." *Maine*, 2017 WL 3225050, at *12. Thus, as Judge Bruggink recognized, Congress's appropriation of only risk corridors collections directly mirrors Congress's appropriation of a defined sum in the case of *Highland Falls* and caps the government's liability at amounts appropriated.

Second, Judge Wheeler attempts to distinguish *Highland Falls* by contrasting an asserted lack of discretion in the risk corridors formula with the broader discretion granted to the Secretary of Education in the Impact Aid Act. *Molina*, 2017 WL 3326842, at *23. Any such distinction is beside the point because neither these risk corridors cases nor *Highland Falls* concern the amounts determined by the agency under the statute. Rather, the dispute here and in *Highland Falls* is whether the government is liable for the full amounts determined. *See* 48 F.3d at 1169 (noting that "the money Highland Falls received under the Act was less than its § 237 entitlement, as determined by the Secretary of DOE"). With respect to payment, the Impact Aid Act provided no more discretion than section 1342; the statute provided simply that "the Secretary **shall pay** to each [school district], rounded to the nearest whole dollar, making application pursuant to subsection (a) of this section, **the amount to which it is entitled under sections 237**, 238, and 239 of this title," 20 U.S.C. § 240(b)(1) (emphasis added). Indeed, insurers here are on even weaker footing than the school districts in *Highland Falls* because the Impact Aid Act provided that school districts were "entitled" to receive payments and indicated that in the event of a shortfall of appropriations, the section 237 amounts shall be paid at 100 percent. Nothing in section 1342 or the ACA either provides for "entitlement" to risk corridors payments or mentions 100 percent payment.

In *Star-Glo Associates, L.P., v. United States*, 414 F.3d 1349 (Fed. Cir. 2005), the Federal Circuit was again confronted with a mandatory payment directive according to a formula and an appropriation insufficient to pay all claims under that formula. The statute provided that the Secretary of Agriculture "shall pay Florida commercial citrus and lime growers $26 for each commercial citrus or lime tree removed . . . . Payments [to each grower] . . . shall be capped in accordance with [specified] trees per acre limitation." Act of October 28, 2000, Pub. L. No. 106-

387, § 810(a), 114 Stat. 1549, 1549A-52. Congress appropriated "$58,000,000 of the funds of the Commodity Credit Corporation to carry out this section to remain available until expended." *Id.* § 810(e). The Federal Circuit concluded, after considering the legislative history, that Congress intended the Secretary of Agriculture to spend "not more than" the $58 million appropriated. *Star-Glo*, 414 F.3d at 1355. Judge Bruggink noted that *Star-Glo* is relevant here, fitting it into the lengthy history of cases demonstrating Congress's control of the purse through appropriations legislation. *Maine*, 2017 WL 3225050, at *11. Judge Wheeler, on the other hand, concluded that the statute in *Star-Glo* "explicitly limited funds available to make mandatory payments." But nothing in the statute explicitly limited funds. Rather, the Federal Circuit concluded based on the Conference Report that Congress intended that not more than the $58,000,000 be spent on the mandated payments. *Star-Glo*, 414 F.3d at 1355. While the payment program was created as part of an appropriations bill that also contained an appropriation for payments, nothing in the Federal Circuit's reasoning depended upon the payment provision and the appropriation appearing in the same bill. Congress's intent to limit payments to amounts appropriated was dispositive, without regard to where Congress expressed that intent.

Most recently, the Federal Circuit has twice addressed claims for payment under the Payment in Lieu of Taxes Act ("PILT") when Congress has appropriated insufficient sums to pay all claims. *Greenlee County*, 487 F.3d at 877-80; *Prairie Cty., Mont. v. United States*, 782 F.3d 685 (Fed. Cir. 2015). In direct conflict with Judge Wheeler's approach, in *Greenlee County* the Court noted that the PILT's "shall pay" directive rendered the statute money-mandating, but that first step in the analysis did not determine the merits of the plaintiff's money claims. *Greenlee County*, 487 F.3d at 877. Recognizing that although "the mere failure of Congress to

appropriate funds . . . does not *in and of itself* defeat a Government obligation created by statute," *id.* at 878 (emphasis added, quotation omitted), "in some instances the statute creating the right to compensation . . . may restrict the government's liability . . . to the amount appropriated by Congress," *id.* at 879. The Court of Appeals eschewed any requirement that Congress must use specific language limiting liability to appropriations or that Congress must appropriate a "specific dollar amount" to limit liability. Instead, the Court adopted a "functional" approach to conclude that Congress intended to limit PILT payments to amounts appropriated. *Id.* at 878-79. Relying on *Star-Glo*, the Court determined its conclusion was "particularly appropriate" because "'there is greater room in benefits programs to find the government's liability limited to the amount appropriated.'" *Greenlee County*, 487 F.3d at 879 (quoting *Star-Glo*, 414 F.3d at 1355).

In *Prairie County*, the Federal Circuit reiterated its holding in *Greenlee County* that the PILT, by its terms, limited liability to amounts appropriated. 782 F.3d at 690. The Court confirmed that, while Congress generally may not curtail existing contractual obligations through appropriations restrictions, "[a]bsent a contractual obligation" Congress can limit liability under money-mandating statutes through appropriations acts. *Id.* Concluding that the PILT did so limit liability, the Court noted that "if Congress intended to obligate the government to make full PILT payments, it could have used different statutory language," and the Congress in fact did so in other years. *Id.* at 691.

As the preceding discussion of cases demonstrate, Congress is always free to define, limit, or modify money-mandating statutes through appropriations acts. No "magic words" are required, and congressional intent is dispositive.

II. Because Congress intended that risk corridors payments would be made solely from risk corridors collections, insurers have no right to receive risk corridors payments beyond their pro rata share of collections

Judge Bruggink's reasoning and conclusions in *Maine* hew closely to precedent. As we have explained, Congress did not appropriate funds or enact any budget authority for risk corridors payments in the ACA itself. Instead, Congress deferred the issue of appropriations until the time to make those payments drew near. Then, Congress solicited the opinion of the GAO as to the funding sources that potentially would be available for risk corridors payments. And informed by the GAO's opinion, Congress appropriated risk corridors collections as the sole source of funding for risk corridors payments, while explicitly foreclosing use of the only other potential funding source that the GAO identified. As Judge Bruggink correctly held, those appropriations acts limit the government's liability to the amounts collected, even if it is assumed that the ACA, standing alone, would have supported insurers' claims.

A. The appropriations acts limit the government's liability to the amounts collected under the risk corridors program

As Judge Bruggink correctly reasoned:

> Congress made clear its intention that no public funds be spent to reimburse risk corridor participants beyond their user fee contributions. It asked GAO what monies were available to HHS to make risk corridor payments. GAO answered that user fees and the CMS program management fund were the only sources available. Congress expressly blocked the use of the latter, leaving only the former. The government's obligation was thus capped to the amount brought in from user fees.

Maine, 2017 WL 3225050, at *12.

This conclusion follows from *Mitchell*, *Dickerson*, *Will*, and *Highland Falls*, and is entirely consistent with *Langston*, *Gibney*, and *New York Airways*. By expressly eliminating the Program Management lump sum appropriation as a source for risk corridors payments, Congress clearly intended for the years at issue that risk corridors payments would be funded solely from

risk corridors collections. This is no "mere failure of appropriations." *Maine*, 2017 WL 3225050, at *11. The only plausible conclusion from the sequence of events is that Congress intended to ensure that the risk corridors program would be self-funded. To reiterate: The appropriations acts were adopted after Congress inquired of GAO concerning available funding for risk corridors payments. "Congress was presented with two potential pools of money for [risk corridors] payments and clearly eliminated one of them, thus expressly limiting payments to the other pool—user fees. Once those funds were exhausted, the government's liability was capped." *Id.* at *12.

If there were any doubt about Congress's intent in the appropriations acts, the legislative history is "clear and uncontradicted" that Congress understood that the "federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect," 160 Cong. Rec. H9307-1, H9838 (daily ed. Dec. 11, 2014). The restriction on the Program Management lump sum "require[ed] the administration to operate the Risk Corridor program in a budget neutral manner." Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Bill, 2016, S. Rep. No. 114-74, at 12 (2015). [4]

B. Contrary to Judge Wheeler's suggestion, Congress did not inadvertently leave the Judgment Fund available for risk corridors payments

1. A payment directive must be interpreted in light of Congress's exercise of its Appropriations power

Although Judge Wheeler acknowledged that Congress did not *intend* to allow risk corridors payments to be made from the Judgment Fund, he suggested that Congress

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[4] In discussing *Highland Falls*, Judge Wheeler also suggests it is improper to consider the clear and uncontradicted legislative history of the appropriations acts here. *Molina*, 2017 WL 3326842, at *23. Every case since *Dickerson* has looked to legislative history to determine Congress's intent in appropriations laws, including *Molina*, *id.* at *18.

inadvertently exposed the Judgment Fund to billions of dollars of risk corridors payments. That reasoning reflects a fundamental misunderstanding of Congress's Appropriations power.

Without considering the federal statutes that implement the Appropriations Clause, Judge Wheeler opined that there is no material difference between a statute that says an agency "shall pay" and a statute that says an agency "shall" take an action that does not involve payment. *See Molina*, 2017 WL 3326842, at *19. For example, Judge Wheeler quoted the Supreme Court's decision in *Lopez v. Davis*, 531 U.S. 230, 241 (2001), for the proposition that Congress's "use of a mandatory 'shall'" imposes "discretionless obligations," even though the statute in *Lopez* stated that the Bureau of Prisons "shall designate the place of the prisoner's imprisonment" without "favoritism given to prisoners of high social or economic status." Similarly, Judge Wheeler quoted *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998), for the proposition that "[t]he mandatory 'shall'. . . normally creates an obligation impervious to judicial discretion," even though the statute in *Lexecon* provided that a civil action transferred by the Judicial Panel on Multidistrict Litigation "shall be remanded by the panel" under specified circumstances.

Judge Wheeler declared that "[t]he test for determining whether a statute obligates the Government does not change simply because" the directive is for "the payment of money." *Molina*, 2017 WL 3326842, at *19. But the Supreme Court's case law recognizes that the test for determining whether a statute obligates the government manifestly *does* change when a payment directive is at issue. No further action by Congress was necessary for the Bureau of Prisons in *Lopez* to comply with a directive to designate places of imprisonment without special favoritism. By contrast, it is unlawful for an agency to implement a payment directive unless Congress appropriates the necessary funds. It is "not enough for a statute to simply require an

agency to make a payment" because "[a]gencies may incur obligations and make expenditures only as permitted by an appropriation." *GAO Op.*, 2014 WL 4825237, at *2. Accordingly, until Congress provided budget authority for HHS to make risk corridors payments, HHS was neither required nor permitted to do so, and a party cannot claim damages based on their non-payment.

2. No judicially-created legal requirements constrain Congress's exercise of its Appropriations power

Judge Wheeler simply misreads the case law involving the effect of appropriations acts on payment directives. As discussed above, Judge Wheeler reached his ruling in *Moda*, which he adopts in *Molina*, without even considering *Highland Falls*, and he misreads *Highland Falls* now. *See Molina*, 2017 WL 3326842, at *17-*18, *21-*23. Indeed, *Highland Falls* cannot be reconciled with Judge Wheeler's analysis. The application of *Highland Falls* here is straightforward: the payment methodology provision of Section 1342 states that an agency "shall pay" amounts determined by HHS, but provides no budget authority to do so. Congress appropriated user fees in light of the GAO opinion, which advised Congress that an analogous user-fee appropriation in the FY 2014 appropriations act would, if reenacted in subsequent fiscal years, allow HHS to use "payments in" from insurers to fund "payments out." In the same legislation, Congress specified that the only other potential funding source that the GAO had identified could *not* be used for risk corridors payments. In light of the shortfall in collections, which are the only appropriated funds available to pay risk corridors, HHS pro-rated risk corridors payments to the extent of the funds Congress appropriated. As in *Highland Falls*, there is "great difficulty imagining a more direct statement of congressional intent than the instructions in the appropriations statutes at issue here," 48 F.3d at 1170, and the United States is not liable for any additional payments.

Judge Wheeler incorrectly declares in *Molina* that Congress can only limit a "shall pay" provision through an appropriations act "expressly," 2017 WL 3326842, at *2-*3, even where the Court recognizes Congress's contrary intent. Under the *Molina* holding, "Courts should not infer Congress's intent to limit payment obligations to a single fund, or repeal a previous payment obligation, through logical inference. . . . There can be no room for inference when dealing with whether the Government will honor its statutory commitments." *Id.* at *24. Not only does no Supreme Court or Federal Circuit decision support this assertion, every case from *Mitchell* to the present belies it because every case upholding an appropriations act limitation in the face of permanent legislation requires an inference. Not one case discussed above and relied upon in *Molina* involved an "express" amendment, suspension, or repeal. Instead, in every case Congress either limited available funding or appropriated only certain funds.

By misreading the case law to impose "legal requirements Congress must meet to rescind a statutory promise," *Molina*, 2017 WL 3326842, at *2, Judge Wheeler substitutes his own theory of equity for the intent of Congress. Judge Wheeler recognized in *Moda* that Congress intended to "prevent HHS from using the CMS Program Management account for risk corridors payments." *Moda*, 130 Fed. Cl. at 461. Indeed, "[t]he GAO report did not mention any other sources of funding as available to the program." *Maine*, 2017 WL 3225050, at *5. And, Judge Wheeler recognized, relying on the 2015 Senate Report, that "cutting off [the Program Management account] forced the administration to operate the program in a budget-neutral manner." *Moda*, 130 Fed. Cl. at 461. Then, he reasoned that Congress "left open" the Judgment Fund for risk corridors payments, but acknowledged in *Molina* that "[i]t is highly unlikely that Congress actively contemplated the availability of the Judgment Fund, let alone intended its use to make risk corridors payments," 2017 WL 3326842, at *19. Nevertheless, Judge Wheeler

declared that the Judgment Fund, "a third option" besides risk corridors collections and the Program Management account, "will always be an appropriation from which the Government's promises can be fulfilled," *id.* at *18, unless Congress "manifest[s] an intent to bar any and all funds to make risk corridors payments," *id.* at *19.

Judge Wheeler's reasoning has no support in any of the cases cited in *Moda* or *Molina*. As discussed, it is squarely contradicted by *Highland Falls* and other cases, such as *Mitchell* and *Star-Glo*, where Congress did not "manifest an intent to bar any and all funds." In each of those cases, the Court concluded that Congress did intend through its appropriations acts to limit the government's payment obligation. Indeed, *Moda* and *Molina* stand irreconcilably apart from over a century of precedent because Judge Wheeler in his decisions imposes on Congress "legal requirements" and limitations on how Congress expresses its intent to define the extent of a financial obligation of the United States.

Moreover, none of the cases cited by Judge Wheeler and discussed above considered the availability of the Judgment Fund in determining Congress's intent. We explained in our prior briefing that reliance on the Judgment Fund to determine liability is inappropriate because the Judgment Fund, by its terms, appropriates funds only "to pay final judgments." 31 U.S.C. § 1304(a). As Judge Bruggink correctly noted, the existence of the Judgment Fund is "immaterial" because "[r]etreat to the Judgment Fund assumes a liability in the first instance." *Maine*, 2017 WL 3225050, at *12 (citing *Richmond*, 496 U.S. at 432).

Finally, Judge Wheeler's reasoning treats Congress's constitutional exercise of its Appropriations Power as a power it must exercise to bar payment, rather than as a constitutional power that Congress alone must affirmatively exercise to authorize payment. Judge Wheeler acknowledges that Congress intended to appropriate only risk corridors collections, but he

reasons that because Congress intended to appropriate some funds but did not specifically *cut off* the Judgment Fund, Congress *inadvertently* left the Judgment Fund available. But the congressional power of the purse means that the federal Treasury is obligated to make payments only insofar as Congress intends. *See Mitchell*, 109 U.S. at 150. Where Congress's intent is clear, it governs, and it is the duty of the Courts to enforce that intent, not to act as a backstop to order payments out of the Treasury that Congress did not intend to be made. "The general appropriation for payment of judgments . . . does not create an all-purpose fund for judicial disbursement. . . . Rather, funds may be paid out only on the basis of a judgment based on a substantive right to compensation based on the express terms of a specific statute." *Richmond*, 496 U.S. at 432.

Here, having conceded that it is "highly unlikely" that Congress intended risk corridors payments would be made from the Judgment Fund, Judge Wheeler's analysis leads to the unescapable conclusion that Congress intended that risk corridors payments would come solely from risk corridors collections. Under *Mitchell*, *Dickerson*, *Will*, and *Highland Falls*, that ends the matter.

C. Congress retained authority to define the extent of the government's liability for risk corridors payments

Insurers contend that because of the "shall pay" language of section 1342, the United States has an obligation to make full risk corridors payments regardless of the amount of collections. The absence of any budget authority or other language creating an "obligation of the Secretary" (to use Medicare Part D's terms) in section 1342 belies this contention. But in any event, even if insurers were correct about section 1342 as enacted in 2010, Congress's subsequent appropriations acts control the question of the liability. *Maine*, 2017 WL 3225050, at

*7. In other words, "the 'shall pay' language of section 1342 is not dispositive in the face of two appropriations riders that limit the sources of funding for that obligation." *Id.* at *8.

The Judges of this Court (including Judge Wheeler) who have addressed funding for section 1342 acknowledge that Congress did not appropriate funds for risk corridors payments in the ACA. *Moda*, 130 Fed. Cl. at 442; *Maine*, 2017 WL 3225050, at *3; *Health Republic Ins. Co. v. United States*, 129 Fed. Cl. 757, 762 (2017); *Land of Lincoln Mut. Health Ins. Co. v. United States*, 129 Fed. Cl. 81, 104-05 (2016), *appeal pending,* No. 17-1224 (Fed. Cir.). Instead of enacting an appropriation or otherwise providing for payments as part of the ACA, Congress deferred the issue of appropriations for risk corridors payments until 2014, the year preceding the first payments.

Moreover, there is no dispute that insurers have no right to payment until after the end of 2014.[5] *Maine*, 2017 WL 3225050, at *7, *8; *Molina*, 2017 WL 3326842, at *21 (noting that "no insurer would be entitled to payment until 2015 at the earliest"); *Blue Cross and Blue Shield of N.C. v. United States*, 131 Fed. Cl. 457, 477 (2017), *appeal pending,* No. 17-2154 (Fed. Cir.); *Moda*, 130 Fed. Cl. at 452-53; *Health Republic*, 129 Fed. Cl. at 778; *Land of Lincoln*, 129 Fed. Cl. at 90, 97. Indeed, section 1342's text forecloses any other conclusion because an insurer's right to payment—as well as the government's authority to assess a charge—is based on the ratio of premiums to allowable costs "for any plan year," 42 U.S.C. § 18062(b), and "allowable costs" must be reduced by any reinsurance and risk adjustment payments, which themselves cannot be determined until after the close of the year, *id.* § 18062(c)(1)(B).[6]

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[5] Insurers do not submit to HHS the data upon which risk corridors is based until June 30 subsequent to the end of the benefit year, meaning, for example, that for benefit year 2014, data was submitted in June 2015.

[6] The GAO identified the CMS Program Management appropriation as a potential source of risk

Congress was free to "readjust[] rights and burdens" and even "upset[ ] otherwise settled expectations" in the risk corridors program. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976); *see also Richardson v. Belcher*, 404 U.S. 78, 80-81 (1971) (noting "the power of Congress to make substantive changes" to benefits programs such as risk corridors); *Kizas v. Webster*, 707 F.2d 524, 539 (D.C. Cir. 1983) (government benefits "are 'limited, as a general rule, by the governmental power to remove, through prescribed procedures, the underlying source of those benefits.'") (citations omitted, emphasis removed). Thus, regardless of insurers' alleged expectations or understanding of how the risk corridors program would operate, Congress was free to define the extent of risk corridors payments before the end of the benefit year. *Maine*, 2017 WL 3225050, at *7 & n.4; *Will*, 449 U.S. at 228; *accord Molina*, 2017 WL 3326842, at *2 ("[We] agree in particular that Congress may expressly limit its payment obligations in appropriations laws").

Congress did so here by prohibiting the use of the Program Management account and appropriating only risk corridors collections. The United States is not liable for anything more.

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corridors payments only because it assumed such payments could be an "other responsibility" of CMS. *GAO Op.*, 2014 WL 4825237, at *3. As we explained in our Supplemental Brief, because the terms of section 1342 do not give rise to payment until *after* the end of calendar year 2014, risk corridors payments, in fact, could not be an "other responsibility" of CMS until calendar year 2015. Thus, *Moda*'s conclusion that either the fiscal year 2014 Program Management appropriation or the fiscal year 2015 continuing resolutions were available to fund risk corridors payments, 130 Fed. Cl. at 456, is erroneous. In *Molina*, Judge Wheeler appears to adopt *Moda*'s conclusion, 2017 WL 3326842, at *16, but also describes it as "not necessary," *id.* at *19. But in *Molina*, Judge Wheeler also references "general appropriation of funds" to HHS and "HHS' general funding." 2017 WL 3326842, at *3, *16. Congress annually funds HHS's activities through the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, which appropriates funds for HHS's various components and agencies. *See*, *e.g.*, Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, div. H, 131 Stat. 135. There is no "general appropriation of funds" or "general funding" that provides funds for risk corridors payments.

III. Congress did not intend to contract for risk corridors payments

We explained in our prior briefing that insurers' implied-in-fact contract claims fail as a matter of law because Congress created a statutory benefits program when it enacted section 1342 and did not intend to contract for risk corridors payments. Both Judges Lettow and Griggsby agreed and correctly rejected insurers' implied contract claims. *See Land of Lincoln*, 129 Fed. Cl. at 111-12; *Blue Cross and Blue Shield of N.C.*, 131 Fed. Cl. at 479. Only Judge Wheeler has found an intent to contract in section 1342. In *Moda*, he announced a novel, two-part test under which Congress intends to contract when a statutory provision (1) creates "a program that offers specified incentives in return for the voluntary performance of private parties" and (2) is "promissory," which, according to Judge Wheeler, means that the provision "give[s] the agency officials administering the program no discretion to decide whether or not to award incentives to parties who perform." 130 Fed. Cl. at 463.

Judge Wheeler's test relies exclusively on two Court of Claims cases each more than half a century old: *Radium Mines, Inc. v. United States*, 153 F. Supp. 403 (Ct. Cl. 1957), and *New York Airways*, 369 F.2d at 745. In *Molina*, Judge Wheeler refers to this new test as "the *Radium Mines* test," 2017 WL 3326842, at *26, though *Radium Mines* did not announce such a test, and the regulation at issue in that case explicitly provided that the government would contract to purchase uranium ore under specified conditions, *see* 153 F. Supp. at 405-06. *New York Airways* announced no test, and the appropriations provision giving rise to that case explicitly referred to "Liquidation of Contract Authorization."

For the last twenty years, consistent Federal Circuit precedent has followed the Supreme Court's test set out in *National Railroad Passenger Corp. v. Atchison*, *Topeka and Santa Fe Railway Co.*, 470 U.S. 451 (1985), and required contractual intent to be expressed either in the

terms of the statute or in the circumstances surrounding enactment, *i.e.* in the statute's legislative history. In *Brooks v. Dunlop Manufacturing, Inc.*, 702 F.3d 624 (Fed. Cir. 2012), the Federal Circuit rejected an implied contract claim based on a repealed *qui tam* provision for bringing false patent marking claims. *Id.* at 631. Looking to the language of the *qui tam* provision, the Federal Circuit noted that "[a]lthough not necessarily determinative, no words typically associated with contract formation, such as 'offer' or 'acceptance,' were used." *Id.* The court then consulted legislative history of the provision and found no intent to create vested contractual rights. *Id.* at 631-32.

Similarly, in *Hanlin v. United States*, 316 F.3d 1325 (Fed. Cir. 2003), the Federal Circuit noted that the statutory provision at issue was "a directive from the Congress to the [agency], not a promise from the [agency] to" third parties. *Id.* at 1329. The Court could "discern no language in the statute or regulation that indicates an intent to enter into a contract," nor could the Court "discern any past course of dealing or practice from which the [agency's] intent to enter into such a contractual relationship can be inferred." *Id.* at 1330.

Finally, in *Bay View, Inc. v. United States*, 278 F.3d 1259 (Fed. Cir. 2001), the Federal Circuit rejected a contract claim arising from an amendment to the Alaska Native Claims Settlement Act ("ANCSA"). The Court reasoned that "[b]ecause ANCSA does not purport to create an express contract between the United States and Bay View, the record of ANCSA's enactment would have to support an implied contract." *Id.* at 1266. Finding no evidence of an offer, acceptance, or consideration in the circumstances surrounding enactment, the Federal Circuit held that ANCSA "was a unilateral act by the United States" that did not create contractual rights. *Id.*

"[T]he Court of Federal Claims must follow relevant decisions of the Supreme Court and the Federal Circuit, not the other way around." *Dellew Corp. v. United States*, 855 F.3d 1375, 1382 (Fed. Cir. 2017). As the United States explained in its briefing before Judge Wheeler, the statutes at issue in both *Brooks* and *Hanlin* would satisfy the *Moda* test, yet the Federal Circuit rejected the implied contract claims in those cases. Judge Wheeler made no attempt to explain this inconsistency with binding precedent. Instead, Judge Wheeler concluded that none of these recent, precedential cases bear on insurers' alleged contract rights, even though they all involved implied contract claims based on statute. *Molina*, 2017 WL 3326842, at *27-*28. The *Molina* opinion demonstrates how unmoored Judge Wheeler's *Moda* test is from well-settled law.

In contrast to Judge Wheeler's analysis, Judges Lettow and Griggsby closely followed *Hanlin* and *Brooks* and found that neither section 1342 nor its implementing regulations contain any language expressing an intent to contract. *Land of Lincoln*, 129 Fed. Cl. at 111-12; *Blue Cross and Blue Shield of N.C.*, 131 Fed. Cl. at 479. Judge Wheeler did not address either of the contrary opinions of his colleagues, but instead relied on a number of HHS's statements in the Federal Register from 2012 through 2014 as "circumstances surrounding the passage of the ACA" that "clearly indicate and intent to contract." *Molina*, 2017 WL 3326842, at *28 (alterations, quotations, and citations omitted). In fact, Judge Griggsby considered and rejected the same alleged "circumstances surrounding enactment" and noted that they "occurred several years after the enactment of the ACA." *Blue Cross and Blue Shield of N.C.*, 131 Fed. Cl. at 479.

Indeed, none of HHS's post-enactment statements in the Federal Register or elsewhere indicate an intent to contract or any recognition of an existing contractual obligation. To the extent such statements are relevant to insurers' alleged contractual rights, they demonstrate the weakness of the implied contract claims. If HHS's statements constitute the terms of an alleged

"offer" by the government, then that "offer" for the 2015 benefit year would include HHS's statements from April and May 2014 regarding HHS's intent to implement the program in a budget neutral manner. Either insurers agreed to this three-year, budget-neutral implementation, in which case there would no breach because HHS has been paying out charges collected, or there was no meeting of the minds and thus no contract. Similarly, for any implied contract claim for the 2016 benefit year, the terms of the alleged "offer" would also include Congress's express limitation on appropriations for risk corridors payments, since an agency cannot contract for payments beyond what Congress has appropriated. *See Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 643 (2005) (without "special authority," an "officer cannot bind the Government in the absence of an appropriation"); *Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442, 1449 (Fed. Cir. 1997). In short, any alleged implied contracts for risk corridors payments would vary considerably in their terms for each benefit year, or insurers never really accepted any "offer" containing such terms in the first place. And, indeed, nothing in the text of section 1342 or its implementing regulations provides any reason to believe that Congress intended insurers' rights and obligations under the risk corridors program to vary wildly from year to year. Instead, the only reasonable conclusion is that Congress never intended to contract in section 1342.

Finally, Judge Wheeler relied on insurers' alleged reliance on HHS's statements, which allegedly "were designed to instill confidence in the Government's promise to actually share the risks of the ACA." *Molina*, 2017 WL 3326842, at *28. According to Molina's counsel, without these assurances, "participation in the risk corridor program 'would have indeed been madness.'" *Id.* Insurers' alleged expectations and the risks they assumed in selling health insurance in a new market says nothing about Congress's intent. And as the Federal Circuit has recognized in reversing a Court of Federal Claims' judgment on an implied contract claim, alleged adverse

effects that may follow in the absence of a contractual commitment by the government cannot substitute for actual intent by the government to contract. *See 1st Home Liquidating Trust v. United States*, 581 F.3d 1350, 1357 (Fed. Cir. 2009).

IV. Plaintiffs' remaining claims also fail as a matter of law

Judge Wheeler correctly followed Judge Lettow's and Judge Griggsby's reasoning and rejected an express contract claim based on the Qualified Health Plan ("QHP") agreements. *Molina*, 2017 WL 3326842, at *29. As in this case, Molina relied upon the QHP agreements' "systems and processes" clause and the governing law clause to assert an express contractual obligation on the part of HHS to make risk corridors payments. As we explained—and as all of the Judges of this Court to have addressed this claim agree—neither clause plausibly supports plaintiffs' contention. There is no express contract regarding risk corridor payments.[7]

Additionally, absent any contractual right to risk corridors payments, plaintiffs have no protected property interest on which to base a Takings claim. Moreover, as Judge Wheeler recognized, because plaintiffs' Takings claim is coextensive with the breach of contract claims and because plaintiffs do not assert that Congress has not prohibited plaintiffs from asserting their alleged contract rights, their remedy lies in contract only, not under the Takings clause. *Molina*, WL 3326842, at *30; *see also Westfed Holdings, Inc. v. United States*, 52 Fed. Cl. 135, 152 (2002). Accordingly, plaintiffs' Takings claim must be dismissed.

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[7] Although Judge Wheeler erroneously found an implied-in-fact contract right to risk corridors payments, he recognized that any claim for breach of the implied covenant of good faith and fair dealing necessarily requires an existing contract right. *Molina*, 2017 WL 3326842, at *29. Because Plaintiffs have no contractual right to risk corridors payments, the good faith and fair dealing claim fails as a matter of law.

Conclusion

Section 1342 provided for the creation of a payment adjustment system as a matter of statute and regulation, not contract. Accordingly, under the Constitution and well-settled precedent, Congress was free to define, limit, or modify the scope of any obligation on the part of the United States to make payment. Congress's power to define the scope of such obligations was not constrained either by insurers' expectation of payment or by any "legal requirements" or theories of equity imposed by the Courts. Congress in fact exercised that power by appropriating only risk corridors collections and expressly prohibiting the use of the CMS Program Management account, with the unmistakable intent that collections would be the sole source of funds for risk corridors payments. Thus, as Judge Bruggink recognized, this clear exercise of Congress's constitutional power limits the United States' obligation to make risk corridors payments to the amount of risk corridors collections. Insurers have no right to additional risk corridors amounts.

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2017, a copy of the foregoing, *United States' Supplemental Brief Regarding Maine Community Health Options v. United States and Molina Healthcare of California v. United States*, was filed electronically with the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing will be sent to all parties by operation of the Court's ECF system.

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