Nos. 18-1023, 18-1028 and 18-1038

In the

Supreme Court of the United States

MAINE COMMUNITY HEALTH OPTIONS,

Petitioner,

v.

UNITED STATES,

Respondent.

(*Caption continued on inside cover*)

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

BRIEF FOR HIGHMARK INC., BLUE CROSS AND BLUE SHIELD OF KANSAS CITY, BLUE CROSS AND BLUE SHIELD OF VERMONT, BLUE CROSS OF IDAHO HEALTH SERVICE, INC., MOLINA HEALTHCARE OF CALIFORNIA, INC., AND L.A. CARE HEALTH PLAN AS *AMICI CURIAE* SUPPORTING PETITIONERS

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September 6, 2019

MODA HEALTH PLAN, INC.,

Petitioner,

v.

UNITED STATES,

Respondent.

BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA,

Petitioner,

v.

UNITED STATES,

Respondent.

LAND OF LINCOLN MUTUAL HEALTH INSURANCE COMPANY,

Petitioner,

v.

UNITED STATES,

Respondent.

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INTEREST OF *AMICI CURIAE*

Amici curiae Highmark Inc., Blue Cross and Blue Shield of Kansas City, Blue Cross and Blue Shield of Vermont, Blue Cross of Idaho Health Service, Inc., Molina Healthcare of California, Inc., and L.A. Care Health Plan, respectfully submit this brief in support of Petitioners Maine Community Health Options, Moda Health Plan, Inc., Blue Cross and Blue Shield of North Carolina, and Land of Lincoln Mutual Health Insurance Company. *Amici* provide health care insurance to more than 11.5 million customers throughout the United States, including over 700,000 on various Patient Protection and Affordable Care Act (ACA) health insurance exchanges. Like Petitioners, *amici* are health insurers that participated in the ACA's "risk-corridors" program, but were paid only a small fraction of the hundreds of millions of dollars they were undisputedly owed by the federal government under the statute.[1]

The ACA consists of a "series of interlocking reforms designed to expand coverage in the individual health insurance market." *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015). Congress structured the ACA to prevent an economic "death spiral" from the expansion of coverage to a new group of insureds, in which "premiums rose higher and higher, [ ] the number of people buying insurance sank lower and lower[,] [and]

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners have filed blanket consents to the filing of *amicus* briefs, and Respondent has consented to the filing of this brief.

insurers began to leave the market entirely." *Id.* at 2486.

A critical component of the ACA was its risk-corridors program, one of the statute's three risk-stabilization programs. It was created to mitigate the enormous and unquantifiable risk that health insurance providers, such as *amici*, shouldered in providing expanded coverage to a new population of policyholders—many of whom previously were uninsured and had unknown healthcare needs. Through this program, the federal government promised to share in the risk by paying insurers that experienced losses determined by a statutorily prescribed formula a portion of their higher-than-expected costs. Likewise, insurers with gains as determined by that statutory formula were required to remit a portion of those gains to the government.

The government's promise was explicitly reinforced by both the Department of Health & Human Services (HHS)—the agency responsible for administering the risk-corridors program—and the Centers for Medicare & Medicaid Services (CMS). Both agencies repeatedly and unequivocally assured *amici* and other risk-corridors insurers that the government owed and would pay them the full amount of risk-corridors payments as determined under the ACA's formula. Relying on these explicit assurances, *amici* entered into agreements with the government to become "Qualified Health Plans" on the new ACA exchanges and issue insurance policies to consumers, many of whom had never been insured before. Due in part to last-minute changes to policies implementing the

ACA, however, *amici* and many other participating insurers sustained significant losses over the course of the three-year risk-corridors program.

As explained in Petitioners' brief, the government nevertheless has refused to honor its promise to pay the required risk-corridors amounts that it acknowledges are owed. The government's justification? Congress impliedly repealed the government's mandatory payment obligation under the risk-corridors statute when, at the end of the first year of the risk-corridors program, it passed a massive budget appropriation rider that, in just a few unnoticed sentences, restricted HHS's use of one source of funds to make the required payments. And when *amici*, Petitioners, and other insurers sued to recover the risk-corridors amounts they are lawfully owed, a divided panel of the Federal Circuit endorsed the government's alarming—and patently unjust—avoidance strategy.

Amici have a direct and substantial interest in the cases before the Court. The government owes *amici* alone more than $900 million in risk-corridors payment, prompting *amici* to assert in the Court of Federal Claims the same statutory and contractual claims for risk-corridors payments against the government that are at issue in these cases. *See Blue Cross of Idaho Health Serv., Inc. v. United States*, No. 16-1384C; *Blue Cross and Blue Shield of K.C. v. United States*, No. 17-95; *Blue Cross and Blue Shield of Vt. v. United States*, No. 18-241C; *First Priority Life Ins. Co., Inc. v. United States*, No. 18-96; *First Priority Life Ins. Co., Inc. v. United States*, No. 16-587; *Local Initiative Health Auth. for L.A. County, d/b/a L.A. Care Health Plan v. United States*, No. 17-1432C; *Molina*

Healthcare v. United States, No. 17-97C; *Molina Healthcare v. United States*, No. 18-333C.

Amici urge the Court to reverse the decision below. That divided ruling impermissibly freed the government from its express promise to risk-corridors insurers based on supposed legislative history relating to Congress's after-the-fact limitation on the use of one source of funds for mandatory payments owed to insurers—like *amici*—that suffered losses during the course of the risk-corridors program. That decision unfairly—and unlawfully—upends the insurers' investment-backed reliance on the government's express promise to pay. It also contravenes bedrock constitutional principles designed to protect those reliance interests and ensure fair notice of the governing law. Even if Congress does have the power to retroactively impair those constitutional interests, it must exercise it clearly and expressly so that it remains accountable for its actions, and that those subject to the law have fair notice of what Congress forbids or requires. These fundamental principles and interests must be protected—or elected politicians and unelected bureaucrats will be permitted to run roughshod over those who, like *amici*, justifiably rely on the government to honor its promises.

SUMMARY OF ARGUMENT

This is a case about a bait-and-switch by the government that left dozens of health insurance companies with billions of dollars in unrecouped losses. The government wanted insurers to participate in risky new insurance marketplaces created to expand access to affordable healthcare, without charging consumers the premiums necessary to mitigate that risk. To induce insurer participation, the government promised

in an Act of Congress to share the risk. But now, despite insurers' reasonable and substantial investment-backed reliance on that promise, the government claims the "absurd[]" "right to deny or change the effect of [its express] promise" after the fact. *United States v. Winstar*, 518 U.S. 839, 913 (1996) (Breyer, J., concurring). Worse, the government claims authority to stretch the plain meaning of the appropriations riders far beyond what their actual text can bear based on a few scraps of purported legislative history—the same history on which the divided panel relied below.

As Petitioners' briefs make crystal clear, the governing law—namely, the proper application of the controlling presumptions against implied statutory repeals and the retroactivity of statutes—is decidedly on the insurers' side. These presumptions require, at minimum, a *clear* statement by Congress that it really meant to go back on its word. The absence of any such statement is enough to rule for Petitioners and reverse the decision below.

It is important to emphasize, though, that the interpretive presumptions that are dispositive here are designed to serve first-order constitutional concerns of fair notice and the protection of investment-backed reliance interests. Those concerns are at their zenith in these cases given the extent of the insurers' reliance on the government's promises, the lengths to which the government went to induce that reliance, and the fair notice-defeating and reliance-upsetting effect of the divided ruling below—which found an implied repeal of the government's mandatory-payment obligation under the risk-corridors statute by one sentence in appropriations riders based not on the text of the

riders, but instead on vanishingly thin and ambiguous purported legislative history. *Amici* focus this brief on those critical due process concerns and how the controlling presumptions, properly applied, shield them from government overreach.

ARGUMENT

I. Insurers Relied On The Government's Explicit Promise To Make the Full Amount Of Payments Required By §1342 In Agreeing To Participate In The Risk-Corridors Program.

From the time Congress codified the risk-corridors program in §1342 of the ACA, until long after *amici*, Petitioners, and other insurers began to perform their duties under the program, the government repeatedly and explicitly assured the insurers that it would honor the full-payment promise made in §1342 and HHS's implementing regulations. Naturally, *amici*, the Petitioners, and other insurers relied heavily—and, as it turned out, to their great detriment—on these explicit assurances in agreeing to participate in the risk-corridors program.

The central mission of the ACA was to expand affordable health insurance coverage to more Americans. *See King*, 135 S. Ct. at 2485–87. The new exchanges the statute created were designed to "facilitate access of individuals and employers . . . to a variety of choices of affordable, quality health insurance coverage. . . ." H.R. Rep. No. 111-299, at 202 (2009). The robust participation of health insurers thus was critical to the ACA's success.

But the government understood the reality that "[i]nsurers charge premiums for expected costs plus a risk premium, in order to build up reserve funds in case medical costs are higher than expected." 76 Fed.

Reg. 41,929, 41,948 (July 15, 2011). And because of the uncertainty about the new (but previously uninsured) population entering the ACA exchanges, the government knew that health insurers likely would not be able to predict their risk accurately, and they would need to price their premiums accordingly. *See*, *e.g.*, 77 Fed. Reg. 17,220, 17,221 (Mar. 23, 2012) ("To protect themselves from adverse selection, issuers may include a margin in their pricing (that is, set premiums higher than necessary) in order to offset the potential expense of high-cost enrollees."); 76 Fed. Reg. 41,929, 41,935 (July 15, 2011) ("[T]here is significant uncertainty about Exchange enrollment, the overall health of the enrolled population, and the cost of care for new enrollees").

Congress therefore needed to include in its design of the ACA features that would induce insurers to participate, while at the same time curb the rise of premiums by reducing risk to the insurers. Enter the ACA's three risk-stabilization programs—"reinsurance," "risk adjustment," and "risk corridors." The government believed that together, the three programs would "reduce the risk to the issuer and the issuer can pass on a reduced risk premium to beneficiaries." 76 Fed. Reg. 41,929, 41,948 (July 15, 2011); *see also* 77 Fed. Reg. 73,118, 73,119 (Dec. 7, 2012) ("The risk corridors program … will protect against uncertainty in rates for qualified health plans by limiting the extent of issuer losses and gains."); 78 Fed. Reg. 72,322, 72,379 (Dec. 2, 2013) (same); 79 Fed. Reg. 13,743, 13,829 (Mar. 11, 2014) (same).

Indeed, the government sold the risk-corridors program—from the way the ACA laid out the program, to government agencies' repeated and public

statements about how it would operate—as a reliable safeguard against the risks and potential losses the program was designed to forestall. The statute itself, as the Federal Circuit correctly found below (Pet.App.16), is unambiguously mandatory in its directive—when participating insurers suffer a certain level of losses, the government "shall pay" them the amount determined by the formula set forth in the statute. 42 U.S.C. §18062(b)(1)(A); *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018) ("The word 'shall' generally imposes a nondiscretionary duty.") (citation omitted). By contrast, the ACA elsewhere used the discretion-conferring term "may." *See*, *e.g.*, ACA, Pub. L. 111-148, §1001, 124 Stat. 119, 135; *id.* §1104(h), 124 Stat. at 149; *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (noting significance of statute's "contrast[ing]" uses of "shall" and "may").

At the same time, Congress notably did not grant the Secretary of HHS any discretion to pay insurers that qualified for risk-corridors payments anything less than the full amount prescribed in §1342(b)(1) and (2). Nor did it limit in any way the Secretary's obligation to make full risk-corridors payments owed to insurers based on congressional appropriations (or the lack thereof) or any restriction on the use of funds. Congress also did not establish in the ACA any particular fund for making risk-corridors payments; direct that "payments in" from profitable insurers were to be the source for making "payments out" to insurers owed those payments; or indicate in any way that the program was intended to be "budget neutral." So "[t]he statute means what it says[,]" *Dahda v. United States*, 138 S. Ct. 1491, 1498 (2018)—the government "shall pay" amounts owed as determined under §1342: no exceptions.

For years following the ACA's enactment—and long after the risk-corridors program began operating—the government did nothing but reinforce this clear statutory meaning. In particular, HHS and CMS, the agencies responsible for administering the risk-corridors program, repeatedly conveyed to insurers the agencies' understanding that the government would owe, and did owe, the full amount of risk-corridors payments to insurers prescribed under the ACA's statutory formula. The agencies unequivocally confirmed the government's obligation to make full payments not limited by "payments in" when, in final rulemaking (following a notice-and-comment period), they stated in the Federal Register that "[t]he risk corridors program is not statutorily required to be budget neutral. Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act." 78 Fed. Reg. 15,410, 15,473 (Mar. 11, 2013).

CMS's implementing regulations mirrored this understanding. CMS adopted a risk-corridors calculation "for calendar years 2014, 2015, and 2016," 45 C.F.R. §153.510(a), that is mathematically identical to the statutory formulation in §1342 of the ACA, using the identical thresholds and risk-sharing levels specified in the statute. *Id.* §153.510. These implementing regulations, just like §1342, do not limit the amount of the government's required risk-corridors payments to insurers by the amounts the government collects from insurers; do not require the risk-corridors program to be "budget neutral"; and do not prescribe the use of "user fees" or "payments in" to make "payments out." By contrast, however, HHS's implementing regulations for the other two "3Rs" programs explicitly provide that those other programs *are* budget-neutral.

See 45 C.F.R. §153.230(d) (reinsurance); 77 Fed. Reg. 73,118, 73,139 (Dec. 7, 2012) (risk adjustment); 78 Fed. Reg. 15,410, 15,441 (Mar. 11, 2013) (risk adjustment). This difference only amplified the government's message to the insurers that it would honor its promises set forth in the risk-corridors statute.

Indeed, all of "[t]hese statements" by the government, "made before … insurers agreed to offer plans on the Exchanges, were designed to instill confidence in the Government's promise to actually share the risks of the ACA and actually protect against potential losses." *Molina Healthcare of Cal., Inc. v. United States*, 133 Fed. Cl. 14, 45 (2017); *see also Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 457 (2017) (finding that HHS "has consistently recognized that Section 1342 is not budget neutral" and that HHS "has never conflated its inability to pay with the lack of an obligation to pay"), *rev'd*, 892 F.3d 1311 (Fed. Cir. 2018). The government's strategy worked.

In 2013, *amici* and other insurers signed on, developing and establishing approved ACA premiums,[2] executing agreements with CMS,[3] and making unalterable commitments to various ACA exchanges for 2014.[4] They did so despite the significant financial risks posed by the uncertainty in the new healthcare markets, in reliance on the financial protections that Congress promised, backed by the full faith and credit of the government. *See*, *e.g.*, *Molina Healthcare of*

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[2] *See* Center for Consumer Information and Insurance Oversight, CMS, Letter to Issuers on Federally-Facilitated and State Partnership Exchanges, at 20 (Apr. 5, 2013).

[3] *See id.*

[4] *See*, *e.g.*, 45 C.F.R. §§147.104, 156.290(a)(2).

Cal., Inc. v. United States, Case No. 17-cv-97, ECF No. 1, ¶150 (Jan. 23, 2017) (Fed. Cl.) ("In July 2013 and September 2013, in reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, Plaintiffs executed their respective CY 2014 QHP Agreements and, upon approval and certification … became QHPs").

It was not until after *amici* and other insurers had firmly committed to participating in the ACA exchanges that the government took a series of steps that would fundamentally transform the risk-corridors program and inflict severe financial harm on the insurers. It began in November 2013 with CMS's announcement of a "transitional policy" that permitted individuals to keep their existing health plans even if those plans did not meet the ACA's requirements. Pet.App.8. The result of this change was to suppress enrollment on the exchanges—particularly by healthier people—which, in turn, exposed insurers to a larger pool of less healthy, higher risk, consumers. *Id.* HHS nonetheless assured insurers that the risk-corridors program would help "ameliorate" any adverse effects of the transitional policy. Pet.App.9.

Then the Government "'pull[ed] a[nother] surprise switcheroo' by doing the opposite of what it had" originally promised and repeatedly assured about the risk-corridors program. *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1810 (2019) (citation and internal quotation marks omitted). In the preamble to a final rule issued on March 11, 2014, months into the first year of the program, HHS stated for the first time—and directly contrary to its prior public statements—that it "intend[ed] to implement th[e] [risk-corridors] program in a budget neutral manner." 79 Fed. Reg.

13,743, 13,829 (Mar. 11, 2014). The next month, in a question-and-answer bulletin, CMS made the same budget-neutrality pivot, stating that if risk-corridors payments were to exceed collections "for a year, all risk corridors payments for that year will be reduced pro rata to the extent of any shortfall[,]" and the next year's collections would be used toward the previous year's shortfall. *BCBSNC* C.A.App. 250.

While laying the groundwork for the shift toward budget neutrality that would eventually form the government's litigating position in these and the other risk-corridors cases, however, the government remained attuned to the need to keep insurers in the risk-corridors program. So it continued to speak out of the other side of its mouth, repeatedly and publicly assuring insurers that the government would make risk-corridors payments in full to those insurers entitled to them—until September *2016*, when the three-year program was only months away from ending.

A month after CMS's April 2014 bulletin, for example, HHS maintained that the government had a statutory obligation "to make full payments to issuers." 79 Fed. Reg. 30,240, 30,260 (May 27, 2014). It also stated that it "anticipate[d] that risk corridors collections will be sufficient to pay for all risk corridors payments." *Id.* It reiterated the same assurance in November 2014, "recogniz[ing that] … the Affordable Care Act requires the Secretary to make full payments to issuers." 79 Fed. Reg. 70,673, 70,700 (Nov. 26, 2014).

This pattern continued over the next two years, long after Congress passed the first appropriations rider (in December 2014) that the government later claimed impliedly repealed its risk-corridors payment

obligations. In February 2015, HHS repeated its oft-stated position that §1342 "require[d] [HHS] to make full payments to issuers." 80 Fed. Reg. 10,750, 10,779 (Feb. 27, 2015). Then, in an October 2015 letter to Moda, HHS affirmed that "[HHS] recognizes that the [ACA] requires the Secretary to make full payments to issuers, and ... HHS is recording those amounts that remain unpaid ... as fiscal year 2015 obligations of the United States Government for which full payment is required." Pet.App.106.

There was more. In July 2015, Kevin Counihan, CEO of the Health Insurance Marketplaces for CMS, sent a letter to state insurance commissioners instructing them that, in assessing proposed rates for the upcoming year, they should assume insurers would receive full risk-corridors payments from HHS. Letter from Kevin J. Counihan, CMS, to Insurance Commissioners, at 2 (July 21, 2015) (available at https://www.cms.gov/CCIIO/Resources/Letters/Downloads/DOI-Commissioner-Letter-7-20-15.pdf.). Then, in November 2015, not long before Congress enacted the second appropriations rider at issue in these cases, Mr. Counihan sent another letter—this one to insurers—which again "reiterate[d] to [them] that [HHS] recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers[.]" *BCBSNC* C.A.App. 11. CMS repeated the same statement two weeks later in a public bulletin, and then again in 2016. *See* Bulletin, CMS, *"Risk Corridors Payments for the 2014 Benefit Year"* (Nov. 19, 2015); Bulletin, CMS, "*Risk Corridors Payments for 2015*" (Sept. 9, 2016) ("HHS will record risk corridors payments due as an obligation of the United States Government for which full payment is required.").

Meanwhile, all along, *amici* continued to uphold their end of the bargain—writing affordable policies for consumers on the ACA exchanges and, where required, making their own "full" risk-corridors payments to the government. It wasn't until the Fall of 2016—when the government began asserting in briefs filed in the Court of Federal Claims that the appropriations riders impliedly repealed the government's obligation to make full risk-corridors payments, and that no such obligation would be restored in the future absent new funding from Congress—that it became clear the government would take the position it continues to assert in this Court. *See*, *e.g.*, *BCBSNC* Fed.Cl.Dkt. 10, at 26–30 (Sept. 30, 2016). This eventual position, as Petitioners amply demonstrate, can find nothing to support it—whether as a matter of law law or policy. It also raises serious constitutional concerns of fair notice of the law and protection of investment-backed reliance interests—concerns that animate the governing principles of statutory construction in these cases. It is these concerns to which *amici* now turn.

II. The Strong Presumptions Against Implied Repeals And Statutory Retroactivity Serve Critical Due Process Interests In Ensuring Fair Notice Of The Law And Protecting Investment-Backed Reliance.

As Petitioners convincingly demonstrate, the powerful interpretive presumptions against implied repeals and retroactive application of statutes dictate reversal of the Federal Circuit's divided ruling below. Congress never suggested, let alone clearly indicated, that it was repealing the statutory promises on which Petitioners and *amici* relied.

Amici here focus on the critical interests these two "clear-statement" rules of statutory construction serve in these cases, where the government's conduct defies the foundational rule-of-law requirement that one must have fair notice of the law that governs him, and severely impairs the investment-backed reliance interests of the insurers the government lured into the risk-corridors program. *Amici* also will explain why, as a result, strict application of these clear-statement rules is compelled here, where the purported repealing legislation consists of budget appropriation bill riders, and the case for using those riders to erase a critical feature of landmark substantive legislation—as well as substantial, investment-backed reliance interests—is built on the quicksand of snippets of purported legislative history.

The presumptions against implied repeals and statutory retroactivity are long-pedigreed clear-statement principles. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108–09 (1991) (describing presumption against implied repeals as a "kindred rule" to other clear-statement principles); *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 41 (2006) (stating that presumption against retroactivity can only be overcome by a "clear statement"). The Court ordinarily adopts clear-statement rules to protect "weighty and constant values[,]" *Astoria Fed. Sav. & Loan Ass'n*, 501 U.S. at 108; foster "superior values" such as "harmonizing different statutes and constraining judicial discretion in the interpretation of the laws[,]"—values that inspire the presumption against implied repeals itself, *id.* at 108–09; or "avoid a potential constitutional problem[,]" *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991).

Clear-statement rules ensure that Congress really meant in a particular statute to accomplish an objective that has significant implications in "traditionally sensitive areas." *Id.* at 461. Requiring a clear statement in a statute "assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Bond v. United States*, 572 U.S. 844, 858 (2014); *see also Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139 (2005) ("[C]lear statement rules ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation"). "This is obviously important when the underlying issue raises a serious constitutional doubt or problem." *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 544 (2002) (citation omitted).

Clear-statement rules also enhance political accountability by forcing Congress to act transparently when it seeks to legislate significant change with serious consequences. Faced with the high bar of a clear-statement rule, "[s]ophisticated legislators or interest groups will not be able to sneak something by a majority of the enacting coalition, nor will the legislature itself be able to sneak something by the voters." Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 Yale L.J. 2, 38–39 (2008); *see also* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1399 (1953) ("The primary check on Congress is the political check—the votes of the people. If Congress wants to frustrate the judicial check, our constitutional tradition requires that it be made to say so unmistakably, so that the people will understand and

the political check can operate."). Clear-statement rules thus "promote democratic accountability because … [w]hen legislatures are forced to better articulate their policies, voters are better able to understand the content of those policies and to hold their representatives accountable for those decisions." Carissa Byrne Hessick, *Corpus Linguistics and the Criminal Law*, 2017 B.Y.U. L. Rev. 1503, 1528 (2017).

The Court has seen fit to demand clear textual statements in a variety of contexts. Textual clarity is required, for example, before statutes will be read to create tension with constitutional separation-of-powers and federalism principles. *See*, *e.g.*, *Franklin v. Mass.*, 505 U.S. 788, 800–801 (1992) (requiring clear statement before "subject[ing] … the President's performance of his statutory duties to … abuse of discretion" review by courts); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238-239, 242–243 (1985) (requiring clear statement before finding a statute abrogates a State's Eleventh Amendment sovereign immunity). Clear textual expressions also are necessary to protect constitutional rights and ensure judicial review. *See*, *e.g.*, *Raygor*, 534 U.S. at 544 (clear statement required where application of statute "raises a serious constitutional doubt or problem"); *Kucana v. Holder*, 558 U.S. 233, 237 (2010) (applying "'presumption favoring interpretations of statutes [to] allow judicial review of administrative action").

Pertinent here, textual clarity is required to satisfy the two clear-statement rules that dictate the disposition here—the presumptions against implied repeals and the retroactive applications of statutes. As with other clear-statement rules, these presumptions carry out the missions ordinarily assigned to such

rules. *See*, *e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (implied-repeal canon reflects "respect for the separation of powers" and "grow[s] from an appreciation that it's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them"); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 267, 272–73 (1994) (rule against retroactivity "assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits"). This is especially so where appropriations bills are concerned. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 458 (1989) ("The principle that appropriations measures should not be construed to amend substantive statutes … is designed in part to promote responsible lawmaking by ensuring that casual, ill-considered, or interest-driven measures do not overcome ordinary statutes").

Of particular relevance, the implied-repeal and non-retroactivity clear-statement rules also protect the due process values of fair notice and protection of investment-backed reliance interests. The implied-repeal presumption is a "constitutionally inspired canon" that "reflect[s] the courts' important role in safeguarding constitutional values. . . ." Zachary D. Clopton, *Replacing the Presumption Against Extraterritoriality*, 94 B.U. L. Rev. 1, 43 (2014); *see United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (the "'first essential of due process of law' [is] that statutes must give people 'of common intelligence' fair notice of what the law demands of them") (citation omitted). "Americans rely on longstanding legal rules, plan their lives

around them, and assume that most of the really important rules will continue to be in place. … These values of continuity undergird … the presumption against implied repeals." William N. Eskridge, Jr., *Book Review: The New Textualism and Normative Canons. The Interpretation of Legal Texts by Antonin Scalia and Bryan A. Garner*, 113 Colum. L. Rev. 531, 555 (2013).

The presumption against giving even "substantive statutory changes retroactive effect may be the clearest instance of a canon of construction that protects interests of reliance and fair warning." David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. Rev. 921, 944 (1992). "'Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions.'" *E. Enters. v. Apfel*, 524 U.S. 498, 533 (1998) (citation omitted). The rule against retroactivity thus ensures "that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf*, 511 U.S. at 265; *see also De Niz Robles v. Lynch*, 803 F.3d 1165, 1169–70 (10th Cir. 2015) (Gorsuch, J.) (presumption against retroactivity operates "in service of the due process interests of 'fair notice, reasonable reliance, and settled expectations'") (citation omitted).

Protecting fair-notice and reliance interests is a constitutional imperative of the first order. As the regulatory state expands, and statutes and regulations proliferate, it is hard enough for individuals and businesses to even begin to know the law that governs

them. *See FMC v. S.C. State Ports Auth.*, 535 U.S. 743, 755 (2002) ("'The proliferation of Government, State and Federal, would amaze the Framers, and the administrative state with its reams of regulations would leave them rubbing their eyes'") (citation omitted). The Federal Circuit's freewheeling approach only exacerbates the challenge. If even unenacted and barely visible legislative history can support a finding of implied repeal, predicting what a court later might determine the law to be and conforming one's conduct to all the possibilities becomes virtually impossible. And when the consequence of such a decision is the upheaval of settled, investment-backed reliance interests, the result is manifestly unfair—and deeply damaging. Accordingly, this Court's careful application of the presumptions against implied repeals and statutory retroactivity cases is especially warranted in these cases.

III. Given The Vital Constitutional Interests At Stake, No Legislative History—And Certainly Not The Kind Relied On By The Court Below—Can Overcome The Bedrock Presumptions That Control Here.

Petitioners persuasively demonstrate that the purported legislative history upon which the Federal Circuit relied does not come close to the heightened level required to show Congress impliedly altered one of its signature legislative achievements of the twenty-first century. *See*, *e.g.*, Brief for Petitioners Moda Health Plan, Inc. and Blue Cross and Blue Shield of N.C. 35–38.[5]

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[5] The Federal Circuit did not even address the presumption against retroactivity, and there is nothing in the legislative

But even if the government had uncovered actual and more relevant legislative history, that would not change the proper outcome here. This Court recently expressed its "doubt" that any "legislative history alone"—no matter how express—could provide "a clear statement" sufficient to overcome a clear-statement rule like those that control here. *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1633 (2015). In fact, this Court's clear-statement jurisprudence has repeatedly—and rightly—rejected arguments that legislative history could do so.

Even before one gets to that body of precedent, however, first principles of construction are instructive. Most fundamentally, "'legislative history is not the law.'" *Allina Health Servs.*, 139 S. Ct. at 1814 (2019) (quoting *Epic Sys. Corp.*, 138 S. Ct. at 1631). "'It is the business of Congress to sum up its own debates in its legislation,' and once it enacts a statute '[w]e do not inquire what the legislature meant; we ask only what the statute means.'" *Epic Sys. Corp.*, 138 S. Ct. at 1631 (citations omitted). These rules naturally apply with all the more force to "ambiguous legislative history[.]'" *Allina Health Servs.*, 139 S. Ct. at 1814 (citation omitted).

They also apply *a fortiori* to the interpretation of appropriations bills such as those at issue in this case. Indeed, this Court has made clear that garden-variety construction of appropriations legislation—that is, in cases that do not, like this one, involve claims that such legislation repeals existing substantive enact-

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history—or anywhere else to *amici's* knowledge—indicating that the riders were intended to have a retroactive effect.

ments—must focus strictly on "the 'text of the appropriation,' not [on] Congress' expectations of how the funds will be spent, as might be reflected by legislative history." *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 200 (2012) (citation omitted); *see also United States v. McIntosh*, 833 F.3d 1163, 1178–79 (9th Cir. 2016) ("It is a fundamental principle of appropriations law that we may only consider the text of an appropriations rider, not expressions of intent in legislative history."). This must necessarily be the case when, as here, the legislative history of an appropriations bill is said to impliedly repeal an essential feature of a substantive piece of legislation. *See United States v. Will*, 449 U.S. 200, 221–22 (1980) (holding that the strong presumption against implied repeals "applies with especial force when the provision advanced as the repealing measure was enacted in an appropriations bill").

Such a heightened application of the strong presumption against implied repeals makes abundant good sense. Even when it comes to substantive legislation, "no matter how 'authoritative' the [legislative] history may be—even if it is that veritable Rosetta Stone of legislative archaeology, a crystal clear Committee Report—one can never be sure that the legislators who voted for the text of the bill were aware of it." *United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring). This is especially true when interpreting appropriation bills, which themselves "often do not receive adequate consideration" and "are usually … voted on at a time when few if any [legislators] have given them the attention appropriate to questions of policy." Jacques B. LeBoeuf, *Limitations on the Use of Appropriations Riders by Congress to Effectuate Substantive Policy Changes*, 19 Hastings

Const. L.Q. 457, 474 n.124 (1992); *see also McCoy v. Gilbert*, 270 F.3d 503, 510 n.4 (7th Cir. 2001) (rejecting reliance on legislative history of appropriations bill where "[i]ts provisions were never seriously debated, were never the subject of a Senate Judiciary Committee mark-up, and were never explained in any committee report"). It is for this reason that legislators are entitled to assume that appropriations are not "altering substantive legislation" without having to "review exhaustively the background of every authorization before voting on an appropriation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978).

Given all these settled and fundamental principles, by the time one considers specifically whether the legislative history of a rider to an appropriations bill can overcome very strong clear-statement rules like the presumptions against implied repeals and retroactivity, the suspense is over. Indeed, not long ago, Justice Scalia observed that he "kn[e]w of no precedent for the proposition that legislative history can satisfy a clear-statement requirement imposed by this Court's opinions." *Gonzalez v. Thaler*, 565 U.S. 134, 164–65 (2012) (Scalia, J., dissenting). He was right—and nothing has changed since. *See*, *e.g.*, *FAA v. Cooper*, 566 U.S. 284, 290 (2012) ("Legislative history cannot supply" the required clear statutory waiver of sovereign immunity "that is not clearly evident from the language of the statute.") (citations omitted); *INS v. St. Cyr*, 533 U.S. 289, 299 (2001) ("Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal.") (citation omitted); *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997) ("[C]ases where this Court has found truly 'retroactive' effect

adequately authorized by a statute have involved statutory language that was so clear that it could sustain only one interpretation."); *Landgraf*, 511 U.S. at 281 (stating that only an "explicit command" in the statutory text can overcome presumption against retroactivity).[6]

Nor should it, because "[i]f Congress' intention is 'unmistakably clear in the language of the statute,' recourse to legislative history will be unnecessary; [and] if Congress' intention is not unmistakably clear, recourse to legislative history will be futile, because by definition" a clear-statement rule thereby "will not be met." *Dellmuth*, 491 U.S. at 230. It should come as no surprise, then, that this Court has specifically rejected the use of legislative history to overcome the presumption against implied repeals. *See*, *e.g.*, *Epic Sys. Corp.*, 138 S. Ct. at 1631 (rejecting reliance on legislative history to support claimed implied repeal of the Federal Arbitration Act by the National Labor Relations Act); *Hill*, 437 U.S. at 190 (rejecting reliance

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[6] *See also United States v. Nordic Village Inc.*, 503 U.S. 30, 37 (1992) (emphasizing that "legislative history has no bearing on the ambiguity point" in applying a clear-statement rule); *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) ("Legislative history generally will be irrelevant to a judicial inquiry into whether Congress" made a clear statement); *Tin Cup, LLC v. U.S. Army Corps of Eng'rs*, 904 F.3d 1068, 1075 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1619 (2019) (refusing to "delve into legislative history" to determine whether appropriations bill contained the requisite "clear statement of futurity in order to give permanent effect to" its provisions) (citation omitted); *Bldg. & Constr. Trades Dep't, AFL-CIO v. Martin*, 961 F.2d 269, 273 (D.C. Cir. 1992) (rejecting legislative history as basis to overcome "very strong presumption" that appropriations act does not "substantively change existing law").

on committee reports to support claimed implied repeal).

This Court's decision in *Hill* illustrates the proper approach to legislative history in a clear-statement/implied-repeal case. There, the Court concluded that an appropriations bill did not impliedly repeal the Endangered Species Act and authorize construction of a dam (the "Tellico Project"). The Court relied heavily on the fact that there was "nothing in the appropriations measures, as passed, which states that the Tellico Project was to be completed irrespective of the requirements of the Endangered Species Act." 437 U.S. at 189. To be sure, there were numerous statements scattered throughout the House and Senate Appropriations Committees' Reports on the Tellico Project expressing the position that the Endangered Species Act would *not* apply to the Project. *Id.* at 191. But the Court concluded that even those express statements in the legislative history simply "cannot be equated with statutes enacted by Congress" for purposes of the implied-repeal analysis. *Id.* at 191.

Accordingly, under this Court's precedents, even the most crystalline legislative history could not establish an implied repeal where the text of the statute itself does not. That goes double for the obscure, tangential snippets of purported legislative history the Federal Circuit relied on here. The letter from the General Accounting Office's general counsel to two Members of Congress is not even in the legislative record, nor is there any evidence Congress considered it in enacting the riders. Pet.App.48. Courts cannot "'rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have' intended" based on a document Congress may or

may not have even considered. *Wisc. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2073 (2018).

The two sentences buried in a 700-page "explanatory statement" of the appropriations rider that were written by one congressman—addressing HHS's regulatory guidance—are no more illuminating. For one thing, they do not actually reflect *any* individual legislator's view of the meaning of the riders at all. Rather, they refer only to *HHS's guidance*, not the riders, and state only that making the risk-corridors program budget-neutral "was the goal" of HHS's regulation. Pet.App.80. If one legislator's views of a statute cannot override the statute's text, *see NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017) (noting that "floor statements by individual legislators rank among the least illuminating forms of legislative history"), surely his views of an agency's non-binding guidance—issued to accomplish what no statute itself had done—cannot do so.

Not only are these slivers of "legislative history" far from clear indicators of Congressional intent, but for any insurer who might even have learned about that buried history, there was every reason for it to believe that the appropriation riders did *not* impliedly repeal the ACA's risk-corridors provision. For one thing, while the lack of appropriated funds constrains government agencies, it does *not* eliminate an incurred statutory obligation or impair the courts from enforcing it. *See Ramah Navajo Chapter*, 567 U.S. at 191 (explaining that a government "agency itself cannot disburse funds beyond those appropriated to it, [but] the Government's 'valid obligations will remain enforceable in the courts'") (citation omitted); *see also United States v. Langston*, 118 U.S. 389, 394 (1886)

(holding that statute fixing government official's salary could not be "abrogated or suspended by subsequent enactments which merely appropriated a less amount"). For another, Congress uses very specific language when it intends to condition the government's liability on the funds appropriated—language noticeably absent from the riders here. *See*, *e.g.*, *Prairie Cty. v. United States*, 782 F.3d 685, 690 (Fed. Cir. 2015) (involving statute imposing payment obligation on government, but stating that payment "[a]mounts are available *only* as provided in appropriation laws").[7]

Still further, the purported legislative history the Federal Circuit relied upon did not even exist at the time insurers decided to participate in early-to-mid 2013. So even if that history shed any light on the proper interpretation of §1342 or the appropriation riders—and it does not—it obviously could not have alerted insurers to the future prospect of billions of dollars of government non-payments at the time they agreed to participate. This is, to put it mildly, the antithesis of "fair notice."

Ultimately, "Congress 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'" *Epic Sys. Corp.*, 138 S. Ct. at 1626–27 (citation omitted). Here, it is "more than a little doubtful that Congress would have

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[7] Congress did use such language in various provisions of the ACA itself in 2010, *see*, *e.g.*, 42 U.S.C. §280k(a); 42 U.S.C. §300hh-31(a), so it "knew exactly how to" limit ACA-mandated payments to available appropriations in the riders several years later had it wished to do so. *SAS Inst.*, 138 S. Ct. at 1356.

tucked into the mousehole of" the appropriations riders "an elephant that tramples the work done by" §1342 of the ACA and the risk-corridors provisions and "flattens the parties' " freely accepted obligations, *id.* at 1627—all directly contrary to the ACA's central purpose of expanding affordable healthcare by inducing the necessary participation of health insurance companies such as Petitioners and *amici*. *See King*, 135 S. Ct. at 2493 ("'We cannot interpret federal statutes to negate their own stated purposes.'") (citation omitted).

It's all the more doubtful still that Congress intended the riders to repeal §1342 for at least two additional reasons. First, unlike the risk-corridors provision in the appropriation riders, various other provisions in the same riders *did* explicitly repeal existing statutes. *See*, *e.g.*, Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2492 (2014) ("Section 414 of the Social Security Act (42 U.S.C. 614) is repealed."); 128 Stat. at 2525 ("Sections 65, 66, 67, and 68 of the Revised Statutes (2 U.S.C. 6569, 6570, 6571) are repealed."); 128 Stat. at 2774 ("Subtitle C of title II of the Pension Protection Act of 2006 (26 U.S.C. 412 note) is repealed."). Because the appropriations riders thus specifically repealed other statutes, "the general rule that repeals by implication are disfavored is especially strong in this case." *Hagen v. Utah*, 510 U.S. 399, 416 (1994).

Second, Congress's repeated and explicit efforts to repeal §1342 through *substantive* legislation—both before and after it passed the appropriations riders at issue—further reveals the absence of an implied repeal here. *See Fourth Estate Pub. Benefit Corp. v.*

Wall-Street.com, LLC, 139 S. Ct. 881, 891 (2019) (finding it "[n]oteworthy" in construing Copyright Act's registration requirement for bringing suit that "[t]ime and again, … Congress has maintained registration as prerequisite to suit, and rejected proposals that would have eliminated registration").

For all these reasons, a clearer case for rejecting the use of (purported) legislative history to support an implied repeal of a statute by an appropriations bill that results in severe retroactive effect is hard to imagine.

IV. The Federal Circuit's Decision Eviscerates The Fair-Notice And Investment-Backed Reliance Interests Of The Insurers Guaranteed By Due Process.

As shown above and in Petitioners' briefs, the divided panel's ruling below is plainly wrong because it misapplied the controlling principles of construction and erroneously relied on purported legislative history in finding that the appropriations riders impliedly repealed §1342's mandatory-payment provision. Legislative history—especially of the variety relied upon here—cannot support an implied repeal of one statute by another that retroactively impairs one's settled rights and interests, and that finds no grounding in the would-be repealing statute's text. Any other conclusion would be a gross departure from established rules of construction—and, indeed, from foundational separation-of-powers principles.

Beyond this, the divided panel's ruling strikes a damaging blow to core due process principles of fair notice and protection of investment-backed reliance interests—harm this Court can, and should, undo by

reversing the decision below. The record is undisputed that the government made an explicit promise to participating insurers to make the full payments due under §1342, and repeatedly and publicly reassured the insurers that it would honor its end of the bargain. The record also is undisputed that Petitioners—like *amici*—relied on the government's promise in undertaking the risky burden of providing health insurance to numerous, previously uninsured Americans, whose health could not accurately be gauged. And the record is undisputed that, after Petitioners and the *amici* undertook this obligation, upheld their end of the bargain, and fulfilled the conditions necessary to trigger the right to full risk-corridors payments, the government reneged on its promise.

In this light, it is clear that when Petitioners and *amici* decided to participate in the risk-corridors program, they reasonably concluded that the governing law—the ACA's risk-corridors provision that Congress enacted—meant what it said: that if an insurer sustained a certain level of losses during its participation in the program, the government would make the full payments required under the statute. No other conclusion about the meaning of the governing law is, or would have been, plausible. Petitioners and *amici* justifiably relied on the government's unmistakable promise—decidedly to their detriment. The record thus makes clear not only that the government reneged on its binding promise—it ignored the insurers' due process right to fair notice of the governing law and eviscerated their substantial, investment-backed reliance interests after the fact.

The government should keep its promises, especially when failing to do so has serious constitutional

repercussions. When it doesn't, the Court should ensure that those harmed by the government's breach are made whole. At a bare minimum, the Court should ensure that the government honor its statutory promises unless and until Congress repeals them clearly and unequivocally. Only through such transparency will there be true accountability, and will the people be afforded the opportunity to decide whether or not they can abide their government's conduct. It is, after all, *their* government. *See M'Culloch v. Maryland*, 17 U.S. 316, 404–05 (1819) ("The government of the Union … is, emphatically and truly, a government of the people[,]" and all power "emanates from them").

CONCLUSION

For the foregoing reasons and those set forth in Petitioners' briefs, the Court should reverse the decision below.

Respectfully submitted.

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