No. 18-1028

IN THE

Supreme Court of the United States

MODA HEALTH PLAN, INC.,

Petitioner,

v.

UNITED STATES,

Respondent.

BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every economic sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

Many of the Chamber's members partner with the federal government in a variety of areas. Congress promotes these efforts because in many instances the public interest is best served (and frequently, can only be served) with public-private partnerships. These dealings are often conducted pursuant to federal statutes that include financial incentives, risk-sharing arrangements, liability limitations and other provisions that Congress implemented to induce the private sector to participate in the federal program. Such statutory commitments can only be effective, however, if the federal government honors its obligations to the business community and conducts itself as a reliable business partner.

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[1] The parties consented to the filing of this brief. In accordance with Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution to fund its preparation or submission.

By holding that the appropriations riders at issue repealed the government's undisputed statutory obligations—despite the absence of any clear statement to that effect in the riders—the decision below frustrates the legitimate expectations of and creates profound uncertainty for companies that do business and partner with the federal government. If allowed to stand, the decision will have a chilling effect on the business community's work with the federal government in the future, and make it more difficult and expensive for the federal government to accomplish important policy objectives. For all of these reasons, the Chamber has substantial interests in the case under review.

SUMMARY OF ARGUMENT

I. The decision below cannot be reconciled with this Court's precedent establishing the standards that govern whether Congress has repealed, by implication, an existing statutory obligation to private parties. This Court has held that implied repeals of statutory obligations are disfavored and must be clear and manifest. According to the Federal Circuit, Congress implemented the implied repeal through appropriations riders. But that is implausible. Such riders presumptively do not affect Congress' existing statutory obligations. And such a repeal would violate the presumption against retroactive legislation and also raise substantial constitutional doubts under the Due Process Clause and Takings Clause.

II. The decision below, if left uncorrected, will have far-reaching consequences for myriad areas in which U.S. businesses partner with the federal government to provide vital goods and services. In addition to the health insurance context, public-private partnerships serve essential roles in areas as diverse as public housing, infrastructure development, public health, transportation, and nuclear energy. Congress often obtains the cooperation of private industry through financial incentives, risk-sharing arrangements, technical assistance, and other provisions. In many instances, such partnerships are the only way to achieve Congress' objectives. Businesses make substantial financial investments to participate in these federal programs, and their willingness to do so is based on having assurance that the government will honor its statutory commitments.

If the Federal Circuit's view prevails and vague appropriations language, supplemented by snippets of legislative history, can be read as excusing the government from abiding by its commitments, then this precedent will discourage doing business with the government. At a minimum, the government will in the future incur greater costs and risks in running existing public-private partnerships and in pursuing new partnerships.

The decision below should be reversed.

ARGUMENT

I. THE FEDERAL CIRCUIT'S DECISION IS CONTRARY TO THIS COURT'S PRECEDENT GOVERNING THE REPEAL OF STATUTORY OBLIGATIONS.

The Federal Circuit's decision cannot be reconciled with this Court's cases disfavoring implied repeals, especially when they take the form of ambiguous appropriations measures, require resort to legislative history, and operate retroactively to upset reasonable reliance interests. As a result, the Federal Circuit's construction calls into question the constitutionality of Congress' action under the Due Process and Takings Clauses.

A. The Decision Below Conflicts With Precedent Holding That Implied Repeals Must Be "Clear And Manifest."

1. The decision below conflicts with long-established law that (i) "repeals by implication are not favored," *Rodriguez* v. *United States*, 480 U.S. 522, 524 (1987) (per curiam); and (ii) a party advocating such a repeal "bears a heavy burden of persuasion," *Amell* v. *United States*, 384 U.S. 158, 165 (1966).[2] As this Court explained in *Posadas* v. *National City Bank of New York*, 296 U.S. 497, 504 (1936), "[w]here the powers or directions under several acts are such as may well subsist together, an implication of repeal cannot be allowed," *id.*; rather, repeals must be "clear and manifest," and the "implication" of repeal "must be a *necessary* implication," *id.* (emphasis added).

Put another way, "the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 141-42 (2001) (quoting *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974)). Statutes are irreconcilable when "there is a positive repugnancy between them or . . . they cannot mutually exist." *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 155 (1976). "[W]hen two statutes are capable of co-existence, it is the duty of

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[2] *See also* 1A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 23.10, at 475-76 (7th ed. 2009) (the presumption against implied repeals is designed "to give harmonious effect to all acts on a subject where reasonably possible").

the courts . . . to regard each as effective." *Id.* (quoting *Morton*, 417 U.S. at 551). That is because "[r]espect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work" and "respect for the separation of powers counsels restraint." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1624 (2018). Indeed, these rules "aiming for harmony over conflict in statutory interpretation grow 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." *Id.*

2. An examination of Congress' original statutory obligation in Section 1342 and the subsequent language tucked within the appropriations riders confirms that there has been no "clear and manifest" repeal of statutory rights and that there is no "irreconcilable" conflict between Section 1342 and the appropriations riders.

Congress induced private insurers to participate in the Affordable Care Act ("ACA") by granting them a statutory right to payments that would reduce the risk that insurance premiums would be inadequate to cover their allowable costs. Section 1342 of the ACA unequivocally provided that if a plan's "allowable costs for any plan year" were "more than 103 percent but not more than 108 percent of the target amount," then "the Secretary shall pay to the plan an amount equal to 50 percent of the target amount in excess of 103 percent of the target amount." 42 U.S.C. § 18062 ("Section 1342"). Further, the Secretary "shall pay" "80 percent of allowable costs in excess of 108 percent of the target amount." *Id.*

None of the judges below disputed that the "plain language of section 1342 created an obligation of the government to pay participants in the health benefit exchanges the full amount indicated by the statutory formula for payments out under the risk corridors program." Pet. App. 20. Put simply, Section 1342 directed "the Secretary of HHS to establish a program whereby participating plans whose costs of providing coverage exceeded the premiums received (as determined by a statutory formula) would be paid a share of their excess costs by the Secretary—'payments out.'" *Id.* at 5. In turn, "plans whose premiums exceeded their costs (according to the same formula) would pay a share of their profits to the Secretary—'payments in.'" *Id.*[3] The risk corridors program thereby "permit[ted] issuers to lower [premiums] by not adding a risk premium to account for perceived uncertainties in the 2014 through 2016 markets." *Id.* at 5-6 (alterations in original) (quoting HHS Notice of Benefit and Payment Parameters for 2014, 78 Fed. Reg. 15,410, 15,413 (Mar. 11, 2013)).[4]

[3] Specifically, if a plan's "allowable costs" for any "plan year" were less than 97 percent of the target amount, then the Plan would be required to pay to the Secretary a portion of the difference between the target amount and the allowable costs (50 percent where allowable costs were between 92 and 97 percent of the allowable amount and 80 percent "of the excess of 92 percent of the target amount over the allowable costs"). Pet. App. 4 (quoting Section 1342(b)(2)(B)).

[4] The government's obligation to pay was reinforced through official pronouncements by HHS. In March 2013, HHS published parameters for payments for the first year of the exchanges under the risk corridors program, Pet. App. 7, and explained that "'the risk corridors program is not required to be budget neutral,' so HHS would make full payments 'as required under Section 1342,'" *id.* (quoting 78 Fed. Reg. at 15,473). And, in March 2014, HHS again explained that "[i]n the unlikely event of a shortfall for the 2015 program year, HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers" and that "HHS will use other sources of funding for the risk corridors payments, subject to the availability of appropriations." Exchange and Insurance Market

3. The clarity with which the government promised to make the payments contrasts sharply with the ambiguous language in the appropriations rider adopted on December 16, 2014, which stated:

> None of the funds made available by *this Act* from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the "Centers for Medicare and Medicaid Services—Program Management" account, may be used for payments under Section 1342(b)(1) of [the ACA] (relating to risk corridors).

Pet. App. 12 (emphasis added) (quoting Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 227, 128 Stat. 2130, 2491 (2014)). Congress adopted "identical riders in FY 2016 and FY 2017." *Id.* at 13.

This language restricts the use of funds "for payments under section 1342(b)(1)" *only* from specific identified sources from "*this Act*." It does not purport to repeal the underlying obligation of the Secretary to make the mandatory risk corridor payments pursuant to the formula in Section 1342. Nor does it alter the mandatory nature of Congress' statutory obligation by making risk corridor payments contingent on budget neutrality within the scope of Section 1342. The appropriations riders do not impliedly repeal Section 1342's risk corridor obligations because they are not irreconcilable with one another. *Radzanower*, 426 U.S. at 155 ("[W]hen two statutes are capable of co-existence, it is the duty of the courts to regard each as effective.") (alteration

Standards for 2015 and Beyond, 79 Fed. Reg. 30,240, 30,260 (May 27, 2014).

omitted); *Nat'l Ass'n of Home Builders* v. *Defs. of Wildlife*, 551 U.S. 644, 662-63 (2007) ("We will not infer a statutory repeal 'unless the later statute "expressly contradict[s] the original act"' or unless such a construction 'is absolutely necessary . . . .'") (alteration in original).

The appropriations rider can hardly be read as Congress' "clear and manifest" intent to repeal the government's obligation to make risk corridor payments (as opposed merely to restricting how funds made available by "this Act" could be used). Had Congress intended to strike a fundamentally different bargain than the one set forth in Section 1342, this Court's cases require that it "say so" in the text of the statute. *Puerto Rico* v. *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1953 (2016). Congress cannot "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Gonzales* v. *Oregon*, 546 U.S. 243, 267 (2006) (quoting *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)); see also *Epic Sys. Corp.*, 138 S. Ct. at 1627 (same). And, the "vague" and "ancillary language" of the appropriations riders cannot overcome the "cardinal rule . . . that repeals by implication are not favored," *Posadas*, 296 U.S. at 503, or satisfy this Court's requirement of "clear and manifest" language making the "implication" of repeal a "necessary" one, *id.* at 504.

B. The Decision Below Is Inconsistent With Precedent Governing Implied Repeals Through Appropriations Riders And Based On Legislative History.

1. The Federal Circuit's decision also conflicts with this Court's precedent recognizing that appropriations riders are a particularly inapt mechanism for Congress to repeal substantive

statutory obligations. Specifically, the "doctrine disfavoring repeals by implication . . . applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act." *Tenn. Valley Auth.* v. *Hill*, 437 U.S. 153, 190 (1978).[5] In *Hill*, after acknowledging that "both substantive enactments and appropriations measures are 'Acts of Congress,'" this Court held that "the latter have the limited and specific purpose of providing funds for authorized programs," *id.*, and adopted a presumption that appropriations measures do not repeal existing law because otherwise "every appropriations measure would be pregnant with prospects of altering substantive legislation," *id.*

Here, the lower court ignored *Hill* and its presumption against implied repeals via appropriations measures. Indeed, the *Hill* Court highlighted that Congress' operating rules dictate that appropriations bills may *not* change existing law. *Id.* at 190-91 (citing House Rule XXI(2); Rule 16.4 of the Standing Rules of the Senate). As explained below in Judge Newman's dissenting opinion, "burying a repeal in a standard appropriations bill would provide clever legislators with an end-run around the substantive debates that a repeal might precipitate." Pet. App. 47 (quoting *Moda Health Plan, Inc.* v. *United States*, 130 Fed. Cl. 436, 458 (2017)).

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[5] *See also United States* v. *Langston*, 118 U.S. 389, 394 (1886) (holding that "a statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments" when those enactments "merely appropriated a less amount for the services of that officer for particular fiscal years, and which contained no words that expressly, or by clear implication, modified or repealed the previous law").

2. Further, the Federal Circuit relied heavily upon an explanatory statement by the House Appropriations Chairman as the basis for its conclusion that Congress intended to modify the government's obligations under Section 1342. Pet. App. 26-27 (citing 160 Cong. Rec. H9838 (daily ed. Dec. 11, 2014)). Under *Hill*, however, the presumption against implied repeals via appropriations measures applies all the more to mere statements by Appropriations Committees or their members. That is because "[e]xpressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress." *Hill*, 437 U.S. at 191 (rejecting argument that "Congress as a whole was aware" of appropriations committee's statements "dealing with requests for appropriations"). Rather, this Court has been "extremely hesitant to presume general congressional awareness of . . . a few isolated statements in the thousands of pages of legislative documents." *Id.* at 192 (quoting *SEC* v. *Sloan*, 436 U.S. 103, 121 (1978)).

In any event, the legislative history the government cites does not remotely create the necessary inconsistency between Section 1342 and the appropriations riders. Rather, the relevant two-sentence statement by Representative Harold Rogers did not preclude any and all federal funds from being used to pay the government's obligations to health plans, let alone say that Congress was repealing the fundamental statutory obligation to pay in the first instance. His statement was:

> In 2014, HHS issued a regulation stating that the risk corridor program will be budget neutral, meaning that the federal government will never pay out more than it collects from issuers over

> the three year period risk corridors are in effect. The agreement includes new bill language to prevent the CMS Program Management appropriation account from being used to support risk corridors payments.

160 Cong. Rec. H9838 (daily ed. Dec. 11, 2014). This statement explains that the rider prevents CMS Program Management appropriations from being used for risk corridors payments, but does not foreclose the use of *other* sources of money for the risk corridors program.

As the government has acknowledged, Chairman Rogers was referring to the March 2014 HHS regulation, which stated that the risk corridor program would be budget neutral. Br. for the United States in Opp'n 17-18. In the course of promulgating that regulation in March 2014, HHS explained that while it *anticipated* budget-neutrality, it recognized the possibility of further outlays by the government.

> As we stated in the bulletin, we anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments. That said, we appreciate that some commenters believe that there are uncertainties associated with rate setting, given their concerns that risk corridors collections may not be sufficient to fully fund risk corridors payments. *In the unlikely event of a shortfall for the 2015 program year, HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers. In that event, HHS will use other sources of funding for the risk corridors payments, subject to the availability of appropriations*.

Exchange and Insurance Market Standards for 2015 and Beyond, 79 Fed. Reg. 30,240, 30,260 (May 27,

2014) (emphasis added). To the extent Chairman Rogers' statement incorporated HHS's March 2014 regulation, he also logically would have incorporated HHS's explanation that, if necessary, "other sources of funding" would be made available to "make full payments to issuers."

Further, even if Chairman Rogers' statement supported the view that Congress was eliminating any obligation the federal government had to make full payments to issuers in the case of a budget shortfall, other legislative evidence contradicts the view that Congress made its obligation under the risk corridor program contingent on budget neutrality. In 2014, Congress also considered but chose not to enact a bill that would have amended Section 1342 and required budget neutrality in its operation. See Obamacare Taxpayer Bailout Protection Act, S. 2214, 113th Cong. (2014). As this Court has explained, "[w]hen the repeal of a highly significant law is urged upon that body [Congress] and that repeal is rejected after careful consideration and discussion, the normal expectation is that courts will be faithful to their trust and abide by that decision." *Sinclair Ref. Co.* v. *Atkinson*, 370 U.S. 195, 210 (1962) (rejecting finding of an implied repeal where Congress "rejected" an express appeal "after careful consideration and discussion"), *overruled in part on other grounds by Boys Mkts., Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). In this context, Congress' refusal to enact a bill amending Section 1342 in 2014, precludes a finding that Congress impliedly repealed the same provision in "clear and manifest" manner through subsequent appropriations riders.

C. The Decision Below Ignores The Presumption Against Retroactive Legislation.

In addition, the Federal Circuit's decision disregards that "deeply rooted in our jurisprudence" is "the presumption against retroactive legislation." *Landgraf* v. *USI Film Prods.,* 511 U.S. 244, 265 (1994). A retroactive statute is defined as one "tak[ing] away or impair[ing] vested rights acquired under existing laws . . . in respect to transactions or considerations already past." *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 37 (2006) (alterations in original). "Elementary considerations of fairness dictate 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. Further, "[r]etroactive 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." *Gen. Motors Corp.* v. *Romein,* 503 U.S. 181, 191 (1992). Such legislation has therefore long been disfavored under our law. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).[6]

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[6] *See also Dash* v. *Van Kleeck*, 7 Johns. 477, 503 (N.Y. 1811) ("It is a principle in the *English* common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect."); Herbert Broom, *A Selection of Legal Maxims* 24 (8th ed. 1911) ("Retrospective laws are, as a rule, of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law."); *see also* 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1398 (5th ed. 1891) ("Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound

Congress undoubtedly can choose to alter statutory obligations *prospectively* in a manner that respects the legitimate expectations of private parties and that does not undo settled transactions that were made in reliance on those statutory obligations. But interpreting the appropriations riders as repealing the government's statutory obligation to make payments to providers who had already chosen to participate in the risk corridors program, when the promise of such payments had induced them to participate in the first place, would constitute retroactive legislation. Pet. App. 57-58 (Newman, J., dissenting). Here, the appropriations riders must be presumed not to repeal Congress' statutory obligations under the risk corridors program "unless such construction is required by explicit language or by necessary implication." *Fernandez-Vargas*, 548 U.S. at 37. As discussed above, *supra* pp. 7-8, the language of the appropriations riders does not remotely satisfy this high standard.

D. The Decision Below Violates The Canon Of Constitutional Avoidance.

Finally, the decision below should be reversed because congressional action must be interpreted, where reasonably possible, to avoid serious constitutional questions. The "cardinal principle of statutory construction is to save and not to destroy," and therefore this Court has held that "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) ("Even to avoid a serious doubt the

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legislation nor with the fundamental principles of the social compact.").

rule is the same."); *United States* v. *Davis*, 139 S. Ct. 2319, 2332 n.6 (2019) ("[C]ourts should, if possible, interpret ambiguous statutes to avoid rendering them unconstitutional . . . ." (citing *Parsons* v. *Bedford*, 28 U.S. (3 Pet.) 433, 448–49 (1830) (Story, J.)). As a result, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. De Bartolo Corp.* v. *Fla. Gulf Coast Bldg. & Trades Council*, 485 U.S. 568, 575 (1988); accord *Miller* v. *French*, 530 U.S. 327, 336 (2000); *Commc'ns Workers of Am.* v. *Beck,* 487 U.S. 735, 762 (1988); *NLRB* v. *Catholic Bishop of Chi.*, 440 U.S. 490, 499-501 (1979).

Here, the Federal Circuit ignored this canon of constitutional avoidance. It construed the appropriations riders to allow Congress to disavow the government's responsibility to pay private insurers $12.3 billion under the risk corridors program, *after* Congress induced health plans to participate in the program with the promise of full payment. That reading raises serious constitutional questions about the retroactive effects of these riders under both the Due Process Clause and the Takings Clause. See, *e.g.*, *Landgraf,* 511 U.S. at 266; see also *E. Enters.* v. *Apfel*, 524 U.S. 498, 549 (1998) (Kennedy, J., concurring in the judgment) (concluding that retroactive imposition of liability violated the Due Process Clause); see *id.* at 537 (plurality opinion) (retroactive nature of legislation supported conclusion that it violated the Takings Clause).

The Due Process Clause "protects the interests in fair notice and repose that may be compromised by retroactive legislation." *Landgraf*, 511 U.S. at 266; see also *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1324-25 (2016). Because retroactive legislation changes "the legal consequences of transactions long closed," it "can destroy the reasonable certainty and security which are the very objects of property ownership," and therefore "due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity." *Apfel*, 524 U.S. at 548-49 (Kennedy, J., concurring in the judgment). The Takings Clause likewise prohibits retrospective laws affecting property rights. A law that imposes a "disproportionate and severely retroactive burden" upon particular individuals or companies violates "fundamental principles of fairness underlying the Takings Clause." *Id.* at 536-37 (plurality opinion). "[S]tability of investment and confidence in the constitutional system" are undermined by retroactive legislation. *Id.* at 548-49 (Kennedy, J. concurring in the judgment). Accordingly, the Due Process Clause and Takings Clause of the Constitution place restrictions against such retroactive legislation. See *Landgraf*, 511 U.S. at 266 (explaining that, under the Due Process Clause, "a justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its retroactive application").

By construing the appropriation riders to repeal statutory promises that induced participation by private insurance carriers, the Federal Circuit's interpretation changed the legal consequences of these long closed transactions and imposed a disproportionate and severely retroactive burden on these insurance carriers. That interpretation flouts these bedrock restrictions of the Due Process and Takings Clauses and conflicts with the Court's cases mandating that courts construe congressional statutes to avoid rendering them unconstitutional.

II. THE FEDERAL CIRCUIT'S DECISION UNDERMINES PUBLIC-PRIVATE PARTNERSHIPS IN AREAS OF CRITICAL IMPORTANCE TO THE NATIONAL ECONOMY.

Although this case involves the ACA and the health care industry, the Federal Circuit's decision—if allowed to stand—will have far-reaching consequences for myriad areas in which U.S. businesses partner with the federal government to provide vital goods and services. In addition to the health insurance context, public-private partnerships serve essential roles in areas as diverse as public housing, infrastructure development, public health, transportation, and nuclear energy.

In all of these fields, businesses of all sizes invest substantial financial and other resources to participate in federal programs. Congress often encourages the cooperation of private industry through direct and indirect financial incentives, risk-sharing and risk-mitigation measures (such as indemnification, liability limitations, and loan guarantees), technical assistance, and other provisions. In many instances, enlisting private business is the only way for Congress viably to achieve its goals. Private entities rely on the federal government's statutory commitments when deciding whether to participate. If the government can be deemed to renege on those commitments through ambiguous language tucked inside appropriations riders, as the Federal Circuit concluded it did with respect to the ACA's risk corridors program, then that ruling jeopardizes the future of public-private partnerships and the benefits that they provide to both the government and the private sector.

For these reasons, an affirmance of the ruling below would adversely affect numerous members of private industry beyond those before the Court. It would also broadly affect the public interest because the legal uncertainty created by the decision below would jeopardize the ability of the federal government to find willing partners in the business community. At a minimum, that uncertainty would increase the government's costs of entering into public-private partnerships.

A. Congress Has Encouraged A Wide Variety Of Efforts By Private Industry To Implement Important Governmental Priorities.

Private sector businesses, large and small, are deeply involved in implementing federal programs of all types. In addition to the health insurance exchanges at issue in this case, due to Medicare, Medicaid, and other programs, health care in the United States is frequently delivered through programs in which the federal government partners with the private sector. See Br. for *Amicus Curiae* Blue Cross Blue Shield Association in Supp. of Pet'rs 18-20 (Mar. 8, 2019) (discussing the Medicare and Medicaid program); Br. of America's Health Insurance Plans as *Amicus Curiae* in Supp. of Pet'rs 15-18 (Mar. 8, 2019) (same).

The federal government's efforts to ensure affordable housing also depend upon the participation of private businesses. Indeed, the U.S. Department of Housing and Urban Development ("HUD") has stated that "most HUD programs are structurally public-private partnerships" or "have some public-private aspects."[7] HUD has favored public-private partnerships because they "enable government to share risks with the private sector, leverage investments for far greater effect, take advantage of efficiencies outside government, and employ broader knowledge and skills." *Id.* at 2.

Infrastructure and energy development are other areas that utilize public-private partnerships to achieve key federal objectives. The Department of Homeland Security's National Infrastructure Protection Plan ("NIPP"), for example, states that "[v]oluntary collaboration between private sector owners and operators . . . and their government counterparts has been and will remain the primary mechanism for advancing collective action toward national critical infrastructure security and resilience."[8] Consistent with this objective, the

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[7] Office of Policy & Research, U.S. Dep't of Hous. & Urban Dev., *The Evolution of HUD's Public-Private Partnerships*: *A HUD 50th Anniversary Publication*, at 1 (2015), https://www.huduser.gov/hud50th/HUD2-048-Public-Private_Partnership_508.pdf (citing as examples "[t]he nation's foremost low-income tenant assistance subsidy," community development block grants, and the Federal Housing Administration's single-family home mortgage insurance program).

[8] U.S. Dep't of Homeland Sec., *NIPP 2013: Partnering for Critical Infrastructure Security and Resilience*, at 10 (2013), https://www.dhs.gov/sites/default/files/publications/national-infrastructure-protection-plan-2013-508.pdf. The Chamber believes that the use of public-private partnerships is essential to modernizing America's infrastructure. *See* U.S. Chamber of Commerce, *Modernizing America's Infrastructure Requires Public-Private Partnerships* (Jan. 17, 2018), https://www.uschamber.com/issue-brief/modernizing-americas-infrastructure-requires-public-private-partnerships (urging Congress to expand existing federal loan programs, create new loan and loan guarantee programs, make discretionary grants, and remove

Department of the Interior's Bureau of Reclamation "is engaging in internal efforts to further analyze the potential for leveraging [public-private partnerships]" to advance its mission of managing and developing America's water and related resources, particularly in the western states.[9] The Department of Energy also uses public-private partnerships to spur innovation and the development of new energy sources.[10]

Several federal loan guarantee programs rely upon the participation of private financial institutions to extend the loans to beneficiaries. For example, the U.S. Department of Agriculture's Rural Development agency "promote[s] economic development" in rural America "by supporting loans to businesses through banks, credit unions and community-managed lending pools."[11] The U.S. Small Business Administration similarly offers programs in which it "guarantee[s] loans made to small businesses by

barriers to public-private partnerships to modernize the nation's airports, ports, rail systems, dams, and waterways).

[9] *See* Bureau of Reclamation, U.S. Dep't of the Interior, *Bureau of Reclamation Releases Public-Private Partnerships Request for Information Summary*, https://www.usbr.gov/p3/ (last updated Oct. 2, 2017).

[10] *See* Office of Energy Efficiency & Renewable Energy, U.S. Dep't of Energy, *Small Businesses, Big Opportunities: Advancing Building Energy Efficiency through Public-Private Collaboration* (Oct. 27, 2016), https://www.energy.gov/eere/buildings/articles/small-businesses-big-opportunities-advancing-building-energy-efficiency.

[11] U.S. Dep't of Agric. Rural Dev., *About RD*, https://www.rd.usda.gov/about-rd (last visited Sept. 3, 2019) (noting that the agency "has a loan portfolio of more than $224.5 billion").

private and other institutions."[12] In addition, the Department of Energy recently announced the Tribal Energy Loan Guarantee Program, in which it will guarantee up to $2 billion in loans to tribes for energy development projects with "[c]ommercial lenders provid[ing] the debt."[13]

As with the ACA, the federal statutes that create the public-private partnerships often include incentives and protections for private industry to induce and encourage its participation. Congress, for example, enacted the National Child Vaccine Injury Act of 1986 ("Vaccine Act"), 42 U.S.C. §§ 300aa-1 to 300aa-34, to "stabilize the vaccine market," which many manufacturers had exited due to the high costs of tort liability for vaccine injuries. *Bruesewitz* v. *Wyeth*, 562 U.S. 223, 228 (2011). The Vaccine Act incented vaccine manufacturers to re-enter the market by creating a no-fault compensation scheme. This scheme is funded by industry contributions, but provides a valuable "*quid pro quo*" to manufacturers because they are "generally immunized from liability" for tort claims. *Id.* at 229. This Court in *Bruesewitz* recognized the importance of this "structural *quid pro quo,*" when it construed the Vaccine Act as preempting state-law design defect claims. *Id.* at 239. The Court reasoned that Congress "would hardly coax manufacturers back into the market" if it had preserved their liability for design defects. *Id.* at 240.

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[12] Office of Fin. Assistance, U.S. Small Bus. Admin., *Resources*, https://www.sba.gov/offices/headquarters/ofa/resources/11421 (last visited Sept. 3, 2019).

[13] Loan Programs Office, U.S. Dep't of Energy, *Tribal Energy Loan Guarantee Program*, https://www.energy.gov/sites/prod/files/2019/03/f60/LPO-tribal-energy-final.pdf.

The Atomic Energy Act similarly includes provisions that limit liability for accidents resulting from the operation of private nuclear power plants. See 42 U.S.C. § 2210. Congress designed these liability caps to "encourage[] the private sector to become involved in the development of atomic energy for peaceful purposes." *Duke Power Co.* v. *Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 63 (1978). This Court rejected due process and equal protection challenges to the liability limitations extended to nuclear power plant operators, finding that the record "fully support[ed] the need for the imposition of a statutory limit on liability to encourage private industry participation" in the production of nuclear energy. *Id.* at 84.

The government's partnership with industry sometimes takes the form of direct financial support to ensure that private companies can provide vital services. For example, in the aftermath of the September 11, 2001 terrorist attacks, Congress enacted the Air Transportation Safety and System Stabilization Act "to preserve the continued viability of the United States air transportation system from potentially ruinous tort liability in the wake of the attacks." *Schneider* v. *Feinberg*, 345 F.3d 135, 139 (2d Cir. 2003) (per curiam). The legislation included "financial and tax relief to the airline industry, including federal support for airline insurance." *Can. Life Assurance Co.* v. *Converium Ruckversicherung (Deutschland) AG*, 335 F.3d 52, 55 (2d Cir. 2003). It also capped the tort liability of air carriers and created a victim compensation fund, which conditions claimants' recovery upon waiver of the right to file court actions. *Schneider*, 345 F.3d at 139.

Regardless of the precise forms of participation in federal programs by the private sector, the federal government's statutory commitments are a necessary precondition to the participation and cooperation of private businesses and, therefore, a critical component of the success of these programs.

In addition to statutory obligations, the federal government enters into direct contractual relationships with private sector businesses to obtain critical goods and services. The federal government spends "about $500 billion each year on contracts."[14] In fiscal year 2018, the U.S. General Services Administration's list of the largest 100 federal government contractors included 65 companies with more than $1 billion in federal dollars obligated, with defense contractors topping the list.[15] Small businesses are also awarded a substantial portion of federal contracts.[16] The federal government contracts with businesses to provide everything from

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[14] U.S. Dep't of the Treasury, *Beta Datalab, Contract Explorer*, https://datalab.usaspending.gov/contract-explorer.html (last visited Sept. 3, 2019).

[15] U.S. Gen. Serv. Admin., *Federal Procurement Data System - Next Generation - Top 100 Contractors Report - Fiscal Year 2018*, https://www.fpds.gov/downloads/top_requests/Top_100_Contractors_Report_Fiscal_Year_2018.xls (Lockheed Martin, $40.6 billion; Boeing, $29.8 billion; Raytheon, $18.8 billion; General Dynamics, $17.5 billion; Northrop Grumman, $12 billion).

[16] U.S. Small Bus. Admin., Press Release No. 18-39, *The Federal Government Achieves Small Business Contracting Goal for the Fifth Consecutive Year with Record-Breaking $105 Billion to Small Businesses* (May 22, 2018), https://www.sba.gov/about-sba/sba-newsroom/press-releases-media-advisories/federal-government-achieves-small-business-contracting-goal-fifth-consecutive-year-record-breaking (reporting that in fiscal year 2017, the federal government "award[ed] 23.88 percent in federal contract dollars to small businesses totaling $105.7 billion").

shoes to private prisons.[17] The willingness of companies to do business with the United States depends upon the government honoring its contractual commitments by paying for what it orders.

B. Critical To Any Public-Private Partnership Is A Need For Certainty And A Shared Understanding That, Absent A Clear And Explicit Repeal, Congress Will Abide By Its Legal Obligations To Private Parties.

Businesses that partner with the federal government make substantial investments of money, time, and resources to comply with Congressional mandates and regulatory requirements. Given the need for these investments, it is crucial that businesses have reasonable certainty that the government will honor its statutory obligations. Absent such certainty, potential participants will be far less willing to put significant investments at risk, particularly when faced with novel market conditions, such as those that existed when the ACA's health insurance exchanges were first launched.

For private industry confidently to rely upon Congress' statutory commitments, Congress must adhere to them unless and until it implements changes through clear and manifest statements that apply prospectively. These policy considerations underlie the principles that this Court has adopted

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[17] *See* Matthew McMullan, All. for Am. Mfg., *New Balance Lands a Contract to Supply Military Recruits with Sneakers* (Mar. 16, 2018), https://www.americanmanufacturing.org/blog/entry/new-balance-lands-a-contract-to-supply-military-recruits-with-sneakers; Fed. Bureau of Prisons, *Contract Prisons*, https://www.bop.gov/about/facilities/contract_facilities.jsp (last visited Sept. 3, 2019).

disfavoring repeals by implication, retroactive legislation, and statutory constructions that raise serious constitutional questions. See Part I, *supra.* Those principles ensure that private parties will continue to participate in federal programs because they understand the ground rules up front.

The Federal Circuit's decision, in contrast, threatens to destroy the trust necessary for public-private partnerships to flourish. By permitting implied repeal based upon ambiguous language in appropriations riders and snippets of legislative history, the Federal Circuit has materially increased the risks of participation in federal programs. Entities considering such participation will now understand they face a significant risk that their investment-backed expectations can be undone through ambiguous language that shields lawmakers from political responsibility. Indeed, the large losses incurred by health insurers as well as the many health cooperatives that went out of business due to the lack of promised risk corridor payments, see Pet. App. 84, stand as a cautionary tale to all businesses that are considering participation in public-private partnerships.

The Federal Circuit's reliance on appropriations riders and legislative history to infer an implied repeal, *e.g.*, Pet. App. 34, is particularly problematic because it imposes an unrealistic burden on businesses. Appropriations bills are voluminous documents, and "legislative history" is often embodied in varied and scattered sources such as congressional reports, hearing records, floor statements, and Presidential signing statements that may be issued over an extended period of time. It is not realistic or reasonable to impose upon private companies, particularly small ones, the burden of identifying such voluminous documents and scouring them to determine whether a clear pre-existing statutory mandate remains in effect or has been reneged impliedly through a subsequent appropriations rider or floor statement. Businesses have neither the resources nor expertise to monitor continually whether the government is engaging in a bait-and-switch through surreptitious action that is not clear and manifest in the text of the statute. The business community cannot efficiently operate under a system where it is forced to guess whether courts will construe appropriations riders or legislative history to eliminate Congress' express statutory commitments.

The Federal Circuit's reliance on language buried in appropriations riders and legislative history also ignores fundamental principles of good government. As Judge Newman cogently stated in her dissent from the denial of *en banc* review, "[t]his is a question of the integrity of government." Pet. App. 67. When Congress buries a legislative repeal in an appropriations rider, it shuts out "substantive debates that a repeal might precipitate." *Id.* at 47 (quoting the opinion of the Court of Federal Claims). Such lack of transparency undermines trust in government. The government cannot demand that its private sector partners "turn square corners," yet treat obligations as "a one-way street." *Id.* at 67 (quoting *Fed. Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 387-88 (1947) (Jackson, J., dissenting)). Companies that suffer losses due to broken government promises will cease doing business with the government altogether. At the end of the day, "[t]he government's access to private sector products and services is undermined if non-payment is readily achieved after performance by the private sector." *Id.* at 68.

This Court has emphasized these principles in the related context of federal contracting. In *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996) (plurality opinion), the Court stated that the federal government has a "long-run interest as a reliable contracting partner in the myriad workaday transaction of its agencies." *Id.* at 883; see also *id.* at 884 (describing the federal government's "practical capacity to make contracts" as "'of the essence of sovereignty' itself" (quoting *United States* v. *Bekins*, 304 U.S. 27, 51-52 (1938))). The Court cautioned against "expanding the Government's opportunities for contractual abrogation, with the certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements." *Id.* In *Salazar* v. *Ramah Navajo Chapter,* 567 U.S. 182 (2012), this Court similarly advised that if the federal government does not act as "a reliable contracting partner" that adheres to its commitments, then "contracting would become more cumbersome and expensive for the Government, and willing partners more scarce." *Id.* at 191-92 (quoting *Winstar*, 518 U.S. at 883 (plurality opinion)). The Court specifically warned that "[i]f the Government could be trusted to fulfill its promise to pay only when more pressing fiscal needs did not arise, would-be contractors would bargain warily—if at all—and only at a premium large enough to account for the risk of nonpayment." *Id.*

These concerns about the consequences of private entities not being able to rely on the government's contractual promises apply with even greater force to Congress' direct actions in making express statutory commitments. The decision below "expand[s] the Government's opportunities for [statutory] abrogation," *Winstar*, 518 U.S. at 884 (plurality opinion), and thereby sends the private sector the alarming message that it cannot rely upon the government's statutory commitments. Accordingly, if the decision below is allowed to stand, the government will be required to expend greater resources than necessary to partner with private industry. The government will incur greater costs and risks of running existing public-private partnerships, and of pursuing new partnerships in the future.

CONCLUSION

For these reasons, the Court should reverse the decision of the United States Court of Appeals for the Federal Circuit.

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