Nos. 2019-1290, 2019-1302, 2019-1633, 2019-2102

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

SANFORD HEALTH PLAN, MONTANA HEALTH CO-OP,
Plaintiffs-Appellees,
v.
UNITED STATES OF AMERICA,
Defendant-Appellant.
Appeals from the U.S. Court of Federal Claims,
Case Nos. 18-136C & 18-143C, Judge Elaine D. Kaplan

COMMUNITY HEALTH CHOICE, INC.,
Plaintiff-Appellee,
v.
UNITED STATES OF AMERICA,
Defendant-Appellant.
Appeal from the U.S. Court of Federal Claims,
Case No. 18-5C, Chief Judge Margaret M. Sweeney

MAINE COMMUNITY HEALTH OPTIONS,
Plaintiff-Appellee,
v.
UNITED STATES OF AMERICA,
Defendant-Appellant.
Appeal from the U.S. Court of Federal Claims,
Case No. 17-2057C, Chief Judge Margaret M. Sweeney

JOINT SUPPLEMENTAL BRIEF FOR APPELLEES ADDRESSING *MAINE COMMUNITY HEALTH OPTIONS V. UNITED STATES*, NO. 18-1023 (S. CT. APRIL 27, 2020)

CROWELL & MORING LLP
Stephen J. McBrady
Daniel W. Wolff
Clifton S. Elgarten
1001 Pennsylvania Ave. NW
Washington, DC 20004-2595
Tel.: (202) 624-2547
Attorneys for Appellees Maine Community Health Options, Montana Health CO-OP, and Sanford Health Plan

FAEGRE DRINKER BIDDLE & REATH LLP
William L. Roberts
Jonathan W. Dettmann
Nicholas J. Nelson
Elizabeth M.C. Scheibel
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Tel.: (612) 766-7000
Attorneys for Appellee Community Health Choice, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other

Maine Community Health Options v. United States, 590 U.S. ___, 140 S. Ct. 1308 (2020), compels a finding of liability in this case against the Government on the plaintiff/appellee health plans' statutory claims. The Court in *Maine* considers and rejects *every* argument the Government has raised in this case against liability. Further, while this Court's supplemental damages question was not directly at issue in *Maine*, the Supreme Court's rationale leaves no room to reduce the damages plainly owed under the express statutory language that governs this case. On both right and remedy, the statute requires that the judgment be affirmed.

RELEVANT BACKGROUND

Maine involves Affordable Care Act (ACA) Section 1342, which established a risk-sharing program (referred to as risk corridors), pursuant to which both insurers and the Government were required to make payments to the other depending on the amount of costs expended by each insurer in a given year. In relevant part, Section 1342 states:

> (a) IN GENERAL.—The Secretary [of Health and Human Services] *shall establish and administer* a program of risk corridors for calendar years 2014, 2015, and 2016….
>
> (b) PAYMENT METHODOLOGY.—
>
> (1) PAYMENTS OUT.—The Secretary *shall provide* under the program established under subsection (a) that if –
>
> (A) a participating plan's allowable costs for any plan year are more than 103 percent but not more than 108 percent of the target amount, 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; and
>
> (B) a participating plan's allowable costs for any plan year are more than 108 percent of the target amount, the Secretary *shall pay* to the plan an amount *equal to* the sum of 2.5 percent of the target amount plus 80 percent of the allowable costs in excess of 108 percent of the target amount.

42 U.S.C. § 18062 (emphasis added).

The ACA did not include an appropriation for risk corridors payments and did not give the Secretary of Health and Human Services (HHS) express advanced budget authority to obligate or make those payments. But the ACA also did not make risk corridors payments subject to the availability of appropriations.

Regarding the statutory claims, the United States advanced three arguments relevant here. *First*, the United States contended that because Congress did not appropriate funds for risk corridors payments, the Government was not required to make those payments. According to the Government, any statutory command to the United States to make payment must always be interpreted against the backdrop of the Appropriation Clause and the Anti-Deficiency Act. *See* Br. Resp't at 20, *Maine Cmty. Health Options v. United States*, Case No. 18-1023 (S. Ct. filed October 21, 2019). *Second*, and relatedly, the Government argued that Section 1342 did not provide a cause of action to health plans, contending that it was "implausible" to think Congress intended plans to have claims under the Tucker Act where Congress itself chose not to fund the risk corridors program. *See id.* at 29. *Third*, the Government contended

that even if Section 1342 created an obligation of the United States in the first instance, later appropriations acts repealed that obligation. *See id.* at 43-46.

ARGUMENT

The Supreme Court in *Maine* addressed three questions: (1) did Section 1342 of the ACA obligate the United States to pay insurers "the full amount calculated by that statute"?; (2) if so, did those obligations survive Congress' decision not to fund those obligations through appropriations?; and (3) if an obligation was created and not negated, does a right of action against the United States for money damages exist under the Tucker Act? *Maine*, 140 S. Ct. at 319.

The Court answered all three questions in the affirmative. That outcome requires this Court's affirmance of the decisions below. In this case, the Government frames the question presented as "[w]hether the insurers' statutory claims fail because Congress did not intend for insurers to receive damages as compensation for cost-sharing payments that Congress declined to fund." Under *Maine*, the answer is clearly no.

The first idea embedded in the Government's question—that Congress does not obligate the Government unless it appropriates money—was already rejected by *this* Court in *Moda*,[1] *and* was unequivocally rejected by the Supreme Court in *Maine*. The second idea embedded in the Government's question—that lack of an

[1] *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311 (Fed. Cir. 2018).

appropriation precludes a Tucker Act claim—was also rejected in *Maine*. The Supreme Court made it crystal clear that a statute mandating the payment of money creates a cause of action in the Court of Federal Claims if the Government fails to make the mandated payment and there is no other judicial remedy available.

I. *MAINE* IS DISPOSITIVE ON THE ISSUE OF LIABILITY.

Section 1402 of the ACA requires insurers to provide certain cost-sharing reductions, or CSRs, to eligible enrollees of ACA-exchange silver plans. The statute specifies the amounts of these required CSRs. *See* §1402(c). The Government, in turn, must reimburse insurers the amount of those CSRs. The statute states in relevant part:

> An issuer of a qualified health plan making [CSRs] under this subsection shall notify the Secretary of such [CSRs] and ***the Secretary shall make periodic and timely payments to the issuer equal to the value of the [CSRs]***.

42 U.S.C. § 18071(c)(3)(A) (emphasis added).

Section 1402 shares key attributes with Section 1342. For one thing, it compels payment: "the Secretary shall make periodic and timely payments." For another, it defines the amount owed with precision: "equal to the value of" the CSRs.

As with Section 1342, Congress did not specifically appropriate funds for HHS to make CSR payments in the ACA and did not give HHS express advanced budget authority to make those payments. But, as with Section 1342, Congress did not make CSR payments subject to the availability of appropriations.

The Government here advances the same arguments it made in *Maine*. As in *Maine*, the Government argues that Section 1402 must be read "in light of the Anti-Deficiency Act" and that because Congress did not appropriate funds for the agency to make CSR payments, Section 1402 does not obligate the United States. The Government also argues that Section 1402 does not create a cause of action in the Court of Federal Claims. And, finally, although Congress never expressly prohibited HHS from using its general appropriation to make CSR payments, as it did with risk corridors (*i.e.*, there is not even arguably an appropriations rider in this case), the Government contends that Congress' decision not to appropriate funds specifically for CSRs should be considered some sort of *implicit* appropriations rider, akin to the riders passed in connection with Section 1342.

All of these arguments must fail here for the same reasons they failed in *Maine*.

a. Congress can obligate the United States independent of the appropriations process.

Addressing the argument that Congress does not obligate the United States unless it appropriates money, the Supreme Court confirmed what was already reflected in its own cases and those from this Court (and its predecessor Court of Claims). Echoing this Court's decision in *Moda*,[2] the Supreme Court agreed with the appellees in this case: "[i]ncurring an obligation, of course, is different from paying one." *Maine*, 140 S. Ct. at 1319. Although "typically" Congress creates programs administered by agencies

[2] *See Moda*, 892 F.3d at 1322.

and grants those agencies budget authority to incur obligations, "Congress can deviate from this pattern." *Id.* at 10.

And one of the ways Congress can do that is by creating an obligation "directly by statute." *Id.* The Court cited *Langston*[3] as one illustration of Congress doing just that, and pointed out that the GAO "shares this view." *Id.* at 11. "Put succinctly," the Court said, "Congress can create an obligation directly through statutory language." *Id.*

Turning to the risk corridors program, the Supreme Court held that Section 1342 "imposed a legal duty of the United States that could mature into a legal liability through the insurers' actions—namely, their participating in the healthcare exchanges." *Id.* "The first sign that the statute imposed an obligation is its mandatory language: 'shall.'" *Id.* at 12. And the Supreme Court noted that its plain-meaning interpretation was buttressed both by the language used in other ACA provisions (contrasting uses of "shall" with uses of "may") and the fact that HHS had long interpreted Section 1342 to impose an obligation on the United States. *See id.* at 12-13 & n.6.

The Supreme Court then rejected the Government's novel application of the Appropriations Clause and the Anti-Deficiency Act:

---

[3] *United States v. Langston*, 118 U.S. 389, 394 (1886).

> Neither the Appropriations Clause nor the Anti-Deficiency Act addresses whether Congress itself can create or incur an obligation directly by statute.

Id. at 13. Rather, those provisions constrain only the executive branch. *See id.*; *accord id.* at 14 (pointing out that not granting "budget authority" to HHS was also immaterial to whether Congress *itself* obligates the Government directly by statute).[4]

As the Court of Federal Claims has held in these CSR cases, the "shall make . . . payments" command of Section 1402 is equivalent to the "shall pay" command of Section 1342. And there is no distinction between the Government's argument in *Maine* and the Government's argument here that the ACA's mandatory payment language should be read as not-mandatory. In *Maine*, the Supreme Court held that "the plain terms of the Risk Corridors provision created an obligation neither contingent on nor limited by the availability of appropriations or other funds." *Maine*, 140 S. Ct. at 1323. The same is true of Section 1402.

b. It follows that a lack of CSR appropriations does not affect the obligation. In *Maine*, the Government argued that even if Section 1342 of the ACA created an obligation when enacted, subsequent riders to the appropriations legislation impliedly negated that

[4] Indeed, the Court pointed out that if every statute mandating payment must be interpreted inherently as subject to the availability of appropriations, then it would be superfluous for Congress to qualify numerous other provisions in the U.S. Code, including other provisions of the ACA, expressly as subject to the availability of appropriations. *See Maine*, 140 S. Ct. 1322-23, n.7.

obligation. This Court in *Moda* had ruled for the Government on that basis.[5] The Supreme Court reversed, reiterating the strong presumption against implied repeals, and making clear that Congress' failure to fund the risk corridors program came nowhere close to demonstrating an intent to repeal the obligation created by Section 1342.

Although similar appropriations riders do not exist with respect to the CSR program, the Government has tried to raise the same rationale here:

> It is incontestable that Congress can through its funding decisions demonstrate an intent to modify or suspend a substantive statute. Here … Congress made clear through its annual appropriations acts that it did not intend for cost-sharing payments to be made. Indeed, Congress pointedly refused the prior Administration's request to appropriate the funds HHS would need to make cost-sharing payments.

Sanford, Govt. Op. Br. at 40. *See also id.* at 40-41 ("When, as here, Congress enacts an appropriations bill for HHS that provides no funding for HHS to make cost-sharing payments, Congress has by 'clear implication' suspended section 1402's instruction to HHS to make such payments.").

The Government's position is without merit. The Supreme Court's rejection of the "implied repeal" argument in *Maine* leaves no room for the Government to argue here that *silence* as to the funding of the CSR program triggers a "repeal" of the obligation created by Section 1402.

---

[5] *See Moda*, 892 F.3d at 1328-29.

"The Government must point to 'something more than the mere omission to appropriate a sufficient sum.'" *Maine*, 140 S. Ct. at 1323 (quoting *United States v. Vulte*, 233 U.S. 509, 515 (1914)). The Supreme Court held in *Maine* that reasonable alternative interpretations of the riders existed, and that the Government could therefore not overcome the strong presumption against implied repeals because it could not show that repeal was the only possible interpretation. *Id.* at 18-19. That is consistent with the Court of Federal Claims' decisions here, which uniformly held that Congress' failure to appropriate funds for CSR payments did not amend or repeal the obligation created by Section 1402. *See, e.g.*, *Maine Cmty. Health Options v. United States*, 142 Fed. Cl. 53, 70 (2019). If anything, the lack of any appropriations legislation addressing CSR payments makes the obligation under Section 1402 an even less likely candidate for implied repeal than the risk corridors program.[6] As does the fact that apparently HHS did not detect any implied repeal, as evidenced by the fact that HHS *made CSR payments* every month from January 2014 to October 2017.

Further, while the Government has tried throughout this case to minimize the Supreme Court's holding in *Langston*, the Court in *Maine* cited *Langston* multiple times in favor of the health plans' position. *See Maine*, 140 S. Ct. at 1320-24. Most

[6] Nor does the legislative history help the Government: it merely states that no appropriation is being made, but an appropriation is not required for there to be an obligation. In any event, in *Maine*, the Supreme Court rejected the Government's reliance on a floor statement to support the implied repeal argument. *See Maine*, 140 S. Ct. at 1326-27.

importantly on the question of implied repeal, the Supreme Court held that "*Langston* confirms that the appropriations riders" neither repealed nor discharged the Government's obligation under Section 1342. Again, there is no room for the Court in this case to reach a different conclusion with respect to Congress' mere failure to appropriate funds to make CSR payments.[7]

c. Section 1402 provides a cause of action under the Tucker Act. The final question in *Maine* was whether Section 1342's "shall pay" mandate created a right of action against the United States in the Court of Federal Claims. In answering this question in the affirmative, the Supreme Court emphasized two points that appellees have also stressed in this case: so long as (1) a statute can be "fairly interpreted" to mandate the payment of money by the United States, (2) that payment is not made, and (3) there is no alternative judicial remedy available, the aggrieved would-be payee can sue for damages under the Tucker Act. *See Maine*, 140 S. Ct. at 1327-28. A statutory command like "shall" reflects congressional intent "'to create both a right and a remedy.'" *Id.* (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 906, n.42 (1988)).

[7] The Supreme Court in *Maine* also found it probative that HHS itself never thought Congress had negated the risk corridors obligation, since HHS repeatedly acknowledged that the risk corridors payments remained an obligation of the United States. *See Maine*, 140 S. Ct. 1324-25. The same is true for the CSR program. HHS ensured that CSR payments *were made* for 45 consecutive months from 2014 to 2017, and it argued in federal court in *U.S. House of Representatives v. Burwell* that Section 1402 "requires the government to pay cost-sharing reductions to issuers" and that the obligation could be enforced by insurers in a Tucker Act lawsuit. *See* Defs.' Mem. ISO Mot. For Summ. J., *U.S. House of Representatives v. Burwell*, Case No. 1:14-cv-01967-RMC, Dkt. No. 55-1 (D.D.C. filed Dec. 2, 2015) at 20.

The Supreme Court found it important that Section 1342 seeks damages only for "past conduct," using "a backwards-looking formula to compensate for losses incurred in providing healthcare coverage for the prior year." *Id.* at 27. The Supreme Court said it was not breaking "new doctrinal ground" on this front, and it highlighted this Court's money-mandating jurisprudence as "concur[ring] in our conclusion." *Id.* n.13.

Finally, the Supreme Court stressed that there was no credible basis on which risk-corridors suits could be an exception to these rules. First, it stressed that the ACA does not provide "its own judicial remedies." *Id.* Unlike in *Bormes*,[8] for example (on which the Government relied in *Maine* as well as in these cases), the Government could not identify any "comparable remedial scheme" in the ACA or anywhere else. Second, distinguishing *Bowen*, the Court pointed out that because the plans were seeking damages and not "prospective, nonmonetary relief to clarify future obligations," relief was not otherwise available or appropriate under the Administrative Procedure Act. *Id.* at 28-29.

The "shall pay" command of Section 1342 and the "shall make . . . payments" command of Section 1402 are equivalent. The conclusion in *Maine* that Section 1342 creates both a right and a remedy applies in every respect to Section 1402. Appellees

[8] *United States v. Bormes*, 568 U.S. 6 (2012).

in these cases seek only damages for CSR payments the Government was required to make but did not.[9]

At oral argument, the Government asserted that there was a "hydraulic connection" between CSR payments required under Section 1402 and advance premium tax credits paid out to eligible enrollees (via their plans) under Section 1401. According to the Government, Congress "would have understood" when drafting the ACA in 2010 that: (i) if the Government at some future point refused to make CSR payments; (ii) health insurers would try to raise premiums on some or all of those insureds; (iii) state regulators would approve such increases; (iv) the Federal Government would consequently pay more in advance premium tax credits; (v) which would ultimately benefit insurers by luring more customers onto the exchanges. *Sanford*, Govt. Opening Br. at 20-22. In effect, the Government argues that the theoretical ability of insurers to recoup losses indirectly—by raising rates—precludes the suggestion that Congress *intended* to allow suits for damages in the Court of Federal Claims.

---

[9] The CSR program still exists. But that does not make it similar to *Bowen* where the case and the plaintiff's claim implicated "a complex ongoing relationship" between the states and federal government under the Medicaid program, and the states were seeking *prospective* relief—essentially asking the court to help manage that relationship. *Maine*, 140 S. Ct. at 13310. Here: (1) Health plans are required to reduce cost-sharing, by statute; (2) the Government is required to make mandatory payments, by statute. Any damages arising under the CSR program, in either direction, arise only *after* one party fails to perform its obligation.

This argument was utterly implausible when it was raised initially, and the *Maine* decision extinguishes it altogether. *Maine* makes clear that, when the Government defaults on a statutory payment mandate, the only exception to the Tucker Act remedy is if there is a "comparable remedial scheme" that provides for "its own judicial remedies." *Maine*, 140 S. Ct. at 1329-30. The Government's argument—which depends on health insurers acting *contrary* to the ACA's goal of keeping premiums low—finds no support in the statute, legislative history, or anything HHS ever said, and must be rejected in light of *Maine*.

II. THE "DEFAULTED AMOUNT" IS THE MEASURE OF DAMAGES.

Maine also confirms that the measure of damages in this case is the amount that the statute requires to be paid. The Supreme Court explained that the controversy in *Maine* was, in part, "whether . . . insurers who claim losses under the Risk Corridors program[ ]have a right to payment . . . and a damages remedy *for the unpaid amounts*." *Maine*, 140 S. Ct. at 1315 (emphasis added). In this case as well, the Court's analysis leaves no room to reduce the damages below "the unpaid amounts" specified by the statute.

Maine is clear that in cases like this one, the payment obligation and the Tucker Act remedy arise together: "Statutory 'shall pay' language often reflects congressional intent to create both a right and a remedy under the Tucker Act." *Id.* at 26. The Supreme Court credits Justice Scalia's dissent in *Bowen* for the elementary rule that "a statute commanding the payment of a specified amount of money by the United

States impliedly authorizes (absent other indication) a claim for damages *in the defaulted amount*." *Id.* at 26 (emphasis added). And it held that the "shall pay" language in Section 1342 "falls comfortably within" this class. *Id.* at 26-27. As a result, in *Maine* the "defaulted amount" was "the sum that § 1342 prescribes." *Id.* at 13. This followed from the fact that Section 1342 *prescribed* amounts the Government "shall pay" in an unambiguous and specific formula: "an amount *equal to*" a fixed percentage of excess costs depending on how much the plan exceeded its "target amount" of "allowable costs" (both defined terms). 42 U.S.C. § 18062(a)&(b)(1) (emphasis added).

In Section 1402, Congress used equivalent language to prescribe what the Government owes insurers for CSRs. The statute mandates that "the Secretary *shall make* periodic and timely payments to the issuer *equal to the value of the [CSRs]*." 42 U.S.C. § 18071(c)(3)(A) (emphasis added). As in *Maine*, this specific statutory payment amount is the "defaulted amount" that the Government owes. The statute unambiguously requires payment of a specified sum:

- For three years (2014-2016), the Government made the required CSR payments, and no amount is in dispute;
- In the fourth year (2017), the Government made only some of the required CSR payments, and the remainder is owed to the health plans;
- In the fourth year (2018), the Government made none of the required CSR payments, and this full amount is owed to the health plans.

Against this back drop, the decisive fact is that over this period, Congress has not amended, reduced, or otherwise changed the United States' statutory obligation to

make periodic and timely payments to the issuer *equal to the value of the CSRs*. The Government has argued that, when it defaults on a statutory payment obligation, courts must measure Tucker Act damages through an open-ended analysis into how plaintiff responded to the nonpayment, and what the ultimate downstream effect on plaintiff's bottom line may have been. *Maine* demonstrates that this approach is error: when a statute requires payment of a "specified amount of money," Tucker Act damages are that amount.

So here: as with Section 1342, Section 1402 "mean[s] what it says." *Maine*, 140 S. Ct. at 1321. And as in *Maine*, the text of Section 1402 contains both appellees' right and remedy.

CONCLUSION

Maine supports affirmance and entry of judgment in the amount of the CSR payments owed but not paid.

Respectfully submitted,

/s/ Stephen J. McBrady
CROWELL & MORING LLP
Stephen J. McBrady
Daniel W. Wolff
Clifton S. Elgarten
1001 Pennsylvania Ave. NW
Washington, DC 20004-2595
Tel.: (202) 624-2547

Attorney for Appellees Maine Community Health Options, Montana Health CO-OP, and Sanford Health Plan,

/s/ William L. Roberts
FAEGRE DRINKER BIDDLE & REATH LLP
William L. Roberts
Jonathan W. Dettmann
Nicholas J. Nelson
Elizabeth M.C. Scheibel
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Tel.: (612) 766-7000

Attorneys for Appellee Community Health Choice, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2020, I electronically filed the foregoing joint supplemental brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Stephen J. McBrady
Stephen J. McBrady

CERTIFICATE OF COMPLIANCE

This joint supplemental brief complies with the Court's order of April 28, 2020, because it is no longer than 15 pages, double-spaced. This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Stephen J. McBrady
Stephen J. McBrady