IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HPHC INSURANCE COMPANY, INC.,	)	
	)	
Plaintiff,	)	**No. 17-87C**
	)	
v.	)	
	)	**Judge Lydia Kay Griggsby**
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

UNITED STATES' MOTION TO DISMISS AND OPPOSITION TO
HPHC'S MOTION FOR PARTIAL SUMMARY JUDGMENT

CHAD A. READLER
Acting Assistant Attorney General

RUTH A. HARVEY
Director
Commercial Litigation Branch

KIRK T. MANHARDT
Deputy Director

/s/ Marc S. Sacks
MARC S. SACKS
CHARLES E. CANTER
TERRANCE A. MEBANE
FRANCES M. MCLAUGHLIN
L. MISHA PREHEIM
PHILLIP M. SELIGMAN
Commercial Litigation Branch
Civil Division
United States Department of Justice

ATTORNEYS FOR THE UNITED
STATES

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UNITED STATES' MOTION TO DISMISS AND OPPOSITION TO
HPHC'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Rule 12(b)(1), the United States moves the Court to dismiss the Amended Complaint ("Complaint"), Dkt. 11, of HPHC Insurance Company, Inc. ("HPHC") for lack of subject matter jurisdiction. Should the Court determine that it has jurisdiction over HPHC's claims, the United States moves for dismissal under Rule 12(b)(6). Alternatively, the United States, under Rule 56, cross-moves for summary judgment on Count I, HPHC's statutory claim, the only count addressed in HPHC's motion for summary judgment ("Pl. MSJ"), Dkt. 12. HPHC concedes in its motion that "[t]his case presents a question of statutory interpretation appropriate for summary disposition, as all material facts are undisputed."[1] Pl. MSJ at 19.

INTRODUCTION

HPHC brings this case seeking $19 million in payments under section 1342 of the Patient Protection and Affordable Care Act (the "Act" or "ACA"), 42 U.S.C. § 18062. Section 1342 directs the HHS Secretary to establish and administer a "risk corridors" program under which HHS collects risk corridors charges from relatively profitable qualified health plans ("QHPs") and then, out of these collections, makes payments to relatively unprofitable QHPs based on the plans' ratio of premiums to claims costs. HPHC participated in the program in the 2014 and 2015 benefit years and claims to be entitled to more than $19 million in payments for those two years, having already received a portion of this amount. HPHC seeks relief in this Court, but its claims fail as a

[1] The United States does not separately respond to HPHC's statement of undisputed material facts. Pl. MSJ at 11-14. While HPHC selectively quotes from the Federal Register and documents produced by the Secretary of Health and Human Services ("HHS") and the Centers for Medicare & Medicaid Services ("CMS"), *see* Pl. MSJ, Addendum A (Dkt. 12-1), the United States does not contest the existence of those documents, which speak for themselves. The United States' motion addresses many of those documents, putting them in context. In any event, an agency's public statements cannot, in and of themselves, create a payment obligation. *See Office of Personnel Management v. Richmond*, 496 U.S. 414, 432 (1990).

matter of law. In all material respects, HPHC's claims are identical to those considered and rejected by this Court in *Land of Lincoln Mutual Health Insurance Co. v. United States*, 129 Fed. Cl. 81 (2016), *appeal docketed*, No. 17-1224 (Fed. Cir. Nov. 16, 2016).

First, HPHC has no claim to "presently due" money damages, as it must to establish jurisdiction under the Tucker Act, including for claims arising under a money-mandating statute.

Second, HPHC's statutory claim (Count I) fails on the merits. Congress controls the power of the purse. "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Accordingly, the Supreme Court has recognized that "payments of money from the Federal Treasury are limited to those authorized by statute." *Richmond*, 496 U.S. at 416. In this case, Congress has not authorized the $19 million in payments HPHC seeks from the Treasury.

As part of the ACA, Congress established Health Benefit Exchanges ("Exchanges") on which insurance companies could compete for customers and take calculated business risks. The Act did not make the taxpayers the guarantor of profits for the health insurance industry. In fact, Congress found that the ACA would reduce the federal deficit. To mitigate some of the risk attendant with the new opportunities available to insurers on the Exchanges, the ACA established three premium-stabilization programs, informally known as the "3Rs," under which payment adjustments are made among insurers. There is no dispute that two of the 3R programs (reinsurance and risk adjustment) are funded solely by the amounts that insurers or plans pay into each program. Risk corridors, the program at issue here, is likewise a self-funded program to distribute gains and losses between insurers that under- and over-estimated their costs-to-premiums ratio. The text and structure of the statute and Congress's express appropriations

restrictions for the years at issue demonstrate that Congress did not authorize the risk corridors payments HPHC seeks.

In section 1342 of the ACA, Congress directed the Secretary of HHS to "establish and administer a program of risk corridors," which would be "based on" a similar program under Medicare Part D. Under the temporary risk corridors program, HHS collects "payments in" from insurers that were more profitable and uses those funds to make "payments out" to insurers who priced their plans too low and were more unprofitable. However, nothing in the ACA provides an appropriation for these "payments out." Indeed, nothing in section 1342 or the ACA authorizes appropriations for these payments, in contrast to dozens of other provisions of the ACA. And in contrast to the Medicare Part D program on which the risk corridors program is based, nothing in section 1342 provides an authorization in advance of appropriations or creates an obligation on the part of HHS to make payments.

In short, no payments under the risk corridors program could be made without further congressional action through the appropriations process. Fiscal year 2015 was the first year in which monies could be paid under the risk corridors program. (By law HHS could not make payments before that time because the ACA requires HHS to use a full year's data to calculate payment and collection amounts, and the program did not begin until January 1, 2014.) In the appropriations legislation for fiscal year 2015 (the 2015 Spending Law), Congress allowed HHS to use "payments in"—amounts collected from insurers under the program—as a source of funding for "payments out." At the same time, Congress expressly prohibited HHS from using other funds for those "payments." The 2015 Spending Law, which Congress subsequently reenacted, guarantees that "the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect." Congress's constitutional exercise of its power

of the purse definitively limits the liability of the United States under section 1342 to the aggregate amount of risk corridors collections.

Third, this Court should dismiss HPHC's implied-in-fact contract claim (Count II) for the same reasons articulated by the Court in *Land of Lincoln* when it considered and dismissed the same contract claim presented in HPHC's Complaint. The implied-in-fact contract claim fails as a matter of law because risk corridors payments are a statutory benefit, not a contractual obligation. No contract requiring risk corridors payments could be formed because Congress neither established the risk corridors program as one based in contract nor conferred authority on HHS to bind the United States in contract for such payments.

STATEMENT OF THE ISSUES

1. Whether HPHC's Complaint should be dismissed for lack of jurisdiction or a justiciable claim where, in light of HHS's three-year payment framework for risk corridors payments, HPHC is not entitled to "presently due money damages" and HHS has not finally determined HPHC's total risk corridors payments under the program.

2. Whether HPHC's statutory claim fails as a matter of law where section 1342 neither provides an appropriation nor authorizes the use of appropriated funds and where Congress, in appropriating funds to make risk corridors payments, prohibited HHS from using funds other than collections to make those payments.

3. Whether HPHC's implied-in-fact contract claim, which is derivative of the statutory claim, fails as a matter of law where HPHC alleges no facts that would plausibly support an inference that HHS is contractually obligated to make risk corridors payments.

STATEMENT OF UNDISPUTED FACTS

A. The Affordable Care Act

Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010), 124 Stat. 119, in March 2010.[2] The Act adopted a series of measures designed to expand coverage in the individual health insurance market. *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015). First, the Act provides billions of dollars of subsidies each year to help individuals buy insurance.[3] *Id*. at 2489. Second, the Act generally requires each individual to maintain coverage or pay a penalty. *Id*. at 2486. Third, the Act bars insurers from denying coverage or charging higher premiums based on an individual's health status. *Id*. Notwithstanding the various subsidies and other initiatives included in the Act, Congress found that the Act would "reduce the Federal deficit between 2010 and 2019" and would "extend the solvency of the Medicare [Hospital Insurance] Trust Fund." ACA § 1563(a), Appendix at (A_) 15-16.

The ACA also created the Exchanges, virtual marketplaces in each state where individuals and small groups can purchase health care coverage. 42 U.S.C. §§ 18031-41. For consumers, Exchanges are the only forum in which they can purchase coverage with the assistance of federal subsidies. For insurers, Exchanges provide marketplaces to compete for business in a centralized location, and they are the only commercial channel in which insurers can market their plans to the

[2] HHS is responsible for overseeing implementation of major provisions of the Act and for administering certain programs under the Act, either directly or in conjunction with other federal agencies. *See, e.g.*, 42 U.S.C. §§ 18041(a)(1)(A), (c)(1). HHS delegated many of its responsibilities under the ACA to CMS, which created the Center for Consumer Information and Insurance Oversight ("CCIIO") to oversee implementation of the ACA. Except where noted, CMS and CCIIO are referred to in this motion as "HHS."

[3] Federal insurance subsidies are advanced directly to issuers on behalf of qualified enrollees and are only available as part of an individual QHP obtained through an Exchange. *See generally* 26 U.S.C. § 36B(c)(2)(B); 42 U.S.C. § 18071(f)(2).

millions of individuals who receive federal subsidies. All plans offered through an Exchange must be QHPs, meaning that they provide "essential health benefits" and comply with other regulatory requirements such as provider-network requirements, benefit-design rules, and cost-sharing limitations. 42 U.S.C. § 18021; 45 C.F.R. parts 155 and 156.

B. The ACA's Premium-Stabilization Programs (the "3Rs")

The ACA's Exchanges created business opportunities for insurers electing to participate. Like most business opportunities, risk was involved—here, in the form of pricing uncertainty arising from the unknown health status of an expanded risk pool and the fact that insurers could no longer charge higher premiums or deny coverage based on an enrollee's health (*i.e.*, expected cost). *See generally* HHS, Standards Related to Reinsurance, Risk Corridors and Risk Adjustment, 76 Fed. Reg. 41,930, 41,931-932 (July 15, 2011), A102-03. To mitigate the pricing risk and incentives for adverse selection arising from this system, the ACA established three premium-stabilization programs modeled on preexisting programs established under the Medicare program. *Compare* 42 U.S.C. §§ 18061-63 *with id.* §§ 1395w-115(a)(2), (b), (c), (e); *see also id.* §§ 18062(a); 18063(b); 42 C.F.R. § 423.329(b)-(c); *see also* Compl. ¶ 8 (noting that the "risk corridors program is required by statute to be modeled after a similar program enacted as part of the Medicare Prescription Drug, Improvement, and Modernization Act."). Informally known as the "3Rs," these ACA programs began in the 2014 calendar year and consist of reinsurance, risk adjustment, and risk corridors. *See* 42 U.S.C. §§ 18061-63.

The 3R programs distribute risks among insurers. Each of the 3R programs is funded by amounts that insurers or plans pay into the program. *See* 76 Fed. Reg. 41,948 ("The payments and receipts in risk adjustment, reinsurance, and risk corridors are financial transfers between issuers.").

The reinsurance program was created by section 1341 of the ACA. It was a temporary program for the 2014, 2015, and 2016 calendar years under which amounts collected from insurers and self-insured group health plans are used to fund payments to issuers of eligible plans that cover high-cost individuals. 42 U.S.C. § 18061.

The risk adjustment program was created by section 1343 of the ACA. It is a permanent program under which amounts collected from insurers whose plans have healthier-than-average enrollees are used to fund payments to insurers whose plans have sicker-than-average enrollees. 42 U.S.C. § 18063.

The risk corridors program, the program at issue here, was created by section 1342 of the ACA. It was a temporary program for the 2014, 2015, and 2016 calendar years under which amounts collected from profitable insurers are used to fund payments to unprofitable insurers. *Id.* § 18062.

Section 1342 directed HHS to "establish and administer a program of risk corridors" under which insurers offering individual and small group QHPs between 2014 and 2016 "shall participate in a payment adjustment system based on the ratio of the allowable costs of the plan to the plan's aggregate premiums." 42 U.S.C. § 18062(a). Under the "payment methodology" set forth in the statute, if an insurer's "allowable costs" (essentially, claims costs) for the year are less than a "target amount" (premiums minus allowable administrative costs) for that year by more than three percent, the plan shall pay a specified percentage of the difference to HHS. *Id.* § 18062(b)(2).[4] The statute refers to these payments as "payments in." *Id.* Conversely, if an insurer's allowable

[4] "Allowable administrative costs" include administrative costs and profit up to 20% of total premiums collected. 45 C.F.R. § 153.500.

costs exceed the target amount by more than three percent, HHS shall pay a specified percentage of the difference. *Id*. § 18062(b)(1). The statute refers to these payments as "payments out." *Id*.

Reinsurance and risk adjustment payments affect the risk corridors calculations. Payments an issuer receives under the reinsurance and risk adjustment programs reduce the issuer's allowable costs for that year. 42 U.S.C. § 18062(c)(1)(B). Thus, risk corridors payments and charges cannot be determined until after the close of the calendar year and after final reinsurance and risk adjustment payments for that year are made. Risk corridors payments and charges, however, do not factor into the other two programs.

"Congress [never has] provided appropriations or authorizations of funds . . . for the risk-corridors program." *Land of Lincoln*, 129 Fed. Cl. at 104-05; *see also Health Republic Ins. Co. v. United States*, 129 Fed. Cl. 757, 762 (2017) ("Neither section 1342 . . . nor any of the Act's other provisions appropriated funds specifically for the risk corridors program."); *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 443 (2017). By contrast, in dozens of other ACA provisions, Congress appropriated or authorized the appropriation of funds for various programs. *See* p. 19 n.12, *infra* (citing examples). "Payments in" from insurers are the only source of funds referenced in section 1342. *See Land of Lincoln*, 129 Fed. Cl. at 91 (noting that section 1342(b) is "silent regarding deficits or excess funds under the risk corridors program").

When the Congressional Budget Office ("CBO") estimated the effect of the ACA on the federal budget, it included estimates for the risk adjustment and reinsurance programs. *See* Letter from Douglas Elmendorf, Director, CBO, to Nancy Pelosi, Speaker, House of Representatives, Tbl. 2 (Mar. 20, 2010) ("CBO Cost Estimate"), A81-82. The CBO estimated that for the risk adjustment and reinsurance programs payments and collections for each program would be equal in the aggregate, but noted that risk adjustment payments lag revenues by one quarter, thus

potentially affecting the federal budget in a given fiscal year. *Id.* The CBO did not, however, attribute any costs to the risk corridors program when it estimated the ACA's impact on the federal budget shortly before the Act's passage. *See Id.* (omitting risk corridors from the budgetary scoring). Congress specifically referenced the CBO Cost Estimate in the ACA, in a provision that emphasized the Act's fiscal responsibility. *See* ACA § 1563(a) ("Sense of the Senate Promoting Fiscal Responsibility"), A15.

C. Congress's Appropriations for the Risk Corridors Program

Congress made no provision for appropriating funds for the risk corridors program when the ACA was enacted in 2010. The program began in the 2014 calendar year, 42 U.S.C. § 18062(a), and the first set of payments could not be made before the 2015 calendar year, which corresponded to the 2015 and 2016 fiscal years.

Anticipating the upcoming appropriations process, in early 2014, Members of Congress took up the question of funding for the risk corridors program. In January 2014, the Congressional Research Service issued a memorandum concluding that section 1342 did not contain its own appropriation because it did not specify a source of funds for payments. Memorandum to House Energy and Commerce Committee, *Funding of Risk Corridor Payments Under ACA § 1342* (Jan. 23, 2014), A128. The memorandum also noted that it was too early to predict whether an appropriation would provide a source of funding because payments would not be made until fiscal year 2015. *Id.*

Members of Congress also asked the Government Accountability Office ("GAO") to address potential sources of funds that might be used for risk corridors payments when such payments came due in 2015. *See Dep't of Health & Human Servs.-Risk Corridors Program*, B-325630 (Comp. Gen.), 2014 WL 4825237, at *1 (Sept. 30, 2014) ("GAO Op."), A141 (noting

requests). The GAO, in turn, solicited the views of HHS, which identified only the risk corridors collections, which would not begin until 2015, as a source of funding for payments. *See* Letter from William B. Schultz, General Counsel, HHS, to Julia C. Matta, Assistant General Counsel, GAO (May 20, 2014), A133.[5]

In its opinion released on September 30, 2014, the GAO recognized that "Section 1342, by its terms, did not enact an appropriation to make the payments specified in section 1342(b)(1)." *GAO Op.*, 2014 WL 4825237, at *2. The GAO considered HHS's fiscal year 2014 appropriations then in effect, and identified only the 2014 CMS Program Management appropriation as a potential source of funding for risk corridors payments, provided Congress reenacted the same language in subsequent years when payments would be made. *Id.* at *3-*4, *5.

The annual CMS Program Management appropriation provides funding "for carrying out" enumerated programs administered by CMS, such as Medicare and Medicaid, and for "other responsibilities of [CMS]." *See generally* Pub. L. No. 113-76, div. H, tit. II, 128 Stat. 5, 374 (Jan. 17, 2014), A23. The Program Management appropriation includes a lump sum amount derived from specified trust funds, including the Medicare Hospital Insurance Trust Fund, as well as "such sums as may be collected from authorized user fees and the sale of data." *Id.* While the appropriated user fees collected during one fiscal year remain available for the next five fiscal years, *id.*, the lump sum amount expires at the end of the fiscal year. *See* Pub. L. No. 113-76, div. H, tit. V, § 502, 128 Stat. 408 ("No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein."), A25.

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[5] The same Members also requested HHS's analysis of funding for risk corridors payments. *See* Letter from Fred Upton, House of Representatives, and Jeff Sessions, U.S. Senate, to Sylvia Mathews Burwell, Secretary, HHS (June 10, 2014), A136. HHS responded with the analysis it had earlier provided to GAO. Letter from Sylvia Mathews Burwell, Secretary, HHS, to Jeff Sessions, U.S. Senate (June 18, 2014), A139.

Nothing in any CMS Program Management appropriation enacted since 2010 mentions risk corridors payments.

The GAO concluded that the term "other responsibilities" in the 2014 Program Management appropriation was broad enough to encompass risk corridors payments, but it did not conclude that the appropriation *was* available for risk corridors payments. Instead, the GAO merely concluded that it "*would have been* available for making the payments pursuant to section 1342(b)(1)." *GAO Op.*, 2014 WL 4825237, at *3 (emphasis added). The GAO agreed with HHS that "payments in" collected from insurers under the risk corridors program could be used to make "payments out" to insurers because those collections would constitute "user fees" under the appropriation, *id.* at *4, but noted that HHS would not begin collections or payments under section 1342 until fiscal year 2015. *Id.* at *5 n.7. Because "[a]ppropriations acts, by their nature, are considered nonpermanent legislation," Congress would need to reenact the same language in future appropriations acts for the Program Management appropriation to supply a source of funds in future fiscal years for risk corridors payments. *Id.* at *5.[6]

[6] The 2014 fiscal year ended and the 2014 CMS Program Management appropriation expired on September 30, 2014. *See* Pub. L. No. 113-76, div. H, tit. V, § 502, 128 Stat. 408, A25. Congress funded government operations, including HHS, past this date through a continuing resolution, which appropriated "[s]uch amounts as may be necessary . . . for continuing projects or activities . . . that were conducted in fiscal year 2014" as provided in the 2014 fiscal year appropriation, including the 2014 CMS Program Management appropriation. Pub. L. No. 113-164, § 101, 128 Stat. 1867 (Sept. 19, 2014), A26. The continuing resolution further provided that "no appropriation or funds made available or authority granted pursuant to section 101 shall be used to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during fiscal year 2014." *Id.* § 104. The funds made available in the continuing resolution were only available until the earlier of (1) the enactment into law of an appropriation for any project or activity provided for in this joint resolution; (2) the enactment into law of the applicable appropriations Act for fiscal year 2015 without any provision for such project or activity; or (3) December 11, 2014. *Id.* § 106. Congress twice extended the December 11 deadline until December 17, 2014. *See* Pub. L. No. 113-202, 128 Stat. 2069 (Dec. 12, 2014), A37; Pub. L. No. 113-203, 128 Stat. 2070 (Dec. 13, 2014), A38.

Congress did not reenact the same appropriations language for fiscal year 2015. On December 16, 2014—months before any payments could have been claimed or made under the risk corridors program—Congress enacted the Consolidated and Further Continuing Appropriations Act, 2015, specifically addressing funding for the risk corridors program. That law provided a lump sum amount for CMS's Program Management account for fiscal year 2015 to be derived from CMS trust funds and also continued to include a user fee provision. Pub. L. No. 113-235, div. G, tit. II, 128 Stat. 2130, 2477, A43. Congress included a rider, however, that expressly limited the availability of some Program Management funds for the risk corridors program, as follows:

> None of the funds made available by this Act from [CMS trust funds], 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 Public Law 111–148 (relating to risk corridors).

Id. § 227, A45. The GAO had identified only the Program Management appropriation as the potential source of available funding for risk corridors payments, and the effect of this rider was to eliminate the lump sum amount as a source, leaving only the user fees, *i.e.*, risk corridors collections as a source of risk corridors payments. An accompanying Explanatory Statement explained that the rider was added "to prevent the CMS Program Management appropriation account from being used to support risk corridors payments." 160 Cong. Rec. H9307-1, H9838 (daily ed. Dec. 11, 2014), A47. The Explanatory Statement further observed that, "[i]n 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." *Id.*[7]

[7] Section 4 of the 2015 appropriations law refers to the Explanatory Statement and provides that it "shall have the same effect with respect to the allocation of funds and implementation of [the Act's

On December 18, 2015, Congress enacted an identical funding limitation in the annual appropriations act for fiscal year 2016. Pub. L. No. 114-113, div. H, tit. II, § 225, 129 Stat. 2242, 2624, A53. The Senate Appropriations Committee Report states:

> The Committee is proactively protecting discretionary funds in the bill by preventing the administration from transferring these funds to bail out ACA activities *that were never intended to be funded through the discretionary appropriations process*. * * * * The Committee continues bill language requiring the administration to operate the Risk Corridor program *in a budget neutral manner* by prohibiting any funds from the Labor-HHS-Education appropriations bill to be used as payments for the Risk Corridor program.

Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Bill, 2016, S. Rep. No. 114-74, at 12 (2015) (emphasis added), A57.[8] Congress subsequently enacted continuing resolutions that retained the same funding limitation, which remains in effect. *See*, *e.g.*, Continuing Appropriations Act, 2017, Pub. L. No. 114-223, div. C, 130 Stat. 857, 909 (2016); Pub. L. No. 114-254, 130 Stat. 1005 (2016).

D. HHS's Implementation of the Risk Corridors Program

HHS regulations require insurers to compile and submit their risk corridors data for a particular calendar year by July 31 of the following year. 45 C.F.R. § 153.530(d). HHS then applies the statutory formula to calculate collection and payment amounts for the preceding calendar year. *Id*. § 153.530(a)-(c).

In March 2014, HHS informed insurers that it would "implement th[e] program in a budget neutral manner." 79 Fed. Reg. 13,744, 13,787 (Mar. 11, 2014). In April 2014, HHS released

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provisions] as if it were a joint explanatory statement of a committee of conference." Pub. L. No. 113-235, § 4, 128 Stat. 2132, A42.

[8] The time period from September 30, 2015 (the end of fiscal year 2015) until the enactment of the fiscal year 2016 appropriations law on December 18, 2015, is covered by continuing resolutions, which incorporate the restriction on risk corridors payments. *See* Pub. L. No. 114-53 § 101(a) (2015); Pub. L. No. 114-96 (2015); Pub. L. No. 114-100 (2015).

guidance explaining that CMS would operate risk corridors as a three-year program and if the total amount that insurers paid into the risk corridors program for a particular year proved insufficient to fund in full the "payments out" calculated under the statutory formula, payments to insurers would be reduced pro rata to the extent of any shortfall. CMS, Risk Corridors and Budget Neutrality (Apr. 11, 2014) ("April 11 Guidance"), A131. The guidance further explained that collections received for the next year would first be used to pay off the payment reductions insurers experienced in the previous year, in a proportional manner, and then be used to fund payments for the current year. *Id*.

HHS implemented its payment methodology when collections in fact proved insufficient to pay the full amounts calculated under the statutory formula. In November 2015, HHS announced that for 2014 (the program's first year), the total amount that insurers were expected to pay in ($362 million) was $2.5 billion less than the total amount that insurers requested ($2.87 billion). Risk Corridors Payments for the 2014 Benefit Year (Nov. 19, 2015) ("November 19 Guidance"), A149. As a result, HHS indicated that it would at that time make pro-rated payments of approximately 12.6 percent of the amount requested for 2014. *Id*. The following year, HHS announced that it would apply the total amount that insurers were expected to pay in for 2015 ($95 million) to outstanding payment requests for 2014. Risk Corridors Payment and Charge Amounts for the 2015 Benefit Year (Nov. 16, 2016), A188. HHS has made two annual payments, one in 2015 and one in 2016, for the three-year risk corridors program. Insurers have not yet submitted their data for 2016, which are due July 31, 2017. To date, the total amount of "payments in" for 2014 and 2015 is approximately $8.3 billion less than the total amount calculated as "payments out" for those years.

E. HPHC's Participation on the Exchanges

HPHC offered QHPs on the Massachusetts Exchange in calendar years 2014 and 2015. Compl. ¶ 17. HHS calculated for the 2014 benefit year a risk corridors payment for HPHC in the amount of $1,214,623.20. Risk Corridors Payment and Charge Amounts for Benefit Year 2014 (Nov. 19, 2015), A150, 163. Based upon the amount of risk corridors collections for the 2014 benefit year, HHS announced a prorated payment to HPHC of $153,259.53. *Id.* HHS calculated for the 2015 benefit year a risk corridors payment for HPHC in the amount of $18,084,109.23, and announced that HPHC would receive another $40,347.74 towards its 2014 payment. To date, HPHC has received $184,002.38 for benefit year 2014. HHS currently lacks funding to pay benefit year 2015 amounts.

ARGUMENT

I. The Court Lacks Jurisdiction Under the Tucker Act Because HPHC Has No Substantive Right to "Presently Due Money Damages"[9]

The Tucker Act, under which HPHC asserts jurisdiction, Compl. ¶ 21, waives sovereign immunity for certain non-tort claims against the United States founded upon the Constitution, a federal statute or regulation, or a contract. 28 U.S.C. § 1491(a)(1). The Tucker Act "does not create any substantive right enforceable against the United States for money damages." *United States v. Testan*, 424 U.S. 392, 398 (1976). "Thus, jurisdiction under the Tucker Act requires the litigant to identify a substantive right for money damages against the United States separate from the Tucker Act itself." *Todd v. United States*, 386 F.3d 1091, 1094 (Fed. Cir. 2004) (citing *Testan*, 424 U.S. at 398). In meeting this burden, it is not enough for a plaintiff to point to a law requiring

[9] The United States acknowledges that in *Land of Lincoln*, this Court concluded that it had jurisdiction and that the insurer's claims were ripe. 129 Fed. Cl. at 97. The United States' jurisdictional and ripeness arguments were also rejected in *Health Republic*, *Moda*, and *Maine Community Health Options v. United States*, No. 16-967C (Fed. Cl.).

the payment of money in the abstract. Instead, the law must "fairly be interpreted as mandating compensation for damages sustained as a result of *a breach of . . . duties [it] impose[s]*." *United States v. Mitchell*, 463 U.S. 206, 219 (1983) (emphasis added).

Further, the law must entitle the plaintiff to "actual, *presently due* money damages from the United States." *Todd*, 386 F.3d at 1093-94 (quoting *United States v. King*, 395 U.S. 1, 3 (1969)) (emphasis added); *Johnson v. United States*, 105 Fed. Cl. 85, 94 (2012) ("Under the Tucker Act, the court's jurisdiction extends only to cases concerning actual, presently due money damages from the United States.") (internal quotation omitted); *see also Overall Roofing & Const. Inc. v. United States*, 929 F.2d 687, 689 (Fed. Cir. 1991) ("[T]he word 'claim' carries with it the historical limitation that it must assert a right to presently due money."), *superseded by statute on other grounds*, Pub. L. No. 102-572, tit. IX, §§ 902(a), 907(b)(1), 106 Stat. 4506, 4516, 4519 (1992). Thus, where a plaintiff has received all the money it is currently due, the Court must dismiss the complaint for lack of jurisdiction. *Annuity Transfers, Ltd. v. United States*, 86 Fed. Cl. 173, 179 (2009).

HPHC's claim of Tucker Act jurisdiction rests on its mistaken assertion that "[t]he Government's failure to provide timely payments . . . is a violation of Section 1342 of the ACA." Compl. ¶ 84; *see also* Compl. ¶¶ 20, 70, 76. But section 1342 does not obligate HHS to make annual payments. *Land of Lincoln*, 129 Fed. Cl. at 107. Rather, section 1342 requires HHS to *calculate* risk corridors payments and charges based on claims and other costs "for" a "benefit year," but it does not require HHS to *pay* the full calculated amounts on an annual basis. Instead, it delegates to HHS the responsibility to "establish and administer" the risk corridors program, 42 U.S.C. § 18062(a), thereby conferring "broad discretion" to HHS "to tailor [the] . . . program to fit both its needs and its budget." *Contreras v. United States*, 64 Fed. Cl. 583, 599 (2005),

aff'd, 168 F. App'x 938 (Fed. Cir. 2006). In the absence of a contrary statutory provision, "agencies, not the courts, . . . have primary responsibility for the programs that Congress has charged them to administer." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992), *superseded by statute on other grounds*, Pub. L. No. 104-134, § 803, 110 Stat. 1321 (Apr. 26, 1996). The Federal Circuit has stated that "the *Chevron* standard of deference applies" where, as here, "Congress either leaves a gap in the construction of the statute that the administrative agency is explicitly authorized to fill, or implicitly delegates legislative authority, as evidenced by 'the agency's generally conferred authority and other statutory circumstances.'" *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1361 (Fed. Cir. 2005) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)).

HHS exercised the discretion conferred by Congress by establishing a three-year payment framework to govern circumstances where risk corridors collections from issuers are insufficient to fund calculated risk corridors payments. Under this framework, if risk corridors claims exceed collections for a given benefit year, as they did for years 2014 and 2015, payments are reduced so as not to exceed HHS's funding for that year. However, further payments for that benefit year are made in subsequent payment cycles (after charges for a later benefit year have been collected), with final payment not due until the final payment cycle in 2017 at the end of the temporary program. *See* April 11 Guidance, A131; November 19 Guidance, A149.

In sum, HHS's three-year payment framework reasonably accounts for the fact that collections are the only authorized source of funding for risk corridors payments, while also ensuring that HHS pays out as much as it can each year within the statutory and programmatic constraints. Because section 1342 does not require—and, in light of the shortfall in collections, the Spending Laws do not permit—full payment on an annual basis, the Court must defer to HHS's

three-year framework as a reasonable construction of these laws. Under that framework, additional payments are not presently due, and the Court lacks jurisdiction to consider HPHC's claims.[10]

II. There Is No Statutory Obligation To Use Taxpayer Funds For Risk Corridors Payments

A. Section 1342 of the ACA Did Not Appropriate Funds for Risk Corridors Payments or Make Such Payments an Obligation of the Government

Risk corridors is one of three premium stabilization programs created by the ACA (together known as the "3Rs"). The two other 3R programs—the reinsurance and risk adjustment programs created by sections 1341 and 1343 of the ACA, respectively—are funded solely by amounts paid by insurers or plans. 42 U.S.C. §§ 18061 (ACA section 1341), 18063 (ACA section 1343); 45 C.F.R. part 153, subparts C & D. HPHC contends that the risk corridors program created by section 1342 of the ACA uniquely obligates the government to use taxpayer dollars to make up shortfalls in the funds collected from insurers. But the text, structure, history, and purpose of the risk corridors program demonstrate that the program was to be self-funded.

Section 1342 directed HHS to "establish and administer" a system of payment adjustments among insurers for the 2014, 2015, and 2016 calendar years, 42 U.S.C. § 18062(a), based on a retrospective analysis of insurers' data for a prior full year, *id.* § 18062(b). Insurers that overestimated their premiums relative to costs make "payments in" at specified percentages; insurers that underestimated their premiums relative to costs receive "payments out" at

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[10] HPHC's claims also should be dismissed because they are not ripe. HHS has not yet finally determined the total amount of payments that HPHC (or any other issuer) will receive under the risk corridors program. Moreover, whether sufficient funds will be available to make full risk corridors payments for any particular benefit year, and for all three years combined, is therefore presently unknown. HHS may collect sufficient funds this year to pay risk corridors claims in full. Alternatively, Congress may appropriate additional funds for the program to pay all risk corridors amounts as calculated under section 1342(b). In short, it is too soon to determine whether HPHC will receive less than the full amount of its risk corridors claims, much less the extent of any such underpayment.

corresponding percentages. *Id*. This "payment methodology" provision, which states that HHS "shall pay" amounts calculated under the statutory formula, *id*. § 18062(b)(1), identifies no source of funds other than "payments in," *id*. § 18062(b)(2).

Nothing in the text of section 1342 obligated—or indeed permitted—the government to use taxpayer dollars to make potentially massive, uncapped payments to insurance companies.[11] In dozens of other ACA provisions, Congress appropriated funds or enacted statutory language authorizing the appropriation of funds in the future.[12] *See Land of Lincoln*, 129 Fed. Cl. at 104-05 ("Congress also provided appropriations or authorizations of funds for other programs within the Act, but it never has done so for the risk-corridors program.") (citing 42 U.S.C. §§ 18031(a)(1), 18054(i)). In contrast, the only funds referred to in the risk corridors statute are "payments in" by insurers and "payments out" to insurers. Section 1342 makes no reference to appropriations whatsoever. 129 Fed. Cl. at 91 (noting that section 1342 is "silent regarding deficits or excess funds under the risk corridors program").

Congress conspicuously omitted from section 1342 any language making risk corridors payments an obligation of the government, in notable contrast to the preexisting risk corridors

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[11] HPHC's motion contains unsupported allegations and mischaracterizations. For example, HPHC asserts that Congress designed risk corridors "to ensure that . . . the Government . . . would be protected." Pl. MSJ at 1. Neither the text of section 1342 nor any legislative history supports HPHC's assertion. HPHC also claims that the risk corridors program is a "'heads-the-Government-wins, tails-the-insurer-loses' payment scheme." *Id.* at 3-4. But section 1342 does nothing more than instruct HHS to establish a program where "payments in" are collected to make "payments out." The United States has not profited from the risk corridors program.

[12] For examples of ACA provisions appropriating funds, *see*, *e.g.*, ACA §§ 1101(g)(1), 1311(a)(1), 1322(g), 1323(c). For examples of ACA provisions authorizing the appropriation of funds, *see*, *e.g.*, ACA §§ 1002, 2705(f), 2706(e), 3014, 3015, 3504, 3505(a), 3505(b), 3506, 3509(a)(1), 3509(b), 3509(e), 3509(f), 3509(g), 3511, 4003(a), 4003(b), 4004(j), 4101(b), 4102(a), 4102(c), 4102(d)(1)(C), 4102(d)(4), 4201(f), 4202(a)(5), 4204(b), 4206, 4302(a), 4304, 4305(a), 4305(c), 5101(h), 5102(e), 5103(a)(3), 5203, 5204, 5206(b), 5207, 5208(b), 5210, 5301, 5302, 5303, 5304, 5305(a), 5306(a), 5307(a), 5309(b).

program under Medicare Part D on which the ACA risk corridors program was generally modeled. *See* 42 U.S.C. § 18062(a) (stating that the ACA's risk corridors program "shall be based on" the risk corridors program under Medicare Part D). The Medicare Part D statute, unlike the ACA risk corridors provision, expressly made risk corridors payments an obligation of the government:

> This section constitutes budget authority in advance of appropriations Acts and represents the obligation of the Secretary to provide for the payment of amounts provided under this section.

42 U.S.C. § 1395w-115(a)(2). Thus, in Medicare Part D, Congress made risk corridors payments an "obligation" of the government regardless of amounts contributed by insurers. *Id*.

Congress enacted no equivalent language in section 1342 of the ACA.[13] This contrast is especially notable because Congress did enact equivalent language elsewhere in the ACA. *See* ACA § 2707(e)(1)(B) (for a psychiatric demonstration project, Congress provided, "BUDGET AUTHORITY.—Subparagraph (A) constitutes budget authority in advance of appropriations Act and represents the obligation of the Federal Government to provide for the payment of the amounts appropriated under that subparagraph."), A17-18. HPHC asserts that "where Congress expressly modeled the ACA [risk corridors program] on the Medicare Part D [risk corridors program], if it intended to omit its defining characteristic, surely Congress would have said so explicitly." Pl. MSJ at 21. In this case, HPHC is correct – Congress *explicitly* omitted the "defining characteristic" of Medicare Part D – budget authority – from the risk corridors program legislation.

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[13] Judge Wheeler mistakenly believed that "the Medicare Part D statute provides only that the Government 'shall establish a risk corridor,' not that the Secretary of HHS 'shall pay' specific amounts to insurers." *Moda*, 130 Fed. Cl. at 455. But the Part D statute provides that "the Secretary shall provide for payment," 42 U.S.C. § 1395w-115(a), and that, if risk corridor costs for a plan are greater than a specified threshold, "the Secretary *shall increase the total of the payments* made to the sponsor or organization offering the plan" by a specified amount, 42 U.S.C. § 1395w-115(e)(2)(B)(i), (ii) (emphasis added). Thus, contrary to Judge Wheeler's reasoning, the Medicare Part D statute directs the Secretary to make specific payments to insurers.

By omitting from section 1342 the budget language it used in the preexisting Medicare Part D statute and elsewhere in the ACA, Congress ensured that section 1342 would not by itself make risk corridors payments an obligation of the government. "Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally." *Land of Lincoln*, 129 Fed. Cl. at 105 (quoting *National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012)). And consistent with the plain text of the statute, the budget estimate that the CBO prepared for Congress when the ACA was under consideration indicated that risk corridors would not increase the federal deficit. *See* CBO Cost Estimate, Tbl. 2 (omitting risk corridors from the budget scoring), A81-82. When the CBO—which is the legislative branch agency responsible for providing Congress with nonpartisan budget analyses—estimated the budgetary impact of the ACA and identified "budgetary cash flows for direct spending" from the ACA, A66, 81-82, it did not mention risk corridors payments, reflecting the understanding that the program would be self-funded.

By contrast, the CBO did score the other 3R programs. It noted that under the risk adjustment program, payments lag receipts by one quarter, which may affect the budget. *Id.* at Tbl. 2 note a, A82. And it noted that under the reinsurance program, payments were expected to total $20 billion, *id.*, whereas collections were expected to total $25 billion, 42 U.S.C. § 18061(b)(3)(B). The CBO likewise scored ACA § 2707 which, as discussed above, made payments under a psychiatric demonstration project an obligation of the government. *See* CBO Cost Estimate, Tbl. 5 (indicating that section 2707 would increase the federal deficit), A87.

Congress explicitly relied on the CBO Cost Estimate when it enacted the ACA. In an ACA provision entitled "Sense of the Senate Promoting Fiscal Responsibility," Congress indicated, "[b]ased on Congressional Budget Office (CBO) estimates," that "this Act will reduce the Federal

deficit between 2010 and 2019." ACA § 1563(a), A15. That projection was crucial to the Act's passage. *See* David M. Herszenhorn, *Fine-Tuning Led to Health Bill's $940 Billion Price Tag*, N.Y. Times, Mar. 18, 2010, A61. And it was predicated on Congress's understanding that risk corridors payments would not increase the deficit.

B. Congress Appropriated Funds Collected From Insurers But Barred HHS From Using Other Funds for Risk Corridors Payments

If there were any doubt as to whether Congress had established a self-funded program, it was removed by the legislation that provided appropriations for risk corridors payments. In those statutes, Congress appropriated the funds that insurers would pay into the risk corridors program, and expressly barred HHS from using other funds to make risk corridors payments. Those appropriations acts confirm that section 1342 required "payments out" to be made solely from "payments in." And even if there could be a question as to the meaning of section 1342, the appropriations acts definitively capped "payments out" at the total amount of "payments in."

As discussed above, the risk corridors program began in calendar year 2014. Because section 1342 of the ACA required HHS to use a full year's data to calculate payment amounts, no payments could be made until calendar year 2015, which corresponds to the 2015 and 2016 fiscal years. *Accord Health Republic*, 129 Fed. Cl. at 774 (noting that "Congress required HHS to make separate calculations for each calendar year"). Congress thus addressed the question of appropriations for the first time in December 2014, when it enacted appropriations legislation for fiscal year 2015.

Under the Appropriations Clause, Congress controls the power of the purse. U.S. Const. art. I, § 9, cl. 7. Congress exercises that power by providing "budget authority," which grants federal agencies authority to incur financial obligations that are binding on the United States. *See* 2 U.S.C. § 622(2); GAO–16–464SP, *Principles of Fed. Appropriations Law* (Ch. 2) 2–1 (4th ed.

2016) (*GAO Red Book*), A181; *see also id.* at 2-55 ("Agencies may incur obligations only after Congress grants budget authority."), A183. The Congressional Budget Act defines the four kinds of budget authority:

> (i) provisions of law that make funds available for obligation and expenditure (other than borrowing authority), including the authority to obligate and expend the proceeds of offsetting receipts and collections;
>
> (ii) borrowing authority, which means authority granted to a Federal entity to borrow and obligate and expend the borrowed funds, including through the issuance of promissory notes or other monetary credits;
>
> (iii) contract authority, which means the making of funds available for obligation but not for expenditure; and
>
> (iv) offsetting receipts and collections as negative budget authority, and the reduction thereof as positive budget authority.

2 U.S.C. § 622(2)(A). A claimant seeking to enforce a money-mandating statute or regulation generally "must identify not just a command to make [payment] but an appropriation of . . . money that . . . may [be] use[d] for that purpose." *Nevada v. Dep't of Energy*, 400 F.3d 9, 13 (D.C. Cir. 2005).

The Federal Circuit has repeatedly recognized that statutory language providing that an agency "shall pay" amounts calculated under a statutory formula (or words to that effect) does not, standing alone, create an obligation on the part of the government to provide for full payment. *See Prairie Cnty., Montana v. United States*, 782 F.3d 685, 689 (Fed. Cir. 2015); *Greenlee Cnty. v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007); *Star-Glo Assocs., LP v. United States*, 414 F.3d 1349, 1355 (Fed. Cir. 2005); *Highland Falls-Fort Montgomery Cent. School Dist. v. United States*, 48 F.3d 1166, 1170 (Fed. Cir. 1995). The threshold inquiry is whether Congress obligated the government to make full payment without regard to appropriations, and as with all statutory questions, the touchstone of that inquiry is congressional intent. *See Prairie Cnty.*, 782 F.3d at

690 ("Absent a contractual obligation, the question here is whether the statute reflects congressional intent to limit the government's liability for [Payment in Lieu of Taxes Act (PILT)] payments, or whether PILT imposes a statutory obligation to pay the full amounts according to the statutory formulas regardless of appropriations by Congress."). And when a plaintiff seeks money damages for payments Congress has not funded, courts unfailingly look to the appropriations laws for the years in question to determine whether Congress has authorized the expenditures the plaintiff seeks. *See e.g.*, *Star-Glo Assocs.* 414 F.3d at 1352-54; *Highland Falls*, 48 F.3d at 1169.

In September 2014, in response to a request from Members of Congress, the GAO issued an opinion identifying two components of the CMS Program Management appropriation for fiscal year 2014 that, if reenacted in subsequent appropriations acts, could be used to make risk corridors payments. First, the GAO explained that the appropriation for "user fees" would, if reenacted for fiscal year 2015, allow HHS to use the "payments in" from insurers to make the "payments out." *GAO Op.*, 2014 WL 4825237, at *3-4. Second, the GAO explained that, if reenacted, a lump sum appropriation to CMS for the management of enumerated programs such as Medicare and Medicaid as well as for "other responsibilities" of CMS could be used to make risk corridors payments. *Id.* at *3. The GAO stressed, however, that these sources would not be available for risk corridors payments unless Congress enacted similar language in the appropriations acts for subsequent fiscal years. *Id.* at *5.

Congress did not enact the same appropriations language for fiscal year 2015. Congress reenacted the user fee appropriation and thus allowed HHS to use "payments in" to make "payments out." Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. G, tit. II, 128 Stat. 2130, 2477 (2014), A43. But Congress added a new provision that expressly barred HHS from using other funds for risk corridors payments:

> None of the funds made available by this Act from [CMS trust funds], 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 Public Law 111–148 (relating to risk corridors).

Id. § 227, 128 Stat. 2491, A45. The effect of this appropriations legislation was to ensure that "payments out" would not exceed the total amount of "payments in." The appropriations legislation thus confirmed that the statute would operate as originally designed: the risk corridors program would be a self-funded program.

Moreover, even assuming that section 1342 had made risk corridors payments an obligation of the government (beyond amounts collected as "payments in"), this specific appropriations legislation, enacted before any risk corridors payments could have been made, definitively capped payments at amounts collected and thus superseded any such obligation. There is no doubt that appropriations legislation can amend a preexisting statutory obligation, as long as Congress's intent to do so is clear. In *United States v. Dickerson*, 310 U.S. 554 (1940), for example, the Supreme Court held that an appropriations act precluding the use of funds to pay military reenlistment allowances superseded permanent legislation providing that an enlistment allowance shall be paid "to every honorably discharged enlisted man . . . who reenlists within a period of three months from the date of his discharge." Similarly, in *United States v. Will*, 449 U.S. 200, 207, 224 (1980), the Supreme Court held that an appropriations act providing that "[n]o part of the funds appropriated for the fiscal year ending September 30, 1979 . . . may be used to pay" salary increases mandated by earlier legislation "indicate[d] clearly that Congress intended to rescind these raises entirely." *See also United States v. Mitchell*, 109 U.S. 146, 148 (1883) ("by the appropriation acts which cover the period for which the appellee claims compensation, congress expressed its purpose to suspend the operation of [a prior statute fixing salaries] and to reduce for

that period the salaries of the appellee and other interpreters of the same class from $400 to $300 per annum").

The Federal Circuit's decision in *Highland Falls* is squarely on point. In contrast to section 1342, the permanent legislation at issue in *Highland Falls*—section 2 of the Impact Aid Act—provided that school districts "shall be entitled" to payment of amounts calculated under a statutory formula. *See* 48 F.3d at 1168. Moreover, the statute specified that in the event of a shortfall in appropriations for various statutory programs, the Secretary "shall first allocate" to each school district 100% of the amount due under section 2 of the Impact Aid Act. *Id.* Subsequently, however, Congress earmarked certain amounts for entitlements under various sections of the Impact Aid Act, and the earmarked amount was insufficient to pay 100% of the amounts due under section 2. *Id.* at 1169. In light of that clear limit on appropriations, the Federal Circuit held that the school districts were entitled to only a pro rata share of the amounts calculated under the statutory formula. *Id.* at 1170-71.

Similarly in *Star-Glo*, Congress had established a temporary program directing the Secretary of Agriculture to "pay Florida commercial citrus and lime growers $26 for each commercial citrus or lime tree removed to control citrus canker" and appropriated $58 million for these payments. 414 F.3d at 1357 & n.7. Growers brought suit seeking additional payments for trees removed after the $58 million appropriation had been exhausted. *Id.* at 1352-53. Nothing in the statute provided for capping the United States' liability through language like "not to exceed" and "not more than," but the court looked to legislative history and concluded that Congress intended to cap total payments at $58 million. *Id.* at 1354.

The application of *Highland Falls* and *Star-Glo* is clear: Congress has in the appropriations laws removed any doubt that the Secretary is only obligated to make risk corridors payments to

the extent of collections. Here, as in *Highland Falls*, it is difficult "imagining a more direct statement of congressional intent than the instructions in the appropriations statutes at issue here." *Id*. at 1170. Indeed, the appropriations legislation for risk corridors is materially indistinguishable from the appropriations legislation in *Highland Falls*. As in *Highland Falls*, the agency could not have paid (in light of the shortfall in collections) full amounts calculated under the statutory formula without violating the Anti-Deficiency Act, which states that "[a]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure . . . exceeding an amount available in an appropriation . . . for the expenditure." *Id*. at 1171 (quoting 31 U.S.C. § 1341(a)(1)(A)) (alterations in original). And in enacting the express restrictions on funding for risk corridors payments, Congress left no doubt as to its intent, which was to ensure that "the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect." 160 Cong. Rec. H9838, A47.

HPHC makes no attempt to distinguish *Highland Falls*, which its brief does not discuss. And HPHC concedes that "through CMS's appropriation in the 2015 and 2016 Spending Laws, Congress has curtailed CMS's funding sources to make [risk corridors program] payment." Pl. MSJ at 35. However, HPHC asserts "that fact is irrelevant to this lawsuit." *Id.* That assertion is incorrect when the question before the Court is whether Congress has authorized the very payments HPHC seeks. Section 1342 alone did not create a "payment obligation." *Id.* Instead of making payments an obligation of the government (as Congress did in the Medicare Part D statute and elsewhere in the ACA), section 1342 reserved Congress's full budget authority over risk corridors payments.

Moreover, there was no "mere failure" by Congress to appropriate funds for risk corridors payments. *See* Pl. MSJ at 35. In the only acts that appropriated funds for such payments, Congress appropriated "payments in" but expressly barred HHS from using other funds to make "payments out." And as discussed above, the precedents of the Supreme Court and the Federal Circuit

recognize that even where (unlike here) permanent legislation creates a government obligation, that obligation can be modified by appropriations legislation of this kind.

Finally, HPHC argues that the Spending Laws cannot do what they explicitly direct (appropriate risk corridors collections, but nothing further, to make risk corridors payments), because Congress has failed to pass legislation that purports to make risk corridors budget neutral or that repeals the program. Pl. MSJ at 24, 35-38 & Addendum B. What Congress *failed* to do is of no legal import here.[14] All that matters is what Congress *actually did*, and as described above, the text of the Spending Laws demonstrates clear congressional intent to limit risk corridors payments to risk corridors collections.

C. HPHC Provides No Basis to Use Taxpayer Funds to Make Up Shortfalls in Insurers' Profits

1. The ACA did not expose the government to uncapped liability for insurance industry losses

The crux of HPHC's argument is that the language in section 1342's "payment methodology" provision stating that the Secretary "shall pay" specified amounts calculated under the formula created a binding obligation on the government, even in the absence of any

[14] HPHC asserts that "Congress knows how to amend or repeal laws it does not like." Pl. MSJ at 37. But there is no dispute that Congress neither repealed the risk corridors program nor amended section 1342's direction to HHS to establish and administer the program. What Congress did do, which it also knows how to do, is to make and limit appropriations. Similarly, HPHC's effort to draw a purported "important distinction" between appropriations and "substantive legislation," Pl. MSJ at 35, is meaningless. As we have explained, this Court need only determine Congress's intent as demonstrated by the text and structure of the Spending Laws. And that intent is clear – no funds are appropriated for risk corridors payments apart from risk corridors collections. Finally, HPHC's contention that "[w]here Congress did not expressly amend the [risk corridors program], this Court should not find that it did so impliedly either," Pl. MSJ at 39, misses the point. Congress *did* expressly make appropriations for the risk corridors program in the 2015 and 2016 Spending Laws and, in so doing, Congress limited the available appropriation to the amount collected from insurers. This Court need not effectuate that legislation by implication – Congress's plain language is explicit and clear.

appropriation or express grant of budget authority (and in contradiction to Congress's repeated enactments that specifically bar HHS from using appropriated funds other than collections for risk corridors payments). *See* Pl. MSJ at 19-25, 30-40. As noted above, however, statutory language directing an agency to pay amounts calculated under a statutory formula does not, without more, create an obligation on the part of the government to provide for full payments in the absence of appropriations.[15] *See*, *e.g.*, *Prairie Cnty.*, 782 F.3d at 691. Neither HPHC nor Judge Wheeler in *Moda* provide any reason to disregard the plain text of section 1342, which does not obligate the government to use taxpayer funds to compensate unprofitable insurers. Although HPHC suggests that section 1342 should be interpreted to track Medicare Part D, *see* Pl. MSJ 20-22, HPHC does not explain how a court could properly do so in light of the crucial differences in the language of the two statutes. As discussed above, Congress made Medicare Part D payments an "obligation" of the government but declined to do so in section 1342.

Following *Moda*, HPHC argues that section 1342 obligates the Government to pay "certain, defined amounts" without regard to appropriations. Pl. MSJ at 20; *see also Moda*, 130 Fed. Cl. at 455 (section 1342 "simply directs the Secretary of HHS to make full 'payments out.'"). Under the "straightforward and explicit command of the Appropriations Clause," however, "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Richmond*, 496 U.S. at 424. Neither the ACA nor section 1342 provides an appropriation for risk corridors payments. "A direction to pay without a designation of the source of funds is not an appropriation." *GAO Red Book*, Ch. 2 at 2-24; *see also Health Republic*, 129 Fed. Cl. at 762. That

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[15] HPHC relies upon *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) for its construction of "shall," Pl. MSJ at 16-17, 20, but the statute at issue there was unrelated to an alleged payment obligation. In any event, there is no dispute that HHS "shall pay" risk corridors payments (and HHS does pay them). The only dispute is whether Congress appropriated funds for that purpose in excess of risk corridors collections.

is why the Medicare Part D statute not only directs the Secretary to make specified payments to insurers, but also provides budget authority to do so and makes such payments an obligation of the government. In section 1342, by contrast, Congress reserved its power of the purse by withholding both (1) an appropriation or authorization of appropriations, and (2) any language that makes risk corridors payments an obligation of the government.

The language that Congress included in the Medicare Part D statute—but omitted from section 1342—is precisely the type of language that the Federal Circuit has identified as establishing a government obligation to pay. In *Prairie County*, the court rejected the argument that a statute directing an agency to make payments to local governments in accordance with a statutory formula obligated the government to make full payments regardless of appropriations. The court explained that "if Congress had intended to obligate the government to make full . . . payments, it could have used different statutory language." 782 F.3d at 691. Specifically, the Federal Circuit noted that a subsequent amendment to the statute provided that each local government "shall be entitled to payment under this chapter" and that "sums shall be made available to the Secretary of the Interior for obligation or expenditure in accordance with this chapter." *Id.* That amendment did not apply to the fiscal years at issue in *Prairie County*, however, and the government thus had no obligation to make payments in excess of appropriations for those years. *Id.*

For the same reason, there is no government obligation to make risk corridors payments without regard to appropriations. Indeed, the claim here is even weaker than the claim in *Prairie County* because the permanent legislation in that case authorized appropriations but limited the scope of that authorization. *See id.* at 686 (explaining that the permanent legislation provided that "[n]ecessary amounts may be appropriated to the Secretary of the Interior to carry out this chapter,"

but qualified that authorization by providing that "[a]mounts are available only as provided in appropriation laws"). Section 1342 does not authorize appropriations in the first place, nor does it provide any other budget authority for risk corridors payments.

Faced with the undisputed fact that that section 1342 does not appropriate funds for risk corridors payments, HPHC argues that Congress's decision not to include an appropriation (or, as in Medicare Part D risk corridors, authorization for an obligation in advance of an appropriation) demonstrates that Congress intended the United States' liability to be limitless. Pl. MSJ at 23-24. HPHC's argument is, essentially, that Congress's *silence* evidences Congress's intent to obligate the United States for unlimited risk corridors payments. *See* Pl. MSJ at 23 ("Congress's *exclusion* of words specifically limiting [risk corridors] payments to appropriated funds underscores its intent to accomplish the opposite."). No legal authority supports such a position. Rather, the Federal Circuit has recognized that statutory language directing an agency to pay amounts calculated under a statutory formula does not, without more, create an obligation on the part of the government to provide for full payments in the absence of appropriations. *See*, *e.g.*, *Prairie Cnty.*, 782 F.3d at 691 (noting that "if Congress had intended to obligate the government to make full . . . payments, it could have used different statutory language"). Here, Congress's silence, in contrast to Medicare Part D and the dozens of provisions in the ACA appropriating or authorizing appropriations, demonstrates that Congress did not create an uncapped liability in section 1342.

Moreover, Congress need only consider *limiting* budget authority when such budget authority was previously or is simultaneously granted. Here, when Congress did grant budget authority – in the 2015 Spending Law authorizing risk corridors collections to be used to make risk corridors payments – it simultaneously limited that authority by expressly prohibiting payment of risk corridors payments from the lone available potential source the CBO had identified, the annually appropriated CMS Program Management lump sum appropriation.

Furthermore, HPHC's attempt to conflate section 1342's status as a "money-mandating" statute with a right to full recovery is meritless. Pl. MSJ at 30-31. The United States does not dispute that section 1342 is money mandating. And, in fact, HPHC *has been paid money pursuant to the statute*. While section 1342's "shall pay" language may grant HPHC access to this Court (though, as explained above, because payment is not presently due, the Court lacks jurisdiction), it does not demonstrate that Congress appropriated funds for risk corridors payments in excess of collections. As *Highland Falls* and the other cases discussed above demonstrate, Congress's exercise of its power of the purse is of central relevance to the *merits question of liability under a statute*.

Here, Congress reserved that power when it passed section 1342. When Congress addressed funding for risk corridors payments in the 2015 and 2016 Spending Laws, Congress appropriated only risk corridors collections, and unequivocally barred the use of any other funds. Moreover, the United States here is not arguing that HPHC must prove a "'second waiver' of sovereign immunity." *See* Pl. MSJ at 32. What HPHC must do, as demonstrated by controlling law, is demonstrate that Congress obligated the United States to pay risk corridors payments in excess of collections. HPHC cannot do that.

HPHC's policy arguments are also unavailing. Pl. MSJ at 28-29. The ACA's premium stabilization programs were designed to create a structure to mitigate insurers' risks, not to eliminate those risks by creating a government guarantee. And while the programs are "interlocking" insofar as reinsurance and risk adjustment payments are included in the risk corridors formula, risk corridors payments and charges do not factor into the other two programs. HPHC's contention that the risk corridors program alone obligates the government to indemnify

insurers against losses regardless of appropriations thus has no grounding in the statutory text and gives short shrift to the ACA's own emphasis on fiscal responsibility. ACA § 1563.

HPHC's contention that "the [risk corridors program's] entire purpose is to *stabilize* insurance premiums in each of the first three years of the exchanges' existence" Pl. MSJ at 18, also "ignores the complexity of the problems Congress [was] called upon to address." *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986). The Exchanges created significant business opportunities for insurers, which had an incentive to compete for market share by lowering premiums. Indeed, a recent article noted "the prevalent strategy of deliberately selling policies below cost in the early years of the program in order to gain market share." Seth Chandler, *Judge's Ruling On 'Risk Corridors' Not Likely To Revitalize ACA*, Forbes, Feb. 13, 2017, A201. A government commitment to indemnify insurers against losses would have exacerbated those incentives, and Congress prudently refrained from committing taxpayer dollars to unprofitable insurers. Instead, Congress created a self-funded program designed to distribute risks among insurers. Insurers' pricing decisions could not create a payment obligation that Congress did not enact.[16]

Judge Lettow rejected the argument that anything less than "full payments annually defeats the purpose of the risk-corridors program[.]" *Land of Lincoln*, 129 Fed. Cl. at 107. As Judge

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[16] HPHC contends that "[w]ithholding payment [or risk corridors payments] until long after the year for which Congress intended the payment to be made only exacerbates premium rate inflation for subsequent years and thus vitiates the [risk corridors program's] objective of *stabilizing* premiums." Pl. MSJ at 18. With this statement, HPHC glosses over the timeline governing QHP premiums and risk corridors payments. HHS paid risk corridors payments for benefit year 2014 in late 2015, months *after* QHPs submitted proposed 2016 benefit year rates to state insurance commissioners for approval. HPHC provides no evidence that if HHS had paid full, annual risk corridors payments for benefit year 2014, it would have had any "stabilizing" impact on insurance premiums for benefit year 2016, the *last* of the three years covered by the risk corridors program, much less the preceding two benefit years.

Lettow recognized, "HHS's payments in due course, not necessarily [in full] annually, to the extent funds are available from 'payments in' without resort to appropriated funds, can still serve the program, albeit not to the extent [issuers] urge[]." *Id.* Indeed, reliance on the general purposes of the program cannot overcome Congress's decision to mitigate losses only to the extent of collections. "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (emphasis in original).

2. Neither the FY 2014 appropriation nor the Judgment Fund was available for risk corridors payments

As discussed above, HHS's fiscal year 2014 appropriation included a $3.7 billion lump sum for the management of enumerated programs such as Medicare and Medicaid and for "other responsibilities" of CMS. HPHC contends that "GAO and *Moda* Agree That Appropriations Were Available for CMS to Incur [Risk Corridors Program] Obligations." Pl. MSJ at 32. In *Moda*, Judge Wheeler mistakenly believed that HHS could have used that lump sum to make risk corridors payments during fiscal year 2014, before Congress's express funding limitation took effect in December 2014. *Moda*, 130 Fed. Cl. at 456 (the "fiscal year 2014 CMS Program Management appropriation" was available but "HHS chose not to use [it]"). And HPHC misreads the GAO Red Book to argue that "there were in fact appropriations available for CMS to form obligations in FY 2014, notwithstanding that CMS would not *pay* its [risk corridors program] obligations until the following fiscal year." Pl. MSJ at 34.

The terms of the ACA preclude that conclusion. By law, the lump sum appropriation in the FY 2014 appropriation expired at the end of the fiscal year (September 30, 2014). *See* Pub. L.

No. 113-76, div. H, tit. V, 128 Stat. 408 (2014), A25.[17] And under the plain terms of section 1342, no risk corridors payments could have been made until the 2015 calendar year. Section 1342 requires that "payments in" and "payments out" be calculated using insurers' data from the entire calendar year. *See* 42 U.S.C. § 18062(b). Indeed, an insurer's allowable costs for the year must be reduced by any reinsurance and risk adjustment payments, which are not made until after the end of the calendar year. *Id.* § 18062(c)(1)(B). Thus, 2014 benefit year "payments out" were not an "other responsibility" of CMS in fiscal year 2014. That is why the GAO advised Congress that, for funds to be available for risk corridors payments, subsequent appropriation acts must include language similar to the language included in the appropriation for fiscal year 2014. 2014 WL 4825237, at *5. Congress did not include similar language in subsequent appropriation acts; Congress appropriated "payments in" but barred HHS from using other funds for risk corridors payments.

HPHC's arguments to the contrary fail. First, the date on which HHS could have recorded benefit year 2014 risk corridors payments as an "obligation" is not relevant to the question of whether an appropriation was available at the earliest time HHS could have calculated risk corridors payments for benefit year 2014. *See* Pl. MSJ at 33. In any event, HPHC is wrong to allege that HHS could have recorded an obligation "when QHP issuers submitted their rates and opted to participate in the exchanges in the forthcoming year," *id.*, which took place months before the end of benefit year 2014. As explained above, HHS had no ability to calculate risk corridors

[17] Likewise, the continuing resolutions noted by Judge Wheeler, *Moda*, 130 Fed. Cl. at 457 n.13, made funds available only for projects or activities for which appropriations were made during fiscal year 2014 and only until December 2014, when Congress enacted the FY 2015 appropriations act. *See*, Pub. L. No. 113-164, § 106, 128 Stat. 1868 (2014), A27. Thus, HPHC is wrong when it suggests that the continuing resolution funding is "unrestricted" and available for risk corridors payments. Pl. MSJ at 34.

collections and payments for benefit year 2014 until, at the earliest, July 2015, when insurers first submitted 2014 benefit year risk corridors data.[18] Second, even if HPHC is correct that the fiscal year 2014 CMS Program Management appropriation remains available for five years, the GAO Red Book excerpt quoted by HPHC makes clear that the appropriation may only cover "obligations incurred prior to the account's expiration." Pl. MSJ at 33. As described above, the fiscal year 2014 CMS Program Management appropriation, which expired on September 30, 2014, and the Continuing Resolutions that extended fiscal year 2014 funding, expired upon the passage of the fiscal year 2015 Spending Law on December 16, 2014 – *before* the end of risk corridors benefit year 2014 and *before* any insurer's risk corridors collections and payments could be calculated in mid-2015.

In *Moda*, Judge Wheeler alternatively reasoned that Congress must have intended to allow insurers to collect full risk corridors payments from the Judgment Fund, because the appropriations acts did not state that no funds "in this *or any other* [*a*]*ct*" are available for risk corridors payments. *Moda*, 130 Fed. Cl. at 462 (emphasis added). But the "general appropriation for payment of judgments . . . does not create an all-purpose fund for judicial disbursement," *Richmond*, 496 U.S. at 432, and it has no bearing on the threshold question of liability. Thus, in *Highland Falls*, the Federal Circuit rejected a Tucker Act claim for damages from the Judgment Fund, even though Congress had simply capped funds available under an agency's appropriations act without making

[18] Recently, in another risk corridors case, *Maine Community Health Options*, counsel for HPHC (there representing Maine Community Health Options) conceded that the earliest a claim could accrue for risk corridors payments was July 2015. Transcript of Argument – Motion to Dismiss and Motion for Summary Judgment, Feb. 15, 2017, at 54:24 – 55:7, A217-18.

reference to "any other act." Under Judge Wheeler's reasoning, the claimants in *Highland Falls* should have prevailed rather than lost.[19]

In the only acts appropriating funds for risk corridors payments, Congress responded to the analysis in the GAO opinion, which identified only two potential funding sources—"payments in" and the lump sum appropriation for program management—and did not suggest that risk corridors payments could be made from the Judgment Fund. Informed by the GAO's analysis, Congress appropriated "payments in" but barred HHS from using other funds in the CMS Program Management account. Congress thus ensured that "the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect." 160 Cong. Rec. H9838, A47. As in *Highland Falls*, that "clear congressional mandate" precludes plaintiff's statutory claim. 48 F.3d at 1171.

3. The cases on which HPHC relies are inapposite

This case bears no resemblance to the cases on which HPHC relies. In *District of Columbia v. United States*, Congress had transferred a federal hospital to the District of Columbia under the Saint Elizabeths Hospital and District of Columbia Mental Health Services Act, which provided

[19] Plaintiff's reliance (Pl. MSJ at 31-32) on the Federal Circuit's decision in *Slattery v. United States*, 635 F.3d 1298, 1317 (Fed. Cir. 2011) (en banc), is likewise misplaced. *Slattery* is simply not relevant. *Slattery* was a breach of contract case where the issue was limited to this Court's Tucker Act jurisdiction. The Federal Circuit held only that the appropriation status of a governmental agency is not relevant to Tucker Act jurisdiction. 635 F.3d at 1321; *see also id.* at 1316 (the Judgment Fund is not a jurisdictional "limitation" of claims within the scope of the Tucker Act); *id* at 1318 (holding that "[t]he appropriation provisions of [FIRREA] were an appropriation to pay governmental obligations."). But as *Highland Falls* and the other cases discussed above demonstrate, Congress's exercise of its power of the purse is of central relevance to the merits question of liability under a statute. The Judgment Fund exists solely to pay "final judgments, awards, compromise settlements, and interests and costs." 31 U.S.C. § 1304(a). Until entry of judgment or execution of a settlement, the Judgment Fund's permanent appropriation is unavailable and it cannot serve to justify the entry of a judgment. *See Slattery*, 635 F.3d at 1317 (recognizing that "[t]he purpose of the Judgment Fund was to avoid the need for specific appropriations to pay judgments awarded by the Court of Claims").

that the United States would bear a share of the costs of the transition of the hospital from the federal government to the District. 67 Fed. Cl. 292, 297 (2005). The Act also provided that HHS "shall initiate . . . and complete . . . such repairs and renovations to such physical plant and facility support systems of the Hospital." Pub. L. No. 98-621, § 4(f)(2)(A), 98 Stat. 3369, 3373 (1984). The Act was later amended to permit HHS to enter into an agreement with the District whereby the District would contract for the repairs and renovation, which HHS would fund. *District of Columbia*, 67 Fed. Cl. at 298 (citing Pub. L. No. 102-150, 105 Stat. 980 (1991). Congress had made several specific appropriations to fund the repair and renovation costs, and those appropriations were paid to the District. *Id.* at 334-35. Those appropriations did not purport to satisfy the Government's existing obligation, however, which was not to make payments but to "repair[] and renovat[e]." Looking to the legislative history, "all the court is able to conclude . . . is that Congress had every intention of fully funding repairs and renovations." *Id.* at 336. In contrast, section 1342 alone creates no payment obligation, and Congress twice expressly restricted funding for risk corridors payments.

Gibney v. United States, 114 Ct. Cl. 38 (1949), is equally far afield. The appropriations act in that case stated that "none of the funds appropriated for the Immigration and Naturalization Service shall be used to pay compensation for overtime services *other than as provided in the* Federal Employees Pay Act of 1945." *Id*. at 48-49 (emphasis added). Because "the 1945 act expressly state[d] . . . that it should not prevent payments in accordance with the 1931 act," the court concluded that the italicized language allowed the plaintiffs to "be paid according to the 1931 act." *Id*. at 50. The risk corridors provisions do not contain any language comparable to the italicized language on which *Gibney* was decided.

Nor does *United States v. Langston*, 118 U.S. 389 (1886), support HPHC's claim. The substantive statute in *Langston* provided that the representative to Hayti "shall be entitled to a salary of $7,500 a year," and "[t]he sum of $7,500" had in fact "been annually appropriated for the salary of the minister to Hayti, from the creation of the office until the year 1883." *Id*. at 390. For two subsequent years, Congress appropriated only $5,000 each for the salaries of various ministers including the minister to Hayti, but Congress omitted from these acts proposed language that would have repealed statutes allowing a larger salary. *Id*. at 391. While cautioning that the case was "not free from difficulty," the Supreme Court concluded 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 which merely appropriated a less amount for the services of that officer for particular fiscal years." *Id*. at 394.

Langston may have been a difficult case, but the risk corridors cases are straightforward. In contrast to the substantive statute in *Langston*, section 1342 does not make risk corridors payments an "entitlement" of insurers. And in contrast to the appropriations act in *Langston*, Congress did not merely fail to appropriate sufficient funds for risk corridors payments, but prohibited HHS from using any funds other than collections for such payments.[20]

New York Airways v. United States, 369 F.2d 743 (Ct. Cl. 1966), on which Judge Wheeler relied, is likewise readily distinguishable for at least four reasons. First, in that case, the court addressed a shortfall in appropriations to compensate helicopter companies for delivering the U.S. mail. But unlike section 1342, the statute at issue in *New York Airways* made explicit reference to

[20] Moreover, until the creation of the Judgment Fund in 1956, most money judgments against the United States required special appropriations from Congress for payment. *Richmond*, 496 U.S. at 424-25. Thus, cases such as *Langston* and *Gibney*, which predate the creation of the Judgment Fund, did not require payment without a congressional appropriation.

appropriations, and there was no dispute that payments would be made from the general fund of the Treasury. 369 F.2d at 745 (quoting 49 U.S.C. § 1376(c) (1964)) ("The Postmaster General shall make payments out of appropriations for the transportation of mail by aircraft . . ."). Second, the statute expressly provided for compensation for services rendered to the Government, and the court recognized, even when considering the effect of the appropriations law, that payments were a "contract obligation" of the Government. 369 F.2d at 746.

Third, the express appropriations restrictions at issue here bear no resemblance to the appropriations provision in *New York Airways*. That provision, which referenced "Liquidation of Contract Authorization" in its title, simply provided for an appropriation "not to exceed" a specific sum. As noted, the court determined from the legislative history that Congress did not intend that appropriation to limit amounts owed to carriers. 369 F.2d at 749-51. In contrast, Congress appropriated only risk corridors collections and expressly barred the use of other funds to make risk corridors payments, and nothing in the text or legislative history of the Spending Laws or section 1342 itself suggests that Congress understood risk corridors payments to be contractual or that the United States would be liable for any shortfall in collections.

Finally, the *New York Airways* court recognized that "clear and uncontradicted" "proof of congressional inten[t] . . . in the legislative history" to amend permanent legislation through an appropriations restriction would place the restriction "within the ambit of *Dickerson*." *Id.* at 750. But in *New York Airways*:

> Congress was well-aware that the Government would be legally obligated to pay the carriers whatever subsidies were set by the Board even if the appropriations were deficient, [as was] evident in the floor debates during the period from 1961 through 1965. The subsidy was recognized by responsible members of Congress on both sides as *a contractual obligation* enforceable in the courts which could be avoided only by changing the substantive law under which the Board set the rates, rather than by curtailing appropriations.

Id. at 747 (emphasis added). Here, in contrast, the legislative history is "clear and uncontradicted." Congress enacted the appropriations restrictions to ensure that "the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect," 160 Cong. Rec. H9838, A47, and to "requir[e] the administration to operate the Risk Corridor program in a budget neutral manner," S. Rep. No. 114-74, at 12, A57.

D. HPHC's Reliance-Based Arguments Fail as a Matter of Law

For related reasons, HPHC does not advance its position by relying on HHS's statements allegedly promising to make full annual risk corridors payments. *See* Pl. MSJ at 27-29. First, HHS often explicitly recognized that its ability to make such payments was subject to appropriations.[21] Second, it is well settled that an agency's statements cannot create a payment obligation that Congress did not authorize. In *Richmond*, the Supreme Court expressly rejected the contention that "erroneous oral and written advice given by a Government employee" may "entitle the claimant to a monetary payment not otherwise permitted by law." 496 U.S. at 415-16. The Supreme Court held that "payments of money from the Federal Treasury are limited to those authorized by statute," and it "reverse[d] the contrary holding of" the Federal Circuit. *Id.* at 416.

The Supreme Court emphasized that a contrary holding could "render the Appropriations Clause a nullity." *Id.* at 428. "If agents of the Executive were able, by their unauthorized oral or written statements to citizens, to obligate the Treasury for the payment of funds, the control over public funds that the Clause reposes in Congress in effect could be transferred to the Executive." *Id.* That would contravene "the straightforward and explicit command of the Appropriations

[21] *See* 79 Fed. Reg. 30,240, 30,260 (May 27, 2014) (stating that if collections are insufficient to fund payments, "HHS will use other sources of funding for the risk corridors payments, *subject to the availability of appropriations*) (emphasis added); 80 Fed. Reg. 10,750, 10,779 (Feb. 27, 2015) (same); CMS, Risk Corridors Payments for 2015 (Sept. 9, 2016), A186 (similar).

Clause," which provides that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Id*. at 424.

It is thus settled that "[a] regulation may create a liability on the part of the government only if Congress has enacted the necessary budget authority." *GAO Red Book*, Ch. 2 at 2-2, A182. Likewise, "[i]f a given transaction is not sufficient to constitute a valid obligation, recording it will not make it one." *GAO Red Book*, Vol. II, Ch. 7 at 7-8 (3d ed. 2006), A60. Any reliance-based arguments founder on these bedrock principles.

Thus, HPHC's recitation of HHS's statements is legally irrelevant. Moreover, given the agency's repeated recognition of the limits of its budget authority, any reliance on those statements would have been unreasonable and selective, at best.

* * * *

In sum, Congress did not create a statutory payment obligation when it enacted section 1342, and insurers are not entitled to more than their prorated share of collections. Congress reserved its full budget authority over the amount of risk corridors payments, and for the 2014 and 2015 benefit years in question, Congress appropriated only risk corridors collections and expressly barred the use of other funds to ensure that the federal government would not pay out under the program more than it collected from profitable insurance companies. The United States is not liable for any shortfall.

III. HPHC's Contract Claim Fails Because Section 1342 Establishes a Benefits Program, Not an Implied Contract

HPHC's implied-in-fact contract theory—that HPHC "entered into a valid implied-in-fact contract with the Government regarding the Government's obligation to make full and timely risk corridors payments to Plaintiff in exchange for Plaintiff's agreement to become a QHP issuer and participate in the Massachusetts Marketplace," Compl. ¶ 86—was correctly rejected by this Court

in *Land of Lincoln*, 129 Fed. Cl. at 111-14. The elements of an implied-in-fact contract are the same as the elements of an express contract, namely: (1) mutuality of intent; (2) an unambiguous offer and acceptance; (3) consideration; and (4) actual authority of the government's representative to bind the government in contract. *Hanlin v. United States*, 316 F.3d 1325, 1328 (Fed. Cir. 2003). HPHC has not alleged and cannot allege facts plausibly establishing these requirements.

A. Nothing in Section 1342 or 45 C.F.R. § 153.510 Indicates an Intent by the United States to Enter into a Contract for Risk Corridors

First, HPHC fails to offer any well-pleaded factual allegations indicating that the United States intended to contract for risk corridors payments. "[A]bsent some clear indication that the legislature intends to bind itself contractually, the presumption is that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465–66 (1985) (internal quotations, citations omitted). Courts must presume that a statutory enactment constitutes a statement of policy rather than a binding commitment, because "the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state . . . [which], unlike contracts, are inherently subject to revision and repeal[.]" *Id.*; *see also Baker v. United States*, 50 Fed. Cl. 483, 489 (2001) ("[T]he United States cannot be contractually bound merely by invoking the cited statute and regulation.").

HPHC cannot overcome this presumption. Like the issuer in *Land of Lincoln*, HPHC points to section 1342, 45 C.F.R. § 153.510, and HHS's and CMS's alleged "repeated admissions regarding their obligation to make risk corridor payments" as allegedly indicating both an intent to contract for, and an offer of, "full and timely risk corridor payments." Compl. ¶ 87. This does not suffice. "Although [section 1342] may mandate payment from HHS, albeit not annually, when a qualified health plan satisfied statutory and regulatory conditions, that alone does not

demonstrate intent to contract." *Land of Lincoln*, 129 Fed. Cl. at 111-12 (citing *ARRA Energy Co. I v. United States*, 97 Fed. Cl. 12, 27 (2011)) ("[T]o overcome th[e] presumption [that general laws do not create private rights in contract], plaintiffs must point to specific language in [the statute or regulation] or to conduct on the part of the government that allows a reasonable inference that the government intended to enter into a contract.").

The Federal Circuit has made clear that intent to contract in a statute is determined by looking first to the text and then to the legislative history. *Brooks v. Dunlop Mfg., Inc.*, 702 F.3d 624, 631 (Fed. Cir. 2012) ("In determining whether a statute creates a contract, the [Supreme Court] has instructed us to first look to the language of the statute. . . . We next look to whether circumstances surrounding the statute's passage manifested any intent by Congress to bind itself contractually."). In *Brooks*, the court considered a plaintiff's claim that the former *qui tam* provision of the patent marking statute was a unilateral offer by the government. 702 F.3d at 630-32; *see also* 35 U.S.C. § 292(b), *amended by* Pub. L. No. 112-29, § 16, 125 Stat. 284 (2011). The court concluded, based on the absence of any intent in the text or legislative history of the *qui tam* provision, that the plaintiff could not demonstrate an intent by Congress to contract. *Brooks*, 702 F.3d at 631.

When courts have found an intent to contract with program participants, the statutes at issue clearly expressed Congress's intent for the government to enter into contracts. *See, e.g.*, *Grav v. United States*, 14 Cl. Ct. 390, 392 (1988) (finding an implied-in-fact contract where statute provided that "Secretary shall offer to enter into a contract"), *aff'd*, 886 F.2d 1305 (Fed. Cir. 1989); *Radium Mines, Inc. v. United States*, 153 F. Supp. 403, 405 (Ct. Cl. 1957) (opining that agency regulation could give rise to implied contract where it stated that "[u]pon receipt of an offer" the agency would "forward to the person making the offer a form of contract containing applicable

terms and conditions ready for his acceptance"). In contrast, neither section 1342 nor 45 C.F.R. § 153.510 contains any contract language; they simply provide for the creation of a program and a formula for determining charges and payments.

Nor do HHS's statements regarding its risk corridors duties, Compl. ¶¶ 94-96, evince an intent to contract; they merely recognize HHS's understanding of its existing *statutory* duties. *See, e.g.*, 79 Fed. Reg. at 30,260, A211 ("HHS recognizes that the *Affordable Care Act* requires the Secretary to make full payments to issuers."); 80 Fed. Reg. at 10,779, A214 (same). An agency's description of a statutory duty is not evidence of an intent to contract. *AAA Pharmacy, Inc. v. United States*, 108 Fed. Cl. 321, 328 (2012). Thus, there is no support for HPHC's contention that Congress or HHS intended the risk corridors program to operate as a contractual obligation. *Cf. Hanlin*, 316 F.3d at 1329-30 (noting that statute and regulation "set forth the [agency's] authority and obligation to act, rather than a promissory undertaking" and "[w]e discern no language in the statute or the regulation that indicates an intent to enter into a contract"); *AAA Pharmacy, Inc.*, 108 Fed. Cl. at 329 (finding no intent to contract in Medicare statute and regulations where statute "only provides for payment" and regulation "provides for a review process"); *ARRA Energy Co. I*, 97 Fed. Cl. at 28 (dismissing implied-in-fact contract claim because statute "simply provides that the government will make an outright payment to any applicant who meets specified conditions").

In finding intent, Judge Wheeler announced a sweeping new rule for inferring congressional intent to contract based on a statute's structure: Congress intends to contract when it (1) creates a voluntary "incentive program" and (2) promises fixed payment to those parties if they perform the required services. *Moda*, 130 Fed. Cl. at 462-64. This rule cannot be reconciled with Federal Circuit precedent. First, considering the "structure" of the statute instead of the text

and legislative history is inconsistent with *Brooks*. *See also Wells Fargo Bank, N.A. v. United States*, 88 F.3d 1012, 1018 (Fed. Cir. 1996) (finding unilateral offer in "promissory words" that upon issuance of "Conditional Commitment for Guarantee" government "will execute" agreement and loan guarantee). Second, the *qui tam* provision at issue in *Brooks* had the same "structure" Judge Wheeler found determinative in *Moda*—a voluntary incentive program whereby individuals could bring suit on behalf of the United States against false patent markers and a firm government promise to pay a fixed amount—but the Federal Circuit found no intent to contract in this "structure." *Brooks*, 702 F.3d at 626 & 630-31. Absent any intent by the United States to contract for the payment of risk corridors, Count III must be dismissed.

B. Section 1342 Does Not Constitute an Offer in Contract that Can Be Accepted by Performance Alone

Contrary to HPHC's allegations, an unambiguous offer and acceptance cannot be inferred from the language or circumstances of the risk corridors program. Compl. ¶¶ 87-88, 92, 94. "Section 1342 and the implementing regulations make no explicit reference to an offer or contract." *Land of Lincoln*, 129 Fed. Cl. at 112 (citing *AAA Pharmacy, Inc.*, 108 Fed. Cl. at 329 and *ARRA Energy Co. I*, 97 Fed. Cl. at 27-28). And HHS's rulemaking and guidance similarly contain no language that can plausibly be construed as an unambiguous offer. HHS's statements in the context of proposed rulemaking cannot constitute an unambiguous offer because those statements, by their nature, are subject to change. Moreover, HPHC "agree[d] to become a QHP issuer," Compl. ¶ 88, *before* HHS established the final "terms" for the risk corridors program, demonstrating that neither party considered the risk corridors program to be a contractual, as opposed to a statutory, obligation.[22]

[22] HPHC's Complaint alleges that it provided consideration to the United States "by agreeing to become a QHP issuer and participating in the Massachusetts Marketplace [which was] crucial to

C. HHS Lacked Authority to Enter Contracts for Risk Corridors Payments

Regarding authority to enter an implied contract with issuers, HPHC again relies on HHS's representations and assurances. *See* Compl. ¶ 87 ("HHS's and CMS's repeated admissions regarding their obligation to make risk corridor payments were made or ratified by representatives of the Government, including, but not limited to, Kevin Counihan, Director of [CCIIO] and CEO of the Health Insurance Marketplaces; Andrew Slavitt, Administrator of CMS; or other CMS officials, all of whom who had actual authority to bind the Government").[23] However, HPHC does not and cannot allege, beyond a mere legal conclusion, that Mr. Counihan or Mr. Slavitt enjoyed authority to bind the government in contract for risk corridors payments, as it must to avoid dismissal. *Trauma Serv. Grp. v. United States*, 104 F.3d 1321, 1327 (Fed. Cir. 1997) (the plaintiff "must allege facts sufficient to show that the Government representative who entered into its alleged implied-in-fact contract was a contracting officer or had implied actual authority to bind the Government").

Nothing in section 1342 or the ACA authorizes *any* federal official to enter into a contract to make risk corridors payments. "A government agent possesses express actual authority to bind the government in contract only when the Constitution, a statute, or a regulation grants it to that

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the Government achieving the overarching goal of the ACA exchange programs." Compl. ¶ 91. However, HPHC's assertion that furthering a policy goal of the United States constitutes contractual consideration is a theory with no limiting principle and lacks legal support.

[23] Not only were many of the representations relied upon by HPHC made two or three years after the time of purported contract formation, at all times, HHS's assurances were expressly grounded in the statute—not a contract—and often were accompanied by the qualifying language "subject to the availability of appropriations." *See, e.g.*, Compl. ¶ 94 (relying on May 27, 2014 (identified erroneously in the Complaint as 2015) final rule containing the qualifying language: "[i]n the unlikely event of a shortfall for the 2015 program year, . . . HHS will use other sources of funding for the risk corridors payments, *subject to the availability of appropriations*.") (emphasis added).

agent in unambiguous terms." *McAfee v. United States*, 46 Fed. Cl. 428, 435 (2000). Absent statutory authority, no federal official can form a binding contract. *See Schism v. United States*, 316 F.3d 1259, 1288 (Fed. Cir. 2002) (en banc) (holding that neither Secretaries of the Armed Forces nor the President had authority to contract with service members for free, lifetime healthcare).

Moreover, budget authority is a prerequisite to contract formation with the United States. The Anti-Deficiency Act prohibits government officials from involving the "government in a[n] . . . obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341(a)(1)(B). Without such authorization (or appropriation), a valid contract for the payment of money cannot be formed. *See, e.g.*, *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 643 (2005) (recognizing that "without . . . special authority, a[n] . . . officer cannot bind the Government in the absence of an appropriation") (citations omitted). As explained above, no appropriation for risk corridors payments was enacted until Congress passed the 2015 and 2016 Spending Laws. Accordingly, HHS lacked budget authority in fiscal years 2013 or 2014 to contract to make risk corridors payments in fiscal year 2015 because "[a]s far as government contracts are concerned," the Anti-Deficiency Act "'bars a federal employee or agency from entering into a contract for future payment of money in advance of, or in excess of, existing appropriation.'" *Cessna Aircraft Co. v. Dalton*, 126 F.3d 1142, 1449 (Fed. Cir. 1997) (quoting *Hercules, Inc. v. United States*, 516 U.S. 417, 426 (1996)). And, as noted above, HHS's "assurances" on which HPHC allegedly relied are immaterial as a matter of law. An agency simply cannot bind itself to the payment of money through its oral or written statements absent express authority bestowed by Congress. *See Richmond*, 496 U.S. at 428.

D. HPHC Cannot Establish that HHS Breached any Contractual Obligation

Finally, even if an implied-in-fact contract for the payment of risk corridors was formed (it was not), HPHC cannot establish that HHS breached a contractual obligation. *See Land of Lincoln*, 129 Fed. Cl. at 113. For HPHC to recover on a breach of contract claim, it must establish both the existence of a valid contract with HHS and a breach of a duty created by that contract. *See Anderson v. United States*, 73 Fed. Cl. 199, 201 (2006). HPHC's implied-in-fact contract theory seeks to convert the risk corridors program into a contractual undertaking. But the program includes HHS's three-year payment framework. *See, e.g.*, Patient Protection and Affordable Care Act; Exchange and Insurance Market Standards for 2015 and Beyond, 79 Fed. Reg. 30,240 30,260 (May 27, 2014). Because any contractual obligation here could extend no farther than what is required by statute and regulation, HHS cannot have breached such an agreement by making pro-rated payments to the extent of collections in conformity with its three-year payment framework. *Land of Lincoln*, 129 Fed. Cl. at 113.

CONCLUSION

Based upon the foregoing, the Court should dismiss HPHC's Complaint, deny HPHC's motion for summary judgment, and enter judgment for the United States.

Dated: April 13, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

RUTH A. HARVEY
Director
Commercial Litigation Branch

KIRK T. MANHARDT
Deputy Director

/s/ Marc S. Sacks
MARC S. SACKS
CHARLES E. CANTER
TERRANCE A. MEBANE
FRANCES M. MCLAUGHLIN
L. MISHA PREHEIM
PHILLIP M. SELIGMAN
Commercial Litigation Branch
Civil Division
United States Department of Justice
P.O. Box 875
Ben Franklin Station
Washington D.C. 20044
Tel. (202) 307-1104
Fax (202) 514-9163
marcus.s.sacks@usdoj.gov

ATTORNEYS FOR THE UNITED
STATES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 13, 2017, I electronically filed the foregoing UNITED STATES' MOTION TO DISMISS AND OPPOSITION TO HPHC'S MOTION FOR PARTIAL SUMMARY JUDGMENT with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants.

/s/ Marc S. Sacks
MARC S. SACKS
Commercial Litigation Branch
Civil Division
United States Department of Justice