IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MOLINA HEALTHCARE OF CALIFORNIA, INC., *et al*.,	)	
Plaintiffs,	)	
v.	)	No. 17-97 C
	)	Judge Wheeler
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

THE UNITED STATES' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND CROSS-MOTION TO DISMISS

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INTRODUCTION

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." *Office of Personnel Management v. Richmond*, 496 U.S. 414, 416 (1990).

Plaintiffs Molina Healthcare of California, Inc., Molina Healthcare of Florida, Inc., Molina Healthcare of Michigan, Inc., Molina Healthcare of New Mexico, Inc., Molina Healthcare of Ohio, Inc., Molina Healthcare of Texas, Inc., Molina Healthcare of Utah, Inc., Molina Healthcare of Washington, Inc., and Molina Healthcare of Wisconsin, Inc. ("Molina") seek hundreds of millions of dollars in payments from the Treasury that Congress has not authorized. As part of the Patient Protection and Affordable Care Act (the "Act" or "ACA"), Congress established Health Benefit Exchanges ("Exchanges") on which insurance companies could compete for customers and take calculated business risks. The Act does not require the taxpayers to indemnify insurers for losses. 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 3Rs 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

payments Molina seeks.

In section 1342 of the ACA, Congress directed the Secretary of Health and Human Services ("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. As this Court has recognized, 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 in 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, 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." That legislation, 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.

STATEMENT OF THE ISSUES

1. Whether Molina'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, plaintiffs are not entitled to "presently due money damages" and HHS has not finally determined plaintiffs' total risk corridors payments under the program.

2. Whether Molina's statutory claim fails as a matter of law because Congress did not obligate the government to make payment beyond amounts collected under the risk corridors program or appropriate funds for that purpose, and prohibited HHS from using funds other than collections to make risk corridors payments.

3. Whether Molina's contract and takings claims, which are derivative of the statutory claim, fail as a matter of law where Molina alleges no facts that would plausibly support an inference that HHS is contractually obligated to make risk corridors payments.

STATEMENT OF 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.[1] 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.[2]

[1] 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 the Centers for Medicare & Medicaid Services ("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."

[2] Federal insurance subsidies are advanced directly to insurers on behalf of qualified enrollees and

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 A15-A16.

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. §§ 18031-18041. The ACA contemplated that states would operate their own Exchanges ("State-Based Exchange") but provided that HHS would establish and operate Exchanges ("Federally-facilitated Exchange") for any state that elected not to do so. *See* 42 U.S.C. § 18041; 45 C.F.R. §§ 155.20, 155.105; Program Integrity; Exchange, SHOP, and Eligibility Appeals, 78 Fed. Reg. 54,070, 54,071 (Aug. 30, 2013).[3]

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 millions of individuals who receive federal subsidies. All plans offered through an Exchange—whether State-Based or Federally-facilitated—must be Qualified Health

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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).

[3] States have three options regarding the establishment and administration of an Exchange: (1) they can elect to run their own Exchange using a state or federally-maintained information technology platform ("State-Based Exchange"); (2) they can let the federal government run their Exchange ("Federally-facilitated Exchange"); or (3) they can partner with the federal government to jointly administer their Exchange ("State Partnership Exchange"). 45 C.F.R. §§ 155.20; 155.105, 155.106, 155.200. HHS uses the term Federally-facilitated Exchanges to include State Partnership Exchanges.

Plans ("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.

To ensure that insurers operating on the Exchanges comply with these requirements, Congress required Exchanges to establish annual certification procedures. 42 U.S.C. § 18031(d)(4); 45 C.F.R. part 156. HHS conducts the certification process for Federally-facilitated Exchanges and, as part of this process, requires insurers to attest that they will comply with federal and state insurance laws, including those governing QHPs, and to execute an agreement known as a "Qualified Health Plan Certification Agreement and Privacy and Security Agreement," or "QHP Agreement" for short. In the QHP Agreement, insurers agree to adhere to privacy and security standards when conducting transactions on the Federally-facilitated Exchange. 45 C.F.R. § 155.260(b)(2). Notwithstanding these requirements, an insurer's decision to offer QHPs on an Exchange in any given year does not commit the insurer to doing so, and merely reflects a business decision by the insurer that is accompanied by regulatory consequences.

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-A103. 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. §§ 18061-18063 *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. ¶ 29 (noting that the risk corridors program "was modeled after a similar program enacted under President George W. Bush"). 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. §§ 18061-18063.

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 insurers.").

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 insurers 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 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 insurer receives under the reinsurance and risk adjustment programs reduce the insurer'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.

As this Court has recognized, neither section 1342 nor the ACA appropriated funds specifically for the risk corridors program. *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 443 (2017); *see also Health Republic Ins. Co. v. United States*, 129 Fed. Cl. 757, 762 (2017); *Land of Lincoln Mut. Health Ins. Co. v. United States*, 129 Fed. Cl. 81, 104-05 (2016), *appeal docketed* No. 2017-1224 (Fed. Cir. Nov. 16, 2016). By contrast, in dozens of other ACA provisions, Congress appropriated or authorized the appropriation of funds for various programs. *See* p. 20 n.14, *infra* (citing examples). "Payments in" from insurers are the only source of funds

[4] "Allowable administrative costs" include administrative costs and profit of the QHP, the sum of which is limited to 20% of total premiums collected. 45 C.F.R. § 153.500.

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-A82. 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-A16.

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), A129. 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, *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), A134-A135.[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 then 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.

[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.

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. 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]

Congress did not reenact the same appropriations language. 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, title II, 128 Stat. 2130, 2477, A43. Congress included a rider, however, that expressly limited the availability of 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

[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, A27. 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.

to eliminate the lump sum amount as a source, leaving only the user fees, *i.e.*, risk corridors collections. 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]

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, title 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

[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 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), 129 Stat. 502, 505 (2015); Pub. L. No. 114-96, 129 Stat. 2193 (2015); Pub. L. No. 114-100, 129 Stat. 2202 (2015).

remain 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 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), 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), 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 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.[9]

ARGUMENT[10]

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

The Tucker Act, under which Molina asserts jurisdiction, Complaint ¶ 11, 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 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).

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[9] HHS calculated a payment of $39,035.74 to Molina for 2014, and a payment of $52,370,918.76 for 2015. To date, Molina has received $6,024.64.

[10] The United States acknowledges that this Court exercised jurisdiction over similar claims and entered judgment in favor of the insurer on the statutory and implied contract counts. *Moda*, 130 Fed. Cl. at 454, 462.

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, Title 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).

Molina's claim of Tucker Act jurisdiction rests on its mistaken assertion that HHS "has refused to make full and timely risk corridors payments to Molina for CY [calendar year] 2014 and CY 2015 as required by Section 1342." Complaint ¶ 108. But section 1342 does not obligate HHS to make annual payments. *Land of Lincoln*, 129 Fed. Cl. at 107; *Blue Cross and Blue Shield of N.C. v. United States ("BCBSNC")*, No. 16-651C, -- Fed. Cl. --, 2017 WL 1382976, at *14 (Apr. 18, 2017) (Griggsby, J.). 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* those 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 collections from insurers are insufficient to fund calculated 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 temporarily 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. *See* A131, 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. *BCBSNC*, 2017 WL 1382976, at *17. 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 Molina's claims.[11, 12]

In any event, this Court lacks jurisdiction to award Molina non-monetary and special relief, including a "declar[ation] . . . [that] the Government must make full and timely CY 2015 and/or CY 2016 risk corridor payments to Plaintiff if it experiences qualifying losses during that year," Complaint at Prayer for Relief ¶ (7). *See Land of Lincoln*, 129 Fed. Cl. at 99. The Court's jurisdiction to grant equitable or declaratory relief is limited to cases in which such remedies are "incident of and collateral to" and necessary "to complete the relief afforded by" a monetary or procurement judgment within the Court's primary jurisdiction. 28 U.S.C. § 1491(a)(2), (b)(2). That encompasses three statutorily defined circumstances: (i) "orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records" where "incident of and collateral to" a money judgment, 28 U.S.C. § 1491(a)(2); (ii) actions brought under the Contract Disputes Act of 1979, *id.*; and (iii) bid protests, *id.* § 1491(b)(2). *See, e.g.*, *Annuity Transfers, Ltd.*, 86 Fed. Cl. at 181-82. None of these circumstances applies here.

[11] Nor are Molina's claims ripe. HHS has not yet finally determined the total amount of payments that Molina (or any other insurer) 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 Molina will receive less than the full amount of its risk corridors claims, much less the extent of any such underpayment.

[12] Should the Court conclud that the question of timing is not jurisdictional, the Court should still dismiss the Complaint on the merits for failure to state a claim because, under HHS's reasonable implementation of the risk corridors program, risk corridors payments beyond the pro-rata payments Molina has already received are not presently due. *BCBSNC*, 2017 WL 1382976, at *17; *accord Land of Lincoln*, 129 Fed. Cl. at 107.

II. Molina's Claims Fail As A Matter of Law Because There Is No Statutory Obligation To Use Taxpayer Funds For Risk Corridors Payments

Alternatively, the Complaint should be dismissed under Rule 12(b)(6) for failure to state a claim. To avoid dismissal, a plaintiff must "provide the grounds of [its] entitle[ment] to relief" in more than mere "labels and conclusions." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation and quotation marks omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A "formulaic recitation of the elements of a cause of action" is insufficient. *Twombly*, 550 U.S. at 555. Rather, the complaint must "plead factual allegations that support a facially 'plausible' claim to relief." *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009). The Court must dismiss a claim "when the facts asserted by the claimant do not entitle [it] to a legal remedy." *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002).[13]

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

The risk corridors program is one of three premium stabilization programs created by the ACA (together known as the "3Rs"). There is no dispute that the other two 3Rs 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. Plaintiffs' Motion for Partial Summary Judgment and Memorandum of Law in Support ("Pl. Br."), Docket 7, at 30 n.45, 32 n.47. Molina 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 amounts collected from insurers. But the text, structure, history, and purpose of the risk corridors program demonstrate that the program was to be self-funded.

[13] Summary judgment in favor of the United States under Rule 56 is also appropriate with respect to Count I. There are no disputed issues of material fact regarding Count I, and the United States is entitled to judgment as a matter of law for the reasons set forth in this brief. *See* Rule 12(d).

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 overpriced their premiums relative to costs make "payments in" at specified percentages; insurers that underpriced their premiums relative to costs receive "payments out" at corresponding percentages. *Id*. The "payment methodology" provision, which states that HHS "shall pay" amounts calculated under the statutory formula, *id*. § 18062(b)(1), does not refer to any potential funding source 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 massive, uncapped payments to insurance companies. In dozens of other ACA provisions, Congress appropriated funds or enacted statutory language authorizing the appropriation of funds in the future.[14] *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").

[14] For examples of ACA provisions appropriating funds, *see* ACA §§ 1101(g)(1), 1311(a)(1), 1322(g), 1323(c). For examples of ACA provisions authorizing the appropriation of funds, *see* 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).

Congress omitted from section 1342 any language making risk corridors payments an obligation of the government, in contrast to the preexisting risk corridors 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); *see also* Pl. Br. 17 n.12. 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 paid by insurers. *Id*.

Congress enacted no equivalent language in section 1342 of the ACA, even though, as Molina acknowledges, Part D's payment process "had long been in place when Congress included Section 1342 in the ACA." Pl. Br. 17.[15] This contrast is especially notable because Congress did enact equivalent language creating an obligation 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

[15] This Court 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). These are specific payment directives that, in combination with "budget authority in advance of appropriations" and the provision that 42 U.S.C. § 1395w-115 "represents an obligation of the Secretary to provide for . . . payment," create a payment obligation under Medicare Part D, while whereas section 1342, which lacks any provision of budget authority, obligating language, or mention of appropriations, does not.

under that subparagraph."), A18.

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 without further action by Congress. "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 budgetary scoring), A81-A82. 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, 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. The CBO noted that under the risk adjustment program, payments lag receipts by one quarter, which may affect the budget. CBO Cost Estimate at Tbl. 2 note a, A82. And the CBO 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 risk corridors as 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 corresponded to the 2015 and 2016 fiscal years. *BCBSNC*, 2017 WL 1382976, at *17 ("any deadline for making [risk corridors payments] to issuers could be no earlier than the December of the following year"); *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.[16]

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.[17] 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.

[16] The appropriations laws present no constitutional issues. As set forth above, section 1342 does not entitle insurers to risk corridors payments in excess of collections, so the appropriations restrictions do not curtail any vested rights insurers may assert under section 1342. Moreover, because insurers could have no right to receive risk corridors payments until after the conclusion of the 2014 calendar year, even if the Court were to conclude that section 1342 had created a right to payment that the appropriations laws modified, insurers would have had no vested rights to receive risk corridors payments until sometime in 2015, and by that time Congress had already exercised its prerogative to preclude any such vesting. In any event, an obligation on the part of the United States to pay money under a statutory benefits program does not give rise to a constitutional claim, *Adams v. United States*, 391 F.3d 1212, 1224 (Fed. Cir. 2004).

[17] The *GAO Red Book* is being updated on a chapter-by-chapter basis. Citations are to the 2016 edition unless otherwise indicated.

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 Cty., Montana v. United States*, 782 F.3d 685, 689 (Fed. Cir. 2015); *Greenlee Cty. 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. Sch. 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 Cty.*, 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 "payments in" from insurers to make "payments out" to insurers. *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 self-funded.

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." And in *United States v. Mitchell*, 109 U.S. 146, 148 (1883), the Supreme Court held that "by the appropriation acts which cover the period for which the appellee claims compensation, [C]ongress 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. 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." 48 F.3d 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 (in light of the shortfall in collections) have paid 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)). 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.

Molina makes no attempt to distinguish *Highland Falls*, which its brief does not discuss. Instead, Molina asserts that "the passage of an appropriations bill, by a different Congress . . . is irrelevant to the construction of [section 1342.]" Pl. Br. 24 (citation omitted). But that assertion is incorrect when the question before the Court is whether Congress has authorized the very payments a plaintiff seeks. Section 1342 alone did not create a payment obligation. *Id.* Instead of creating such an obligation (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. 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 this Court recognize that even where (unlike here) permanent legislation creates a government obligation, that obligation can be modified by appropriations legislation of this kind.

C. Molina Provides No Basis to Use Taxpayer Funds to Make Up Shortfalls in Collections from Insurers

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

The crux of Molina's argument is that language in section 1342(b) stating that the Secretary "shall pay" amounts calculated under the formula is sufficient to create a binding obligation on the government, regardless of appropriations and despite Congress's repeated and express funding limitations. *See* Pl. Br. 29-30. This argument rests on two independent errors. First, the language on which Molina relies is embedded in the statute's "payment methodology" provision,

section 1342(b). *See* 42 U.S.C. § 18062(b). The operative provision is section 1342(a), which directs the Secretary to establish and administer a program of payment adjustments among insurers. *See* 42 U.S.C. § 18062(a) ("The Secretary shall establish and administer a program of risk corridors for calendar years 2014, 2015, and 2016 under which a qualified health plan offered in the individual or small group market shall participate in a payment adjustment system based on the ratio of the allowable costs of the plan to the plan's aggregate premiums."). Thus, the language on which Molina relies simply describes the way the Secretary shall administer the program of payment adjustments among QHPs; it is not a freestanding directive to the agency to make payments.

Second, as explained above, even a freestanding directive to an agency to pay amounts calculated under a statutory formula would not—standing alone—create an obligation on the part of the government to make payments without regard to appropriations. The Federal Circuit's decision in *Prairie County, Montana v. United States*, 113 Fed. Cl. 194 (2013), *aff'd*, 782 F.3d 685 (Fed. Cir. 2015), is illustrative. The statute at issue in *Prairie County* directed an agency to make payments to local governments in accordance with a statutory formula, but the Federal Circuit rejected the contention that the statute 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 court noted that Congress did use different language in a subsequent amendment to the statute, which 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.* Because that amendment did not apply to the

fiscal years at issue in *Prairie County*, the government had no obligation to make payments in excess of appropriations for those years. *Id*.

The language of "obligation" that the Federal Circuit discussed in *Prairie County* is comparable to the language of "obligation" that Congress used in the Medicare Part D statute and elsewhere in the ACA. But as explained above, Congress omitted that language (or its equivalent) from section 1342. Accordingly, section 1342 did not create a government obligation to make risk corridors payments without regard to appropriations. Indeed, the insurers' claim here is even weaker than the claim in *Prairie County*, because the permanent legislation in *Prairie County* authorized appropriations, while limiting the scope of that authorization.[18] By contrast, section 1342 does not authorize appropriations in the first place, nor does it provide any other budget authority for risk corridors payments.

The plain text of section 1342 does not obligate the government to use taxpayer funds to compensate unprofitable insurers. Although Molina suggests that section 1342 should be interpreted to track Medicare Part D, *see* Pl. Br. 30-31, Molina 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.

Molina argues that section 1342 simply directs HHS "to make full 'payments out.'" Pl. Br. 30; *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

[18] *See Prairie Cty.*, 782 F.3d 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").

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. *Moda*, 130 Fed. Cl. at 442; *Health Republic*, 129 Fed. Cl. at 762. And as discussed above, a direction to pay does not, standing alone, create an obligation of the government. That 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.

Molina's policy arguments are equally unavailing. The ACA's premium stabilization programs were designed to *mitigate* insurers' risks, not to *eliminate* insurers' risks by creating a government guarantee. Indeed, Molina concedes that the other 3R programs—reinsurance and risk adjustment—are self-funded. Pl. Br. 30 n.45, 32 n.47. Molina's contention that the risk corridors program alone creates an uncapped government obligation to indemnify insurers against losses regardless of appropriations thus has no grounding in the statutory text and gives short shrift to the ACA's explicit emphasis on fiscal responsibility. ACA § 1563, A15.

Molina's invocation of the ACA's "fundamental purpose," Pl. Br. 30, 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). Molina suggests that anything less than full, annual risk corridors payments—anything that does not "stabilize the health insurance markets" by shoring up insurers' losses—"is clearly inconsistent with the undisputed fundamental purpose of the ACA, and therefore must be disregarded." Pl. Br. at 34. The

"fundamental purpose" of the ACA was not the financial well-being of health insurers. And Molina ignores that 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, but Congress prudently refrained from committing taxpayer dollars to unprofitable insurers.

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 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 [insurers] urge[]." *Id.*; *see also BCBSNC*, 2017 WL 1382976, at *16 ("pro-rata [risk corridors payments] satisfy the stated purpose and objectives of the Risk Corridors Program, by protecting issuers from uncertainties regarding the cost of health insurance claims during the first three years of the ACA's Exchanges."). 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

Molina also fails to identify any proper basis to disregard Congress's express limitation on funding for risk corridors payments. As discussed above, HHS's fiscal year (FY) 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. In *Moda*, this Court 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. 130 Fed. Cl. at 456 (the "fiscal year 2014 CMS Program Management appropriation" was "available" but "HHS chose not to use [it]"). Molina similarly misreads the GAO's opinion for the proposition that HHS program funds were available to make payments under Section 1342. Pl. Br. 33.

The terms of the ACA foreclose 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.[19] 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 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 it receives, and those payments are not made until after the end of the calendar year. *Id*. § 18062(c)(1)(B). Thus, "payments out" for the 2014 benefit year 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

[19] Likewise, the continuing resolutions noted by this Court, *Moda*, 130 Fed. Cl. at 457 n.13, made funds available only until December 2014, when Congress enacted the FY 2015 appropriations act. *See* Pub. L. No. 113-164, § 106, 128 Stat. 1868 (2014), A27.

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.

In *Moda*, this Court 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 Act*" are available for risk corridors payments. 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 reference to "any other act." Under this Court's reasoning, the claimants in *Highland Falls* should have prevailed rather than lost.[20]

In the 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. Informed by the GAO's analysis,

[20] Plaintiffs' reliance, Pl. Br. 39, 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* held only that the appropriation status of a governmental agency is not relevant to Tucker Act jurisdiction. *Id*. at 1321. 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. *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").

Congress appropriated "payments in" but barred HHS from using other funds in the 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.

To the extent this Court relied on *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012), its reasoning was foreclosed by the Federal Circuit's decision in *Prairie County*, which held that *Ramah*'s reasoning does not extend to statutory claims. *See Prairie Cty.*, 782 F.3d at 689-90. In holding that "the Government cannot back out of its contractual promise to pay each Tribe's full contract support costs," the Supreme Court relied on "well-established principles of Government contracting law." *Id*. (quoting *Ramah*, 132 S. Ct. at 2188, 2189, 2192). "Rights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Lynch v. United States*, 292 U.S. 571, 579 (1934). By contrast, a "statutory obligation to pay money, even where unchallenged," does not "create a property interest within the meaning of the Takings Clause," *Adams*, 391 F.3d at 1225, and the extent of a statutory obligation may be determined by appropriations, *Highland Falls*, 48 F.3d at 1170-72.

3. The cases on which Molina relies are inapposite

This case bears no resemblance to the cases on which Molina 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 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 renovations, 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, 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.

New York Airways v. United States, 369 F.2d 743 (Ct. Cl. 1966), is likewise readily distinguishable. 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 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 . . ."). The statute also 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.

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.

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* relied.

Nor does *United States v. Langston*, 118 U.S. 389 (1886), support Molina'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 funds other than collections for such payments.[21]

[21] 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

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

For related reasons, Molina does not advance its position by relying on HHS's statements allegedly promising to make risk corridors payments without regard to appropriations. *See* Pl. Br. 11, 34-35. Although HHS often explicitly recognized that its ability to make such payments was subject to appropriations,[22] in at least one public statement HHS failed to do so.[23] HHS at various times also stated that the ACA "requires the Secretary to make full payments to issuers," Pl. Br. 19, and described risk corridors payments as "an obligation of the U.S. Government," Pl. Br. 29.[24]

Although Molina seeks to capitalize upon these statements, 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.

Fund, did not require payment without a congressional appropriation.

[22] *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).

[23] *See* 78 Fed. Reg. 15,410, 15,473 (Mar. 11, 2013) (stating that "[r]egardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act"). In light of the Anti-Deficiency Act, even that statement assumed the availability of appropriations to "remit payments."

[24] *See also* CMS, Risk Corridors Payments for the 2014 Benefit Year (Nov. 19, 2015) (stating that "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to insurers, and HHS is recording those amounts that remain unpaid . . . as fiscal year 2015 obligations of the United States Government for which full payment is required"), A149; CMS, Risk Corridors Payments for 2015 (Sept. 9, 2016), A186 (similar).

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 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* 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, *Principles of Federal Appropriations Law* (Vol. II) at 7-8 (3d ed. 2006), A60. Any reliance-based arguments founder on these bedrock principles.[25, 26]

Thus, Molina'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, this is not a situation in which the government has said, in effect, as this Court characterized in *Moda*, "the joke is on you." Molina's purported selective reliance upon some agency statements disregards the full impact and scope of the agency's multi-year administration

[25] The United States does not seek deference on the question whether the government has a statutory obligation to make risk corridors payments in the absence of appropriations because Congress did not delegate that question to the agency but reserved to itself its full budget authority over the *amount* of risk corridors payments. The narrow question where deference is appropriate is on the *timing* of payments, discussed above.

[26] Similarly, the alleged effects of HHS's Transitional Policy, *see* Pl. Br. 13-15, are immaterial to the question of liability under section 1342. In any event, Molina has not challenged the policy in this Court or any district court.

of the risk corridors program and the clear absence of any provision by Congress for use of appropriated funds in section 1342, something this Court recognized in *Moda*, 130 Fed. Cl. at 442, even as it denied the government's motion to dismiss. The complex and fundamental questions at issue in this case involve the scope of Congress's constitutional authority, powers that cannot be lightly cast aside.

* * * *

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 years in question—the only years risk corridors payments could be made—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. The United States Has No Contractual Obligation to Make Risk Corridors Payments

A. The QHP Agreement Is Wholly Unrelated to the Risk Corridors Program

Molina contends that the QHP Agreement gives rise to an express contractual right to receive risk corridors payments. But as two judges of this Court have held, the QHP Agreement does not create "a valid express contract pertaining to risk corridors payments." *Land of Lincoln*, 129 Fed. Cl. at 110; *see also BCBSNC*, 2017 WL 1382976, *17 (concluding that the same provisions Molina relies upon "cannot be reasonably read to create . . . an obligation" to make risk corridors payments).

The Court must begin with the plain language of the agreement. *Coast Fed. Bank, FSB v. United States*, 323 F.3d 1035, 1038 (Fed. Cir. 2003) (en banc). The Court need go no further: the

QHP Agreement does not mention risk corridors, section 1342, or 45 C.F.R. § 153.510, and nothing in the Agreement relates in any way to the risk corridors program. Rather, the Agreement is focused on the electronic transmission of enrollee data through the Exchanges and the protection of personally identifying information in those transmissions. *See Land of Lincoln*, 129 Fed. Cl. at 108-09.

Consistent with this focus, in Section II of the Agreement—entitled "Acceptance of Standard Rules of Conduct"—a QHP issuer agrees that, in order "to gain and maintain access to the 'CMS Data Services Hub Web Services,'" it will abide by rules relating to HIPAA compliance, secure transaction formats, transaction testing, and laws governing the use and storage of personally identifiable information.[27] QHP Agreement § II.a. HHS, in turn, agrees to "undertake all reasonable efforts to implement systems and processes that will support QHP[] functions" and, in the event of system failure, to "work with QHP[s] in good faith to mitigate any harm caused by such failure." *Id.* § II.d. As Judge Griggsby noted, "this provision plainly does not require that HHS make the Risk Corridors Program Payments." *BCBSNC*, 2017 WL 1382976, *17.

"HHS's obligation 'to implement systems and processes' . . . must be read in the context of the agreement as a whole." *Land of Lincoln*, 129 Fed. Cl. at 109. The term "systems and processes," as used here, "must relate to the electronic system that HHS and the qualified health plan will be using, and the processes that support this electronic system." *Id.* Section II cannot plausibly be read to relate in any way to the risk corridors program.[28] *See Land of Lincoln*, 129

[27] The CMS Data Services Hub Web Services is a CMS-operated electronic data system that connects insurers to the Federally-facilitated Exchanges. *Id.*

[28] The QHP Agreement specifically incorporates by reference, at § II.b(3), a "Companion Guide" created for insurers that sets forth the detailed electronic data transmission requirements that insurers must follow to effectuate eligibility, enrollment, and federal insurance subsidy transactions with the Exchanges through the Hub Web Services. The official title of the Companion Guide is "CMS Standard Companion Guide Transaction Information: Instructions

Fed. Cl. at 109 (finding, after considering the text, surrounding provisions, context, and Companion Guide, that the "'systems and processes' language [in the QHP Agreement] does not give rise to any risk corridors obligations").[29]

Molina also relies on section V.g. of the QHP Agreement, which provides that the Agreement is governed by federal law. As in *Land of Lincoln,* Molina argues that this reference to federal law necessarily incorporates section 1342 (and presumably the vast corpus of other federal laws applicable to Molina—whether ACA-related or not) by reference into the Agreement as a contractual commitment. Complaint ¶¶ 313-14. But "[s]ection V.g[] does not incorporate the risk-corridors program into the agreement." *See Land of Lincoln,* 129 Fed. Cl. at 109. A court may not "find that statutory or regulatory provisions are incorporated into a contract with the government unless the contract *explicitly* provides for the incorporation." *St. Christopher Assoc., L.P. v. United States*, 511 F.3d 1376, 1384 (Fed. Cir. 2008) (citation omitted) (emphasis added); *see also Northrop Grumman Info. Tech., Inc. v. United States*, 535 F.3d 1339, 1344 (Fed. Cir.

related to the ASC X12 Benefit Enrollment and Maintenance (834) transaction, based on the 005010X220 Implementation Guide and its associated 005010X220A1 addenda for the Federally facilitated Exchange (FFE), Companion Guide Version Number 1.5 (March 22, 2013). *See* A208. As set forth in the Companion Guide, the systems and processes that use the Hub Web Services include the: "testing process" (A216), "validation processes" (A217), "Centers for Medicare and Medicaid Services (CMS) Enterprise File Transfer (EFT) System" (A217, A219), "Federal Exchange Program System (FEPS) Enrollment Data Store (EDS)" (A221, A226), enrollment process (A223, A238), termination process (A241-A242), monthly reconciliation process (A248-A249), "HHS Reconciliation Process Flow" (A247), "QHP Issuer Reconciliation Process Flow" (A246) and the "comparison process" (A246). The Companion Guide thus illustrates that the types of "systems and processes" referred to in the QHP Agreement are far afield from the risk corridors program.

[29] If the term "systems and processes" were read to encompass the risk corridors program, it would also encompass any other ACA program that can plausibly be construed to "support" a QHP. Such a reading would necessarily transform the dozens of ACA programs operated by HHS from regulatory functions into contractual commitments. There is no limiting principle to such a construction, and nothing in the ACA or the QHP Agreement supports it.

2008); *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 826 (Fed. Cir. 2010).

The QHP Agreement fails this test. "Here, the general reference to federal law and HHS regulations does not expressly or clearly incorporate the specific risk-corridors provisions upon which [Molina] relies." *Land of Lincoln*, 129 Fed. Cl. at 110. Section V.g. states merely that the Agreement "will be governed by the laws and common laws of the United States of America, including . . . such regulations as may be promulgated . . . by [HHS]." It uses no "clear and express" language incorporating section 1342 by reference; indeed it uses no language of incorporation at all with reference to risk corridors. Section V.g. does not mention risk corridors, section 1342, or 45 C.F.R. § 153.510 or in any way imply that the Agreement has anything to do with risk corridors. *See, e.g.*, *Earman v. United States*, 114 Fed. Cl. 81, 104 (2013) (provision stating that a contract is governed by Federal laws, "which does not refer to any particular statutory or regulatory provision, cannot reasonably be read as incorporating the corpus of the [ ] statute into plaintiff's contract."); *Smithson v. United States*, 847 F.2d 791, 794 (Fed. Cir. 1988) (rejecting argument that provision that contract was "subject to" regulations promulgated by the Farmers Home Administration incorporated the agency's regulations). Molina's suggestion that Section V.g. creates a contractual right to risk corridors payments must be rejected.[30]

Finally, interpreting the QHP Agreement to encompass risk corridors obligations would create an absurd result in that some of the plaintiffs in this case could recover in contract, but not Molina Healthcare of California, which did not execute a QHP Agreement with HHS because it

[30] As noted above, the QHP Agreement incorporates the Companion Guide expressly and specifically into the Agreement. *See* Complaint Exhibit 6 § II.b.3. The use of specific incorporation language to incorporate the Companion Guide but not to incorporate section 1342 or 45 C.F.R. § 153.510 further indicates that the Agreement does not incorporate the provisions of the risk corridors program.

participates on the California State-Based Exchange.[31] The Supreme Court has held that a legal interpretation under which the rights of participants on federal and state Exchanges would fundamentally differ should be rejected. *King*, 135 S. Ct. at 2483 (rejecting textual interpretation under which "State and Federal Exchanges would differ in a fundamental way" because 42 U.S.C. § 18041(c) "indicates that State and Federal Exchanges should be the same"); *see also Land of Lincoln*, 129 Fed. Cl. at 109 n.26 (noting the "inconsistent and unintended result" that ensues from adopting this express contract theory). Molina identifies no reason why Congress would have designed the program in such a way, and there is none. The QHP Agreement does not require HHS to make risk corridors payments. Count II must be dismissed.

B. No Implied-In-Fact Contract For Risk Corridors Exists

Molina's contention that it has an implied-in-fact contract for risk corridors payments also fails as a matter of law. *See Land of Lincoln*, 129 Fed. Cl. at 111-113; *BCBSNC*, 2017 WL 1382976, at *18-*19; *but see Moda*, 130 Fed. Cl. at 466. To allege a binding implied-in-fact contract, a plaintiff must allege facts demonstrating "(1) mutuality of intent to contract; (2) consideration; (3) an unambiguous offer and acceptance, and (4) 'actual authority' on the part of the government's representative to bind the government." *Schism v. United States*, 316 F.3d 1259, 1278 (Fed. Cir. 2002) (en banc).

1. Section 1342 did not create an implied-in-fact contract

"The Supreme Court 'has maintained that absent 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

[31] QHPs sold only on Exchanges that do not use HHS's platform (such as many State-Based Exchanges), though equally subject to the risk corridors program, do not enter QHP Agreements with HHS.

ordain otherwise.'" *Brooks v. Dunlop Mfg., Inc.*, 702 F.3d 624, 630 (Fed. Cir. 2012) (quoting *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-66 (1985)). "This well-established presumption is grounded in the elementary proposition that the principal function of the legislature is not to make contracts, but to make laws that establish the policy of the state." *Id*. (quoting *Atchison*, 470 U.S. at 466). Accordingly, "the party asserting the creation of a contract must overcome this well-founded presumption and [courts should] proceed cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation." *Id*. at 630-31 (quoting *Atchison*, 470 U.S. at 466).

In *Brooks*, for example, the Federal Circuit rejected the contention that a qui tam relator entered into a contract with the United States by filing suit against a third party for false patent marketing. The qui tam statute at issue in *Brooks* provided that "[a]ny person may sue for the penalty, in which one-half shall go to the person suing and the other to the use of the United States." 702 F.3d at 631. Rejecting the implied-in-fact contract claim, the Federal Circuit explained that "[n]othing in this language 'create[s] or speak[s] of a contract' between the United States and a qui tam relator." *Id*. (quoting *Atchison*, 470 U.S. at 467).

Similarly, the Federal Circuit has recognized that federal employees' "entitlement to retirement benefits must be determined by reference to the statute and regulations governing these benefits, rather than to ordinary contract principles." *Schism*, 316 F.3d at 1274. "[A]pplying th[is] doctrine . . . courts have consistently refused to give effect to government-fostered expectations that, had they arisen in the private sector, might well have formed the basis for a contract or an estoppel." *Id*.; *see also Hanlin v. United States*, 316 F.3d 1325, 1329 (Fed. Cir. 2003) (finding no contract where the "statute is a directive from the Congress to the [agency], not a promise from the [agency] to" a third party).

These precedents foreclose Molina's implied-in-fact contract claim. "Neither Section 1342 nor its implementing regulations contain language that creates a contractual obligation with respect to the Risk Corridors Program Payments." *BCBSNC*, 2017 WL 1382976, at *18. Nothing in the language of section 1342 "'create[s] or speak[s] of a contract' between the United States and" insurers. *Brooks*, 702 F.3d at 631 (quoting *Atchison*, 470 U.S. at 467). Section 1342 "is a directive from the Congress to the [agency], not a promise from the [agency] to" third parties. *Hanlin*, 316 F.3d at 1329.

This Court's reasoning in *Moda* is irreconcilable with the governing precedents discussed above. This Court declared that a statute binds the government in contract if it "creates a program that offers specified incentives in return for the voluntary performance of private parties." 130 Fed. Cl. at 463. That novel test would transform myriad statutory programs into contractual undertakings. Indeed, under this reasoning, the claimants in *Brooks* and *Hanlin* should have prevailed on their contract claims. The qui tam statute in *Brooks* offered a specified incentive (a share of the penalty) in return for a voluntary performance by a private party (bringing a successful suit for false patent marketing). Likewise, in *Hanlin*, the statute and regulations offered a specified incentive (direct payment of attorney's fees) to a private attorney who performed a voluntary undertaking (successfully represented a veteran seeking back-due benefits). Despite the incentives for private conduct that these statutory schemes created, the Federal Circuit easily found that they did not create contracts for payment by the government.

The older cases on which this Court relied are inapposite. The regulation at issue in *Radium Mines, Inc. v. United States*, 153 F. Supp. 403, 405 (Ct. Cl. 1957), expressly 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." And in *New York Airways*,

Inc. v. United States, 369 F.2d 743, 752 (Ct. Cl. 1966), the court emphasized that "Congress recognized the contract nature of the subsidy payments" by titling its enactment "Payments to Air Carriers (Liquidation of Contract Authorization)." Section 1342 has no language comparable to the contractual language on which *Radium Mines* and *New York Airways* relied. *See also BCBSNC*, 2017 WL 1382976, at *19 n.8 ("*New York Airways* is . . . factually distinguishable from this case, because the Risk Corridors Program Payments are made in connection with administering the Risk Corridors Program, rather than payments for particular goods and services.").

2. HHS did not purport to commit the government contractually for full risk corridors payments and, in any event, the agency had no authority to do so

Molina also contends that an implied-in-fact contract could be derived from HHS's regulations and its alleged "admissions regarding their obligation to make risk corridors payments." Complaint ¶ 327. But nothing in the agency's regulations or statements purported to obligate the government contractually for risk corridors payments.

Moreover, HHS had no statutory authority to obligate the government for payments in excess of appropriations. An implied-in-fact contract cannot arise without "actual authority" on the part of the government's representative to bind the government. *Schism v. United States*, 316 F.3d 1259, 1278 (Fed. Cir. 2002) (en banc). "As to 'actual authority,' the Supreme Court has recognized that any private party entering into a contract with the government assumes the risk of having accurately ascertained that he who purports to act for the government does in fact act within the bounds of his authority." *Id*. (citing *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947)). "The oft-quoted observation . . . that 'Men must turn square corners when they deal with the Government,' does not reflect a callous outlook." *Merrill*, 332 U.S. at 385. "It merely expresses

the duty of all courts to observe the conditions defined by Congress for charging the public treasury." *Id*.; *accord Richmond*, 496 U.S. at 420 (quoting *Merrill*, 332 U.S. at 385).

"As 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)). Without "special authority," an "officer cannot bind the Government in the absence of an appropriation." *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 643 (2005). Thus, in *Schism*, the Federal Circuit held that promises of free lifetime medical care made by military recruiters did not bind the government because the "[t]he recruiters lacked actual authority, meaning the parties never formed a valid, binding contract." 316 F.3d at 1284. The court emphasized that even the President, as Commander-in-Chief, "does not have the constitutional authority to make promises about entitlements for life to military personnel that bind the government because such powers would encroach on Congress' constitutional prerogative to appropriate funding." *Id*. at 1288.

The same principles foreclose Molina's claim. Section 1342 did not vest HHS with any contracting authority, much less with authority to enter into contracts that would obligate the government to make uncapped risk corridors payments without regard to appropriations.[32]

C. Molina Has No Property Interest in Risk Corridors Payments

In Count V, Molina alleges that it had a property interest in risk corridors payments that was taken by Congress's enactments limiting appropriations for those payments. The claim fails

[32] Because Molina's express and implied contract claims fail as a matter of law, its claim for breach of an implied covenant of good faith and fair dealing (Count IV) also must be dismissed. *HSH Nordbank AG v. United States*, 121 Fed. Cl. 332, 341 (2015).

because Molina had no such property interest. *See Land of Lincoln*, 129 Fed. Cl. at 114; *BCBSNC*, 2017 WL 1382976, at *20.

As shown above, Molina has no contractual right to risk corridors payments. Nor does Molina have a statutory right to risk corridors payments in excess of appropriations. In any event, a "statutory obligation to pay money, even where unchallenged," does not "create a property interest within the meaning of the Takings Clause." *Adams v. United States*, 391 F.3d 1212, 1225 (Fed. Cir. 2004) (holding that government employees did not have a property interest in "underpaid overtime compensation under the FLSA"); *see also Nat'l Educ. Ass'n—Rhode Island v. Ret. Bd. of the Rhode Island Employees' Ret. Sys.*, 172 F.3d 22, 30 (1st Cir. 1999) (where an expectation of payment is insufficient to constitute an enforceable contract, it does not constitute property under the Takings Clause); *Kizas v. Webster*, 707 F.2d 524, 539-40 (D.C. Cir. 1983) ("A 'legitimate claim of entitlement' to a government benefit does not transform the benefit itself into a vested right."). Because Molina cannot "demonstrate the existence of a legally cognizable property interest, the court's task is at an end." *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004).

CONCLUSION

Molina's motion for partial summary judgment should be denied, and the Complaint should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 28, 2017, a copy of the attached *United States' Opposition to Plaintiffs' Motion for Partial Summary Judgment and Cross-Motion to Dismiss* was served via the Court's CM/ECF system on Plaintiff's counsel, Lawrence S. Sher.

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