IN THE UNITED STATES COURT OF FEDERAL CLAIMS

NANCY G. ATKINS, in her capacity as Liquidator of Kentucky Health Cooperative, Inc.,	:	Case No. 17-906C
	:	Judge Kaplan
Plaintiff,	:	
v.	:	
THE UNITED STATES OF AMERICA,	:	
Defendant.	:	

THE UNITED STATES' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION TO DISMISS

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INTRODUCTION

This is one of 40 cases filed in this Court challenging Congress's Constitutional exercise of its plenary power over the federal fisc. The Federal Circuit will address these challenges when it hears the companion appeals of *Land of Lincoln Mutual Health Insurance. Company v. United States*, 129 Fed. Cl. 757 (2017) (Lettow, J.), *appeal pending*, No. 17-1224 (Fed. Cir.), and *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 461 (2017) (Wheeler, J.), *appeal pending*, No. 17-1994 (Fed. Cir.).[1] In light of the appeals, 21 of these cases have been stayed.

In this case, Plaintiff Nancy G. Atkins (the "Liquidator"), in her capacity as Liquidator of Kentucky Health Cooperative, Inc. ("KYHC"), seeks $142 million 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 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

[1] Two other cases have reached final judgment in the government's favor: *Blue Cross and Blue Shield of N.C. v. United States ("BCBSNC")*, 131 Fed. Cl. 457, 475 (2017) (Griggsby, J.), *appeal pending*, No. 17-2154 (Fed. Cir.); and *Maine Community Health Options v. United States*, 133 Fed. Cl. 1 (2017) (Bruggink, J.), *appeal pending*, No. 17-2395 (Fed. Cir.). Judge Wheeler, the only judge to rule in insurers' favor, granted partial summary judgment in *Molina Healthcare of California, Inc. v. United States*, 133 Fed. Cl. 14 (2017). Further proceedings in that case are stayed pending disposition of the *Land of Lincoln* and *Moda* appeals.

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 that the Liquidator 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. Nothing in the ACA provides an appropriation for these "payments out." *Moda*, 130 Fed. Cl. at 442; *Maine*, 133 Fed. Cl. at 13; *Health Republic Ins. Co. v. United States*, 129 Fed. Cl. 757, 762 (2017) (Sweeney, J.); *Land of Lincoln*, 129 Fed. Cl. at 104-05. Indeed, nothing in section 1342 or the ACA authorizes appropriations for these payments, in contrast to dozens of other provisions of the ACA where Congress chose to address appropriations. 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. 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 Pers. Mgmt. v. Richmond*, 496 U.S. 414, 416 (1990).

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." Because Congress intended that only risk corridors "payments in" be used to make risk corridors payments, "[o]nce those funds were exhausted, the government's liability was capped." *Maine*, 133 Fed. Cl. at 13.

Nor can the Liquidator convert risk corridors payments, which are a statutory benefit, into a contractual obligation. Nothing in the text or circumstances surrounding the enactment of the ACA suggests that Congress intended the federal government to be bound in contract to make risk corridors payments. Moreover, Congress did not confer authority on HHS to bind the United States in contract for such payments.

As this Court held in *Maine*, 133 Fed. Cl. at 13, and *Land of Lincoln*, 129 Fed. Cl. at 105-06, 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 the Liquidator'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, the Liquidator is not entitled to "presently due money damages" and HHS has not finally

determined KYHC's total risk corridors payments under the program.

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

STATEMENT OF UNDISPUTED FACTS

A. The Patient Protection and Affordable Care Act

Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010), 124 Stat. 119, in March 2010.[2] The Act adopted a series of measures designed to expand coverage in the individual health insurance market. *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015). First, the Act provides billions of dollars of subsidies each year to help individuals buy insurance.[3] *Id*. at 2489. Second, the Act generally requires each individual to maintain coverage or pay a penalty. *Id*. at 2486. Third, the Act bars insurers from denying coverage or charging higher premiums based on an individual's health status. *Id*. Notwithstanding the various subsidies and

[2] HHS is responsible for overseeing implementation of major provisions of the Act and for administering certain programs under the Act, either directly or in conjunction with other federal agencies. *See*, *e.g.*, 42 U.S.C. §§ 18041(a)(1)(A), (c)(1). HHS delegated many of its responsibilities under the ACA to 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."

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

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. §§ 18031-41. For consumers, Exchanges are the only forum in which they can purchase coverage with the assistance of federal subsidies. For insurers, Exchanges provide marketplaces to compete for business in a centralized location, and they are the only commercial channel in which insurers can market their plans to the millions of individuals who receive federal subsidies. All plans offered through an Exchange must be Qualified Health 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, 41,931-32 (July 15, 2011), A102-03. To mitigate the pricing risk and incentives for adverse selection arising from this system, the ACA established three premium-stabilization programs modeled on preexisting programs established under the Medicare program. *Compare* 42 U.S.C. §§ 18061-63 *with id.* §§ 1395w-115(a)(2), (b), (c), (e); *see also id.* §§ 18062(a); 18063(b); 42 C.F.R. § 423.329(b)-(c); *see also* Complaint ¶ 7 (noting that the "[risk corridors program] is required by statute to be modeled after a similar program enacted as part of the Medicare Prescription Drug, Improvement, and Modernization Act."). Informally known as the "3Rs," these ACA programs began in the 2014 calendar year and consist of reinsurance, risk adjustment, and risk corridors. *See* 42 U.S.C. §§ 18061-63.

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

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

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

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

Section 1342 directed HHS to "establish and administer a program of risk corridors" under which insurers offering individual and small group QHPs between 2014 and 2016 "shall participate in a payment adjustment system based on the ratio of the allowable costs of the plan to the plan's aggregate premiums." 42 U.S.C. § 18062(a). Under the "payment methodology" set forth in the statute, if an insurer's "allowable costs" (essentially, claims costs) for the year are less than a "target amount" (premiums minus allowable administrative costs) for that year by more than three percent, the plan shall pay a specified percentage of the difference to HHS. *Id*. § 18062(b)(2).[4] The statute refers to these payments as "payments in." *Id*. Conversely, if an insurer's allowable costs exceed the target amount by more than three percent, HHS shall pay a specified percentage of the difference. *Id*. § 18062(b)(1). The statute refers to these payments as "payments out." *Id*.

Reinsurance and risk adjustment payments affect the risk corridors calculations. Payments an issuer receives under the reinsurance and risk adjustment programs reduce the issuer's allowable costs for that year. 42 U.S.C. § 18062(c)(1)(B). Thus, risk corridors payments and

[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.

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.

Neither section 1342 nor the ACA appropriated funds for the risk corridors program. *Land of Lincoln*, 129 Fed. Cl. at 104-05 ("Congress [never has] provided appropriations or authorizations of funds . . . for the risk-corridors program."); *Health Republic*, 129 Fed. Cl. at 762 ("Neither section 1342 . . . nor any of the Act's other provisions appropriated funds specifically for the risk corridors program."); *Moda*, 130 Fed. Cl. at 442 ("Congress did not specifically appropriate funds for the risk corridors program in the ACA"). By contrast, in dozens of other ACA provisions, Congress appropriated or authorized the appropriation of funds for various programs. *See* p. 19 n.12, *infra* (citing examples). "Payments in" from insurers are the only source of funds referenced in section 1342. *See Land of Lincoln*, 129 Fed. Cl. at 91 (noting that section 1342(b) is "silent regarding deficits or excess funds under the risk corridors program").

When the Congressional Budget Office ("CBO") estimated the effect of the ACA on the federal budget, it included estimates for the risk adjustment and reinsurance programs. *See* Letter from Douglas Elmendorf, Director, CBO, to Nancy Pelosi, Speaker, House of Representatives, Tbl. 2 (Mar. 20, 2010) ("CBO Cost Estimate"), A81-82. The CBO estimated that for the risk adjustment and reinsurance programs payments and collections for each program would be equal in the aggregate, but noted that risk adjustment payments lag revenues by one quarter, thus potentially affecting the federal budget in a given fiscal year. *Id.* The CBO did not, however, attribute any costs to the risk corridors program when it estimated the ACA's impact on the federal budget shortly before the Act's passage. *See Id.* (omitting risk corridors from the budgetary scoring). Congress specifically referenced the CBO Cost Estimate in the ACA, in a provision that

emphasized the Act's fiscal responsibility. *See* ACA § 1563(a) ("Sense of the Senate Promoting Fiscal Responsibility"), A15.

C. Congress's Appropriations for the Risk Corridors Program

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

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

Members of Congress also asked the Government Accountability Office ("GAO") to address potential sources of funds that might be used for risk corridors payments when such payments came due in 2015. *See Dep't of Health & Human Servs.-Risk Corridors Program,* B-325630 (Comp. Gen.), 2014 WL 4825237, at *1 (Sept. 30, 2014) ("GAO Op."), A141 (noting requests). The GAO, in turn, solicited the views of HHS, which identified only the risk corridors collections, which would not begin until 2015, as a source of funding for payments. *See* Letter

from William B. Schultz, General Counsel, HHS, to Julia C. Matta, Assistant General Counsel, GAO (May 20, 2014), A133.[5]

In its opinion released on September 30, 2014, the GAO recognized that "Section 1342, by its terms, did not enact an appropriation to make the payments specified in section 1342(b)(1)." *GAO Op.*, 2014 WL 4825237, at *2. The GAO considered HHS's fiscal year 2014 appropriations then in effect, and identified only the 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-*5.

The annual CMS Program Management appropriation provides funding "for carrying out" enumerated programs administered by CMS, such as Medicare and Medicaid, and for "other responsibilities of [CMS]." *See generally* Pub. L. No. 113-76, div. H, tit. II, 128 Stat. 5, 374 (Jan. 17, 2014), A23. The Program Management appropriation includes a lump sum amount derived from specified trust funds, including the Medicare Hospital Insurance Trust Fund, as well as "such sums as may be collected from authorized user fees and the sale of data." *Id.* While the appropriated user fees collected during one fiscal year remain available for the next five fiscal years, *id.*, the lump sum amount expires at the end of the fiscal year. *See* Pub. L. No. 113-76, div. H, tit. V, § 502, 128 Stat. 408 ("No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein."), A25. Nothing in any CMS Program Management appropriation enacted since 2010 mentions risk corridors payments.

[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 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 2014 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)" only if payments had been due in 2014. *GAO Op.*, 2014 WL 4825237, at *3 (emphasis added). The GAO then agreed with HHS that "payments in" collected from insurers under the risk corridors program could be used to make "payments out" to insurers because those collections would constitute "user fees" under the appropriation, *id.* at *4, but noted that HHS would not begin collections or payments under section 1342 until fiscal year 2015. *Id.* at *5 n.7. Because "[a]ppropriations acts, by their nature, are considered nonpermanent legislation," Congress would need to reenact the same language in future appropriations acts for the Program Management appropriation to supply a source of funds in future fiscal years for risk corridors payments. *Id.* at *5.[6]

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

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

> None of the funds made available by this Act from [CMS trust funds], or transferred from other accounts funded by this Act to the 'Centers for Medicare and Medicaid Services—Program Management' account, may be used for payments under section 1342(b)(1) of Public Law 111–148 (relating to risk corridors).

Id. § 227, A45. The GAO had identified only the Program Management appropriation as the potential source of available funding for risk corridors payments, and the effect of this rider was to eliminate the lump sum amount as a source, leaving only the user fees, *i.e.*, risk corridors collections as a source of risk corridors payments. An accompanying Explanatory Statement explained that the rider was added "to prevent the CMS Program Management appropriation account from being used to support risk corridors payments." 160 Cong. Rec. H9307-1, H9838 (daily ed. Dec. 11, 2014), A47. The Explanatory Statement further observed that, "[i]n 2014, HHS issued a regulation stating that the risk corridor program will be budget neutral, meaning that the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect." *Id.*[7]

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

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

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

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

D. HHS's Implementation of the Risk Corridors Program

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

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

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provisions] as if it were a joint explanatory statement of a committee of conference." Pub. L. No. 113-235, § 4, 128 Stat. 2130, 2132, A42.

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

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

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

E. KYHC's Participation on the Exchanges

KYHC offered QHPs on the Kentucky Exchange in calendar years 2014 and 2015. Complaint ¶ 16. HHS calculated for the 2014 benefit year a risk corridors payment for KYHC's individual market QHPs in the amount of $77,074,941.10. Risk Corridors Payment and Charge Amounts for Benefit Year 2014 (Nov. 19, 2015), A150, A163. Based upon the amount of anticipated risk corridors collections for the 2014 benefit year, HHS announced a prorated payment to KYHC of $9,725,213.20. *Id.* HHS calculated for the 2015 benefit year a risk corridors payment for KYHC in the amount of $77,311,836.24, and announced that KYHC would receive another $2,560,299.94 towards its 2014 payment. To date, KYHC has received $12,232,750.90 for benefit year 2014. KYHC was placed into liquidation in January 2016 and did not offer QHPs in 2016.

ARGUMENT

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

The Tucker Act, under which the Liquidator asserts jurisdiction, Complaint ¶ 20, 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

[9] The United States acknowledges this Court concluded that it has jurisdiction and that the insurer's claims were ripe in *Land of Lincoln*, *Health Republic*, *Moda*, *Maine*, and *Molina*.

as mandating compensation for damages sustained as a result of *a breach of . . . duties [it] impose[s]*." *United States v. Mitchell*, 463 U.S. 206, 219 (1983) (emphasis added).

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

The Liquidator's claim of Tucker Act jurisdiction rests on its mistaken assertion that "[t]he Government's failure to provide timely payments to KYHC is a violation of Section 1342 of the ACA." Complaint ¶ 82. But section 1342 does not obligate HHS to make annual payments. *Land of Lincoln*, 129 Fed. Cl. at 107; *BCBSNC*, 131 Fed. Cl. at 475. Rather, section 1342 requires HHS to *calculate* risk corridors payments and charges based on claims and other costs "for" a "benefit year," but it does not require HHS to *pay* the full calculated amounts on an annual basis. Instead, it delegates to HHS the responsibility to "establish and administer" the risk corridors program, 42 U.S.C. § 18062(a), thereby conferring "broad discretion" to HHS "to tailor [the] . . . program to fit both its needs and its budget." *Contreras v. United States*, 64 Fed. Cl. 583, 599 (2005), *aff'd*, 168 F. App'x 938 (Fed. Cir. 2006). In the absence of a contrary statutory provision, "agencies, not the

courts, . . . have primary responsibility for the programs that Congress has charged them to administer." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992), *superseded by statute on other grounds*, Pub. L. No. 104-134, § 803, 110 Stat. 1321 (Apr. 26, 1996). The Federal Circuit has stated that "the *Chevron* standard of deference applies" where, as here, "Congress either leaves a gap in the construction of the statute that the administrative agency is explicitly authorized to fill, or implicitly delegates legislative authority, as evidenced by 'the agency's generally conferred authority and other statutory circumstances.'" *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1361 (Fed. Cir. 2005) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)).

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

In sum, HHS's three-year payment framework reasonably accounts for the fact that collections are the only authorized source of funding for risk corridors payments, while also ensuring that HHS pays out as much as it can each year within the statutory and programmatic constraints. *BCBSNC*, 131 Fed. Cl. at 477. 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 the Liquidator's claims.[10, 11]

II. The Liquidator'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).[12]

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

[11] Should the Court conclude 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 KYHC has received already are not presently due. *BCBSNC*, 131 Fed Cl. at 477; *Land of Lincoln*, 129 Fed. Cl. at 107.

[12] 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).

A. Congress Has Plenary Power Over the Federal Treasury

"No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Courts have long recognized that Congress's control over federal expenditures is "absolute," that Congress "is responsible for its exercise of this great power only to the people," and that Congress "can refuse to appropriate for any or all classes of claims." *Hart's Case*, 16 Ct. Cl. 459, 484 (1880), *aff'd sub nom. Hart v. United States*, 118 U.S. 62 (1886); *see also Department of the Navy v. FLRA*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (citing *Harrington v. Bush*, 553 F.2d 190, 194-95 (D.C. Cir. 1977)). Congress's constitutional authority to prescribe limitations on the use of public funds—and its corresponding accountability to the public for its exercise of that authority—is an essential feature of the Constitution's separation of powers. *See Schism v. United States*, 316 F.3d 1259, 1288 (Fed. Cir. 2002) (en banc); *see generally* Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1352-63 (1988). By reserving to Congress the authority to approve or prohibit the payment of money from the Treasury, the Appropriations Clause serves the "fundamental and comprehensive purpose" of assuring "that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *Office of Pers. Mgmt.*, 496 U.S. at 427-28.

Congress has implemented the Appropriations Clause in a series of statutes that together establish the basic framework of appropriations law. First, "[a]ppropriations shall be applied only to the objects for which the appropriations were made," 31 U.S.C. § 1301(a), and a "law may be construed to make an appropriation out of the Treasury or to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states that an appropriation is made or that such a contract may be made," *id.* § 1301(d). Once made, annual

appropriations are generally only available for obligation until the end of the fiscal year unless the appropriation "expressly provides that it is available after the fiscal year." *Id.* § 1301(c).

Second, the Anti-Deficiency Act prohibits any officer or employee of the United States from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A). Moreover, Congress has barred federal officers from withdrawing "from one appropriation account and credit[ing] to another [except] when authorized by law." 31 U.S.C. § 1532. Finally, except as otherwise specifically provided by law, the Miscellaneous Receipts Act requires that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. § 3302(b). This statutory requirement ensures that all money received "for the Government," such as risk corridors collections, is deposited into the United States Treasury, unless the law specifically provides otherwise. Once deposited into the Treasury, the Appropriations Clause requires an appropriation from Congress to pay the money out.

Congress grants federal agencies authority to incur binding financial obligations by providing agencies with "budget authority." *See* 2 U.S.C. § 622(2); GAO–16–464SP, *Principles of Fed. Appropriations Law* (Ch. 2) 2–1 (4th ed. 2016) (*GAO Red Book*), A181; *see also id.* at 2-55 ("Agencies may incur obligations only after Congress grants budget authority."), A183. The Congressional Budget Act defines the four kinds of budget authority:

> (i) provisions of law that make funds available for obligation and expenditure (other than borrowing authority), including the authority to obligate and expend the proceeds of offsetting receipts and collections;
>
> (ii) borrowing authority, which means authority granted to a Federal entity to borrow and obligate and expend the borrowed funds, including through the issuance of promissory notes or other monetary credits;

> (iii) contract authority, which means the making of funds available for obligation but not for expenditure; and
>
> (iv) offsetting receipts and collections as negative budget authority, and the reduction thereof as positive budget authority.

2 U.S.C. § 622(2)(A). A claimant seeking to enforce a money-mandating statute or regulation generally "must identify not just a command to make [payment] but an appropriation of . . . money that . . . may [be] use[d] for that purpose." *Nevada v. Dep't of Energy*, 400 F.3d 9, 13 (D.C. Cir. 2005). "Appropriations" under the Constitution, as well as "budget authority" under federal statutes, do not merely entail a specification of amounts for expenditure. Rather, "[t]he extent or amount of funding modifies and shapes the object funded." Stith, 97 Yale L.J. at 1354 (quotation marks omitted). Thus, in denying or limiting appropriations, "Congress decides that, under our constitutional scheme, for the duration of the appropriations denial, the specific activity is no longer within the realm of authorized government actions." *Id.* at 1361.

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

Section 1342 directed HHS to "establish and administer" a system of payment adjustments among insurers for the 2014, 2015, and 2016 calendar years, 42 U.S.C. § 18062(a), based on a

retrospective analysis of insurers' data for a prior full year, *id*. § 18062(b). Insurers that overestimated their premiums relative to costs make "payments in" at specified percentages; insurers that underestimated their premiums relative to costs receive "payments out" at corresponding percentages. *Id.* This "payment methodology" provision, which states that HHS "shall pay" amounts calculated under the statutory formula, *id*. § 18062(b)(1), identifies no source of funds other than "payments in," *id*. § 18062(b)(2).

Nothing in the text of section 1342 obligated—or indeed permitted—the government to use taxpayer dollars to make potentially massive, uncapped payments to insurance companies.[13] 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

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

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

whatsoever. *Land of Lincoln*, 129 Fed. Cl. at 91 (noting that section 1342 is "silent regarding deficits or excess funds under the risk-corridors program").

Congress conspicuously omitted from section 1342 any language making risk corridors payments an obligation of the government, in notable contrast to the preexisting risk corridors program under Medicare Part D on which the ACA risk corridors program was generally modeled. *See* 42 U.S.C. § 18062(a) (stating that the ACA's risk corridors program "shall be based on" the risk corridors program under Medicare Part D). The Medicare Part D statute, unlike the ACA risk corridors provision, expressly made risk corridors payments an obligation of the government:

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

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

Congress enacted no equivalent language in section 1342 of the ACA.[15] This contrast is especially notable because Congress did enact equivalent language elsewhere in the ACA. *See* ACA § 2707(e)(1)(B) (for a psychiatric demonstration project, Congress provided, "BUDGET AUTHORITY.—Subparagraph (A) constitutes budget authority in advance of appropriations Act and represents the obligation of the Federal Government to provide for the payment of the amounts

[15] Judge Wheeler mistakenly believed that "the Medicare Part D statute provides only that the Government 'shall establish a risk corridor,' not that the Secretary of HHS 'shall pay' specific amounts to insurers." *Moda*, 130 Fed. Cl. at 455. But the Part D statute provides that "the Secretary *shall provide for payment*," 42 U.S.C. § 1395w-115(a) (emphasis added), 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, whereas section 1342, which lacks any provision of budget authority, obligating language, or mention of appropriations, does not.

appropriated under that subparagraph."), A17-18. The Liquidator asserts that "Congress expressly modeled the ACA [risk corridors program] on the Medicare Part D [risk corridors program]," and "[i]f Congress had intended the ACA *not* to track this defining and core characteristic of Part D, surely Congress would have said so explicitly." Plaintiff's Motion for Summary Judgment and Memorandum of Law in Support ("Pl. MSJ"), Docket 7, at 22-23 (emphasis in original). In so arguing, the Liquidator ignores that Congress did distinguish the statutes – Congress *explicitly* omitted the purported "defining and core characteristic" of Medicare Part D – budget authority – from the risk corridors program legislation.

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

By contrast, the CBO did score the other 3R programs. It noted that under the risk adjustment program, payments lag receipts by one quarter, which may affect the budget. *Id*. at

Tbl. 2 note a, A82. And 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.

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

If there were any doubt as to whether Congress had established a self-funded program, it was removed by the legislation that provided appropriations for risk corridors payments. In those statutes, Congress appropriated the funds that insurers would pay into the risk corridors program, and expressly barred HHS from using other funds to make risk corridors payments.[16] 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."

[16] Risk corridors collections are user fees which cannot be paid out absent an appropriation permitting that payment,

As discussed above, the risk corridors program began in calendar year 2014. Because section 1342 of the ACA required HHS to use a full year's data to calculate payment amounts, no payments could be made until calendar year 2015, which corresponds to the 2015 and 2016 fiscal years. *BCBSNC*, 131 Fed. Cl. at 477 ("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 risk corridors payments for the first time in December 2014, when it enacted appropriations legislation for fiscal year 2015.

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

Congress did not enact the same appropriations language for fiscal year 2015. Congress reenacted the user fee appropriation and thus allowed HHS to use "payments in" to make "payments out." Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-

235, div. G, tit. II, 128 Stat. 2130, 2477 (2014), A43. But Congress added a new provision that expressly barred HHS from using other funds for risk corridors payments:

> None of the funds made available by this Act from [CMS trust funds], or transferred from other accounts funded by this Act to the 'Centers for Medicare and Medicaid Services—Program Management' account, may be used for payments under section 1342(b)(1) of Public Law 111–148 (relating to risk corridors).

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

Moreover, even assuming that section 1342 had made risk corridors payments an obligation of the government (beyond amounts collected as "payments in"), this specific appropriations legislation, enacted before any risk corridors payments could have been made, definitively capped payments at amounts collected and thus superseded any such obligation. As Judge Bruggink recognized, "Congress' power to spend, or not, is unimpeded by its earlier actions." *Maine*, 133 Fed. Cl. at 8; *accord Manigault v. Springs*, 199 U.S. 473, 487 (1905) ("a general law . . . may be repealed, amended or disregarded by the legislature which enacted it," and "is not binding upon any subsequent legislature"). Thus, where Congress indicates in its appropriations acts "a broader purpose" beyond "something more than the mere omission to appropriate a sufficient sum," *United States v. Vulte*, 233 U.S. 509, 515 (1914), the Supreme Court and the Federal Circuit have given effect to Congress's limitations on the expenditure of funds and concluded that the United States is not liable for payments in excess of those limitations.

D. Controlling Precedent Dictates That Congress's Intent in Its Appropriations Acts Governs the Extent of Federal Financial Obligations

Congress is not constrained to use particular words or phrases to define or modify the financial obligations of the United States. As long as Congress makes its intent clear, that intent

is controlling. "The whole question depends on the intention of Congress as expressed in the statutes." *United States v. Mitchell*, 109 U.S. 146, 150 (1883). In *Mitchell*, for example, the Supreme Court concluded that, by appropriating salaries at the rate of $300 per year for five consecutive years instead of the $400 provided in permanent legislation, Congress "reveal[ed] a change in the policy" with the "purpose" "to suspend the law fixing the salaries . . . at $400 per annum." *Id.* Judge Bruggink correctly recognized that *Mitchell* was not a "simple case of a failure to appropriate sufficient funds." *Maine*, 133 Fed. Cl. at 8. Thus, the plaintiff was entitled to no more than $300 per year in salary because "the intention of Congress [was] to fix, by the appropriations act . . . the annual salaries of interpreters for the time covered by those acts at $300 each" even though those appropriations acts did not expressly amend the permanent legislation setting salaries at $400. *Mitchell*, 109 U.S. at 150.

Cases since *Mitchell* demonstrate that congressional intent is the touchstone for determining the effect of an appropriations act on permanent legislation. In *Langston v. United States*, 118 U.S. 389 (1886), permanent legislation provided that the minister to Haiti would be paid $7,500 per year. Congress appropriated that full amount for several consecutive years and included a provision in those appropriations acts specifying that the salary should continue beyond 1878. *Langston*, 118 U.S. at 390. Then in 1882, Congress changed the manner in which it appropriated funds for certain ambassadors, appropriating a lump sum of $25,000 for the salaries of ministers in five countries, including Haiti, "at $5,000 each." *Id.* at 391. Noting that "the case is not free from difficulty," because the appropriation acts "contained no words that expressly, or *by clear implication*, modified or repealed the previous law," the Supreme Court concluded that

Congress did not intend, by a mere failure to appropriate sufficient funds, to deny a federal officer the salary for which he had worked. *Id.* at 394 (emphasis added).[17]

In *Dickerson v. United States*, 310 U.S. 554 (1940), the Court concluded that Congress's repeated restriction on the use of appropriated funds to pay reenlistment bonuses, notwithstanding permanent legislation providing for such bonuses, evinced an intent to suspend payment of them. As Judge Bruggink noted in *Maine*, although the appropriations restriction "was not phrased in a clear enough manner to warrant setting aside the bonus," "[a] review of the legislative history of the provision persuaded the Court that Congress' intent [to suspend reenlistment bonuses] was clear." *Maine*, 133 Fed Cl. at 8; *see also*, *Dickerson*, 310 U.S. at 561-62. Nothing in the Supreme Court's opinion supports Judge Wheeler's recent attempt to distinguish *Dickerson*. *Molina*, 133 Fed. Cl. at 13, 17. The Supreme Court emphasized that "words when used in an appropriation bill are [not] words of art or have a settled meaning" and noted the central role of legislative history in determining congressional intent in appropriations acts. *Dickerson*, 310 U.S. at 561-62.

In *Gibney v. United States*, 114 Ct. Cl. 38 (1949), Congress had, for a single year, included a provision that prohibited funds "appropriated for the Immigration and Naturalization Service" from being used "to pay compensation for overtime services other than as provided in the Federal Employees Pay Act of 1945 . . . and the Federal Employees Pay Act of 1946." But the Federal Employees Pay Act of 1945 expressly permitted the payment of overtime services sought by the

[17] While *Langston* may have been a difficult case, the risk corridors cases are straightforward. In contrast to the substantive statute in *Langston*, section 1342 does not make risk corridors payments an "entitlement" of insurers. And in contrast to the appropriations act in *Langston*, Congress did not merely fail to appropriate sufficient funds for risk corridors payments, but prohibited HHS from using any funds other than collections for such payments. 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*, which predate the creation of the Judgment Fund, did not require payment without a congressional appropriation.

plaintiff, so the restriction by its own terms did not prohibit the payments sought, and the Senator who offered the rider had conceded the following year that he was mistaken as to the underlying law. *Id.* at 53-54. Thus, again as Judge Bruggink noted in *Maine*, the Court of Claims distinguished *Dickerson* on the grounds that Congress did not intend to deny payment of the overtime compensation at issue in *Gibney*. *Maine*, 133 Fed. Cl. at 10.

In *New York Airways v. United States*, 369 F.2d 743 (Ct. Cl. 1966), Congress merely appropriated an insufficient sum for "Payments to Air Carriers (Liquidation of Contract Authorizations)" to cover subsidies and compensation for helicopter companies required to carry U.S. Mail at rates set by an administrative board. The Court of Claims emphasized that Congress itself recognized that the statute providing for those subsidies created a judicially enforceable payment obligation. *Id.* at 751-52. 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[.]"). And as Judge Bruggink notes, Congress viewed the obligations as contractual in nature. *Maine*, 133 Fed. Cl. at 11 n.7 (citing *N.Y. Airways*, 369 F.2d at 747). Indeed, the Court of Claims invoked cases arising out of contract claims in prefatory discussion of the United States' liability under statute. *N.Y. Airways*, 369 F.2d at 748 (citing *Ferris v. United States*, 27 Ct. Cl. 542 (1892)).

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. 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.

Another Supreme Court case, *Will v. United States,* 449 U.S. 200 (1980), involved four differently-phrased appropriations restrictions in four different fiscal years, yet the Supreme Court had no trouble concluding that each restriction expressed the same congressional intent not to raise judicial pay. In one of those years—"Year 4"—Congress merely provided that "funds available for payment [to the plaintiff-judges] shall not be used to pay . . . any sum in excess of 5.5 percent increase in existing pay." *Will*, 449 U.S. at 208. In a decision finding for plaintiffs on risk corridors, Judge Wheeler ignored that restriction, *Molina*, 133 Fed. Cl. at 19 (quoting only the restrictions in three of the four relevant years), and reiterated his prior incorrect reasoning that because "Congress did not use the 'this or any other act' language . . . Congress meant only to prevent HHS from using the CMS Program Management account for risk corridors payments," *id.* at 34 (quoting *Moda*, 130 Fed. Cl. at 461). In *Maine*, Judge Bruggink correctly recognized that Congress had used different phrasing in the appropriations acts at issue in *Will*. *Maine* rightly noted that the Supreme Court's holding in *Will* was grounded, not in a particular phrase, but in congressional intent and the Court's recognition that "'[t]o say that Congress could not alter a method of calculating salaries before it was executed would mean the Judicial Branch could command Congress to carry out an announced future intent as to a decision the Constitution vest[s] exclusively in the Congress.'" *Maine*, 133 Fed. Cl. at 9 (quoting *Will*, 449 U.S. at 228).

The Federal Circuit's decision in *Highland Falls* squarely forecloses the Liquidator's attempt to recover under 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 (quoting 20 U.S.C. § 237(a) (1988 & Supp. V 1993), *repealed by* Pub. L. No. 103-382, title III, pt. C, § 331(b), 108 Stat. 3518, 3965.). 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 to which it is entitled as computed under [section 2]." *Id.* (quoting 20 U.S.C. § 240(c)(1)(A)). Nevertheless, when Congress earmarked specific sums for section 237 payments that proved insufficient to pay the amounts to which the plaintiff school districts were "entitled," the Federal Circuit concluded that the Secretary's pro rata distribution of payments was permissible, and the government was not liable for the shortfall. 48 F.3d at 1171-72.

Judge Bruggink correctly recognized that the Federal Circuit relied, in part, on the Anti-Deficiency Act and 31 U.S.C. § 1532 to conclude that Congress, in appropriating only a portion of the necessary funds, did not intend the government to pay more in total subsidies than what it appropriated. *Maine*, 133 Fed. Cl. at 11. [18] The Federal Circuit in *Highland Falls* thus explicitly recognized that payment directives must be interpreted both in light of Congress's annual appropriations decisions and in context with the broader statutory scheme in which Congress exercises its power of the purse. *See* 48 F.3d at 1171 (by making pro rata reductions in the amounts to which school districts were found entitled, the Secretary of Education "harmonized the

[18] Judge Bruggink mistakenly referred to the Impact Aid Act as the Payment in Lieu of Taxes Act, though this does not affect his analysis. *See Maine*, 133 Fed. Cl. at 11.

requirements of [the Impact Aid Act] and the appropriations statutes with the requirements of 31 U.S.C. §§ 1341(a)(1)(A) and 1532").[19]

In *Star-Glo Associates, L.P., v. United States*, 414 F.3d 1349 (Fed. Cir. 2005), the Federal Circuit was again confronted with a mandatory payment directive according to a formula and an appropriation insufficient to pay all claims under that formula. The statute provided that the Secretary of Agriculture "shall pay Florida commercial citrus and lime growers $26 for each commercial citrus or lime tree removed . . . . Payments [to each grower] . . . shall be capped in accordance with [specified] trees per acre limitations." Act of October 28, 2000, Pub. L. No. 106-387, § 810(a), 114 Stat. 1549, 1549A-52. Congress appropriated "$58,000,000 of the funds of the Commodity Credit Corporation to carry out this section, to remain available until expended." *Id.* § 810(e). The Federal Circuit concluded, after considering the legislative history, that Congress intended the Secretary of Agriculture to spend "not more than" the $58 million appropriated. *Star-Glo*, 414 F.3d at 1355. Judge Bruggink noted that *Star-Glo* is relevant here, fitting it into the lengthy history of cases demonstrating Congress's control of the purse through appropriations legislation. *Maine*, 133 Fed. Cl. at 12. Judge Wheeler, on the other hand, concluded that the statute in *Star-Glo* "explicitly limited funds available to make mandatory payments." *Molina*, 133 Fed. Cl. at 37. But nothing in the statute explicitly limited funds. Rather, the Federal Circuit

[19] There is no merit to the suggestion that the Federal Circuit concluded that the statute was not money-mandating. *See*, *e.g.*, *Molina*, 133 Fed. Cl. at 40 n.17. The statute explicitly provided that the government "shall pay" the amounts at issue. 20 U.S.C. § 240(b)(1). Moreover, as the *Highland Falls* opinion makes clear, the government moved to dismiss for failure to state a claim on which relief could be granted, 48 F.3d at 1167, 1169, and the Federal Circuit affirmed the trial court's dismissal on the merits, *id.* at 1172. Nothing in the opinion suggests that the Federal Circuit was making a jurisdictional ruling. And the Federal Circuit's precedent confirms that 20 U.S.C. § 240(b)(1)'s "shall pay" language is money-mandating. *See*, *e.g.*, *Greenlee Cty., Ariz. v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007).

concluded based on the Conference Report that Congress intended that not more than the $58,000,000 be spent on the mandated payments. *Star-Glo*, 414 F.3d at 1355. While the payment program was created as part of an appropriations bill that also contained an appropriation for payments, nothing in the Federal Circuit's reasoning depended upon the payment provision and the appropriation appearing in the same bill. Congress's intent to limit payments to amounts appropriated was dispositive, without regard to where Congress expressed that intent.

Most recently, the Federal Circuit has twice addressed claims for payment under the Payment in Lieu of Taxes Act ("PILT") when Congress has appropriated insufficient sums to pay all claims. *Greenlee County*, 487 F.3d at 877-80; *Prairie Cty., Mont. v. United States*, 782 F.3d 685 (Fed. Cir. 2015). In direct conflict with Judge Wheeler's approach, in *Greenlee County* the Court noted that the PILT's "shall pay" directive rendered the statute money-mandating, but that first step in the analysis did not determine the merits of the plaintiff's money claims. *Greenlee County*, 487 F.3d at 877. Recognizing that although "the mere failure of Congress to appropriate funds . . . does not *in and of itself* defeat a Government obligation created by statute," *id.* at 877 (emphasis added, quotation omitted), "in some instances the statute creating the right to compensation . . . may restrict the government's liability . . . to the amount appropriated by Congress," *id.* at 878. The Court of Appeals eschewed any requirement that Congress must use specific language limiting liability to appropriations or that Congress must appropriate a "specific dollar amount" to limit liability. Instead, the Court adopted a "functional" approach to conclude that Congress intended to limit PILT payments to amounts appropriated. *Id.* at 878-79. Relying on *Star-Glo*, the Court determined its conclusion was "particularly appropriate" because "'there is greater room' in benefits programs to find the government's liability limited to the amount appropriated." *Greenlee County*, 487 F.3d at 879 (quoting *Star-Glo*, 414 F.3d at 1355).

In *Prairie County*, the Federal Circuit reiterated its holding in *Greenlee County* that the PILT, by its terms, limited liability to amounts appropriated. 782 F.3d at 690. The Court confirmed that, while Congress generally may not curtail existing contractual obligations through appropriations restrictions, "[a]bsent a contractual obligation" Congress can limit liability under money-mandating statutes through appropriations acts. *Id.* Concluding that the PILT did so limit liability, the Court noted that "if Congress intended to obligate the government to make full PILT payments, it could have used different statutory language," and the Congress in fact did so in other years. *Id.* at 691.

As the preceding discussion of cases demonstrate, Congress is always free to define, limit, or modify money-mandating statutes through appropriations acts. No "magic words" are required, and congressional intent is dispositive.

The Liquidator concedes that "through the Spending Laws, Congress curtailed CMS's funding sources to make [risk corridors program] payments," but asserts "that fact is irrelevant to this lawsuit." Pl. MSJ at 37. That assertion simply cannot be reconciled with over a century of cases denying additional recovery on the basis of Congress's appropriations decisions. *See*, *e.g.*, *Mitchell*, 109 U.S. at 150; *Dickerson*, 310 U.S. at 561-62; *Will*, 449 U.S. at 208, 228; *Highland Falls*, 48 F.3d at 1170-71. Section 1342 alone did not create a "payment obligation." Instead of making payments an obligation of the government (as Congress did in the Medicare Part D statute and elsewhere in the ACA), section 1342 reserved Congress's full budget authority over risk corridors payments.

Moreover, there was no "mere failure" by Congress to appropriate funds for risk corridors payments. *Maine*, 133 Fed. Cl. at 11. In the only acts that appropriated funds for such payments, Congress appropriated "payments in" but expressly barred HHS from using other funds to make "payments out." And as discussed above, the precedents of the Supreme Court and the Federal

Circuit recognize that even where (unlike here) permanent legislation creates a government obligation, that obligation can be modified by appropriations legislation of this kind.[20]

Finally, the Liquidator argues that the Spending Laws cannot do what they explicitly direct (appropriate risk corridors collections, but nothing further, to make risk corridors payments), because Congress has failed to pass legislation that purports to make risk corridors budget neutral or that repeals the program. Pl. MSJ at 37-40. Legislation Congress *failed* to enact is of no legal import here.[21] All that matters is what Congress *actually did*, and as described above, the text of

[20] To the extent the Liquidator relies on *District of Columbia v. United States*, 67 Fed. Cl. 292 (2005), that reliance is misplaced. There, 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. *Id.* at 297. The Act also provided that HHS "shall initiate . . . and complete . . . such repairs and renovations to such physical plant and facility support systems of the Hospital." Pub. L. No. 98-621, § 4(f)(2)(A), 98 Stat. 3369, 3373 (1984). The Act was later amended to permit HHS to enter into an agreement with the District whereby the District would contract for the repairs and renovation, which HHS would fund. *District of Columbia*, 67 Fed. Cl. at 298 (citing Pub. L. No. 102-150, 105 Stat. 980 (1991). Congress had made several specific appropriations to fund the repair and renovation costs, and those appropriations were paid to the District. *Id.* at 334-35. Those appropriations did not purport to satisfy the Government's existing obligation, however, which was not to make payments but to "repair[] and renovat[e]." Looking to the legislative history, "all that the court [was] 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 has continued to expressly restrict funding for risk corridors payments.

[21] The Liquidator asserts that "Congress knows how to amend or repeal laws it does not like." Pl. MSJ at 39. But there is no dispute that Congress neither repealed the risk corridors program nor amended section 1342's direction to HHS to establish and administer the program. What Congress did do, which it also knows how to do, is to make and limit appropriations. Similarly, the Liquidator's effort to draw a purported "important distinction" between appropriations and "substantive legislation," Pl. MSJ at 39, is meaningless. As we have explained, this Court need only determine Congress's intent as demonstrated by the text and structure of the Spending Laws. And that intent is clear – no funds are appropriated for risk corridors payments apart from risk corridors collections. Finally, the Liquidator's contention that "[w]here Congress did not expressly amend the [risk corridors program], this Court should not find that it did implicitly," Pl. MSJ at 41, misses the point. Congress *did* expressly make appropriations for risk corridors payments in the 2015 and 2016 Spending Laws and, in so doing, Congress limited the available

the Spending Laws demonstrates clear congressional intent to limit risk corridors payments to risk corridors collections.

E. The Liquidator Provides No Basis to Use Taxpayer Funds to Make Up Shortfalls in Insurers' Profits

1. The ACA Did Not Expose the Government to Uncapped Liability for Insurance Industry Losses

The crux of the Liquidator's argument is that the language in section 1342's "payment methodology" provision stating that the Secretary "shall pay" amounts calculated under the formula created a binding obligation on the government, regardless of appropriations and despite Congress's repeated and express funding limitations. *See* Pl. MSJ at 20-28, 31-41. As noted above, however, statutory language directing an agency to pay amounts calculated under a statutory formula does not, without more, create an obligation on the part of the government to provide for full payments in the absence of appropriations.[22]

As Judge Bruggink correctly reasoned:

> Congress made clear its intention that no public funds be spent to reimburse risk corridor participants beyond their user fee contributions. It asked GAO what monies were available to HHS to make risk corridor payments. GAO answered that user fees and the CMS program management fund were the only sources available. Congress expressly blocked the use of the latter, leaving only the former. The government's obligation was thus capped to the amount brought in from user fees.

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appropriation to the amount collected from insurers. This Court need not effectuate that legislation by implication – Congress's plain language is explicit and clear.

[22] The Liquidator relies upon *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) for its construction of "shall," Pl. MSJ at 16, 21, but the statute at issue there was unrelated to an alleged payment obligation. In any event, there is no dispute that HHS "shall pay" risk corridors payments (and HHS does pay them). The only dispute is whether Congress intended HHS to make payments in excess of risk corridors collections.

Maine, 133 Fed. Cl. at 13. This conclusion follows from *Mitchell*, *Dickerson*, *Will*, and *Highland Falls*, and is entirely consistent with *Langston*, *Gibney*, and *New York Airways*.

Neither the Liquidator nor Judge Wheeler provide any reason to disregard the plain text of section 1342, which does not obligate the government to use taxpayer funds to compensate unprofitable insurers. Although the Liquidator suggests that section 1342 should be interpreted to track Medicare Part D, *see* Pl. MSJ at 21-23, the Liquidator 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.

Relying on *Moda*, the Liquidator argues that section 1342 obligates the Government to make "full" payment without regard to appropriations. Pl. MSJ at 31; *see also Moda*, 130 Fed. Cl. at 455 (Section 1342 "simply directs the Secretary of HHS to make full 'payments out.'"). Under the "straightforward and explicit command of the Appropriations Clause," however, "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Richmond*, 496 U.S. at 424. Neither the ACA nor section 1342 provides an appropriation for risk corridors payments. *Moda*, 130 Fed. Cl. at 442; *Maine*, 133 Fed. Cl. at 13; *Health Republic*, 129 Fed. Cl. at 762; *Land of Lincoln*, 129 Fed. Cl. 81 at 104-05. And as discussed above, a direction to pay does not, standing alone, create an obligation of the government. *See GAO Red Book*, Ch. 2 at 2-24; *see also Health Republic*, 129 Fed. Cl. at 762. 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.

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

For the same reason, there is no government obligation to make risk corridors payments without regard to appropriations. Indeed, the claim here is even weaker than the claim in *Prairie County* because the permanent legislation in that case authorized appropriations but limited the scope of that authorization. *See id*. at 686 (explaining that the permanent legislation provided that "[n]ecessary amounts may be appropriated to the Secretary of the Interior to carry out this chapter," but qualified that authorization by providing that "[a]mounts are available only as provided in appropriation laws"). Section 1342 does not authorize appropriations in the first place, nor does it provide any other budget authority for risk corridors payments.

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

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

Furthermore, the Liquidator's attempt to conflate section 1342's status as a "money-mandating" statute with a right to full recovery is meritless. Pl. MSJ at 31-34. The United States does not dispute that section 1342 is money mandating. And, in fact, KYHC *has been paid money pursuant to the statute*. While section 1342's "shall pay" language may grant the Liquidator access to this Court (though, as explained above, the Court lacks jurisdiction because payment is not presently due), it does not demonstrate that Congress appropriated funds for risk corridors payments in excess of collections. As *Highland Falls* and the other cases discussed above demonstrate, Congress's exercise of its power of the purse is of central relevance to the *merits question of liability under a statute*. Here, Congress reserved that power when it passed section 1342. When Congress addressed funding for risk corridors payments in the 2015 and 2016 Spending Laws, Congress appropriated only risk corridors collections, and unequivocally barred the use of any other funds.

Moreover, the United States is not arguing that the Liquidator must prove a "second waiver" of sovereign immunity. *See* Pl. MSJ at 33. What the Liquidator must do, as demonstrated by controlling law, is demonstrate that Congress obligated the United States to pay risk corridors payments in excess of collections. The Liquidator cannot do that.

The Liquidator's policy arguments are equally unavailing. Pl. MSJ at 28-30. The ACA's premium stabilization programs were designed to create a structure to mitigate insurers' risks, not to eliminate those risks by creating a government guarantee. And while the programs are "interlocking" insofar as reinsurance and risk adjustment payments are included in the risk corridors formula, risk corridors payments and charges do not factor into the other two programs. The Liquidator's contention that the risk corridors program alone obligates the government to indemnify insurers against losses regardless of appropriations thus has no grounding in the

statutory text and gives short shrift to the ACA's own emphasis on fiscal responsibility. ACA § 1563.

The Liquidator's contention that "the [risk corridors program's] mandate was to *stabilize* insurance premiums in each of the first three years of the exchanges' existence," Pl. MSJ at 18, misses the point. The three year program was entirely backward looking in that all three years' premiums were set before the first risk corridors collection or payment amounts were determined. The Liquidator's argument "ignores the complexity of the problems Congress [was] called upon to address." *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986). The Exchanges created significant business opportunities for insurers, which had an incentive to compete for market share by lowering premiums. Indeed, a recent article noted "the prevalent strategy of deliberately selling policies below cost in the early years of the program in order to gain market share." Seth Chandler, *Judge's Ruling On 'Risk Corridors' Not Likely To Revitalize ACA*, Forbes, Feb. 13, 2017, A201. A government commitment to indemnify insurers against losses would have exacerbated those incentives, and Congress prudently refrained from committing taxpayer dollars to unprofitable insurers. Instead, Congress created a self-funded program designed to distribute risks among insurers. Insurers' pricing decisions could not create a payment obligation that Congress did not enact.[23]

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

Judge Lettow aptly 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 [issuers] urge[]." *Id.* Indeed, reliance on the general purposes of the program cannot overcome Congress's decision to mitigate losses only to the extent of collections. "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (emphasis in original).

2. Neither the Fiscal Year 2014 Appropriation Nor the Judgment Fund Were Available for Risk Corridors Payments

As discussed above, HHS's fiscal year 2014 appropriation included a $3.7 billion lump sum for the management of enumerated programs such as Medicare and Medicaid and for "other responsibilities" of CMS. In *Moda*, Judge Wheeler mistakenly believed that HHS could have used that lump sum to make risk corridors payments during fiscal year 2014, before Congress's express funding limitation took effect in December 2014. *Moda*, 130 Fed. Cl. at 456 (the "fiscal year 2014 CMS Program Management appropriation" was "available" but "HHS chose not to use [it]"). The Liquidator similarly misreads the GAO Red Book (and its opinion) to argue that "there were appropriations available for CMS to form fiscal year 2014 obligations, notwithstanding that CMS would not *pay* its [risk corridors program] obligations until the following year." Pl. MSJ at 35.

The terms of the ACA preclude that conclusion. By law, the lump sum appropriation in the fiscal year 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. 5, 408 (2014), A25.[24] And under the plain terms of section 1342, no risk corridors payments could have been made until the 2015 calendar year. Section 1342 requires that "payments in" and "payments out" be calculated using insurers' data from the entire calendar year. *See* 42 U.S.C. § 18062(b). Indeed, an insurer's allowable costs for the year must be reduced by any reinsurance and risk adjustment payments, which are not made until after the end of the calendar year. *Id*. § 18062(c)(1)(B). Thus, "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 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.

The Liquidator's arguments to the contrary fail. First, the date on which HHS could have recorded benefit year 2014 risk corridors payments as an "obligation" is not relevant to the question of whether an appropriation was available at the earliest time HHS could have calculated risk corridors payments for benefit year 2014. *See* Pl. MSJ at 35. In any event, the Liquidator is wrong to allege that HHS could have recorded an obligation "when QHP issuers submitted their rates and opted to participate in the exchanges in the forthcoming year," *id.*, which took place months

[24] Likewise, the fiscal year 2015 continuing resolutions noted by Judge Wheeler, *Moda*, 130 Fed. Cl. at 457 n.13, made funds available only for projects or activities for which appropriations were made during fiscal year 2014. Thus, the first time when risk corridors payments could be made were in December 2014 when Congress enacted the fiscal year 2015 appropriations act and HHS calculated the 2014 payment amounts. *See*, Pub. L. No. 113-164, § 106, 128 Stat. 1827, 1868 (2014), A27. Thus, the Liquidator is wrong when she suggests that the continuing resolution funding is "unrestricted" and available for risk corridors payments. Pl. MSJ at 35-36.

before the end of benefit year 2014. As explained above, KYHC did not possess calendar year 2014 data until the conclusion of that calendar year. And HHS had no ability to calculate risk corridors collections and payments industry-wide for benefit year 2014 until, at the earliest, July 2015, when insurers first submitted 2014 benefit year risk corridors data.[25] Second, the Liquidator is incorrect that the fiscal year 2014 CMS Program Management appropriation remains available for five years. And even the GAO Red Book excerpt quoted by the Liquidator makes clear that an appropriation may only cover "obligations incurred prior to the account's expiration." Pl. MSJ at 35. As described above, the fiscal year 2014 CMS Program Management appropriation, which expired on September 30, 2014, and the Continuing Resolutions that extended fiscal year 2014 funding, expired upon the passage of the fiscal year 2015 Spending Law on December 16, 2014 – *before* the end of risk corridors benefit year 2014 and *before* any insurer's risk corridors collections and payments could be calculated in mid-2015.

In *Moda*, Judge Wheeler alternatively reasoned that Congress must have intended to allow insurers to collect full risk corridors payments from the Judgment Fund, because the appropriations acts did not state that no funds "in this *or any other* [*a*]*ct*" are available for risk corridors payments. *Moda*, 130 Fed. Cl. at 462 (emphasis added). But the Supreme Court has already held that the "general appropriation for payment of judgments . . . does not create an all-purpose fund for judicial disbursement," *Richmond*, 496 U.S. at 432, and the Judgment Fund 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

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

available under an agency's appropriations act without making reference to "any other act." Under Judge Wheeler's reasoning, the claimants in *Highland Falls* should have prevailed rather than lost.[26]

In the only acts appropriating funds for risk corridors payments, Congress responded to the analysis in the GAO opinion, which identified only two potential funding sources—"payments in" and the lump sum appropriation for program management. Informed by the GAO's analysis, Congress appropriated "payments in" but barred HHS from using other funds in the CMS Program Management account. Congress thus ensured that "the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect." 160 Cong. Rec. H9307-01, H9838, A47. As in *Highland Falls*, that "clear congressional mandate" precludes plaintiff's statutory claim. 48 F.3d at 1171.[27]

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[26] The Liquidator's reliance on the Federal Circuit's decision in *Slattery v. United States*, 635 F.3d 1298, 1317 (Fed. Cir. 2011) (en banc), is likewise misplaced. Pl. MSJ at 32-33. As Judge Bruggink recognized, *Slattery* is simply not relevant. *Maine*, 133 Fed. Cl. at 11. *Slattery* was a breach of contract case where the issue was limited to this Court's Tucker Act jurisdiction. The Federal Circuit held only that the appropriation status of a governmental agency is not relevant to Tucker Act jurisdiction. 635 F.3d at 1321; *see also id.* at 1316 (the Judgment Fund is not a jurisdictional "limitation" of claims within the scope of the Tucker Act); *id* at 1318 (holding that "[t]he appropriation provisions of [FIRREA] were an appropriation to pay governmental obligations."). But as *Highland Falls* and the other cases discussed above demonstrate, Congress's exercise of its power of the purse is of central relevance to the merits question of liability under a statute. The Judgment Fund exists solely to pay "final judgments, awards, compromise settlements, and interests and costs." 31 U.S.C. § 1304(a). Until entry of judgment or execution of a settlement, the Judgment Fund's permanent appropriation is unavailable and it cannot serve to justify the entry of a judgment. *See Slattery*, 635 F.3d at 1317 (recognizing that "[t]he purpose of the Judgment Fund was to avoid the need for specific appropriations to pay judgments awarded by the Court of Claims").

[27] To the extent the Liquidator relies on *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182 (2012), Pl. MSJ at 24, 34, that reasoning was foreclosed by the Federal Circuit's decision in *Prairie County*, which held that *Ramah* 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

F. The Liquidator's Reliance-Based Arguments Fail as a Matter of Law

For related reasons, the Liquidator does not advance her position by relying on HHS's statements allegedly promising to make full annual risk corridors payments. *See* Pl. MSJ at 28-30. First, HHS explicitly recognized that its ability to make such payments was subject to appropriations.[28] Second, it is well settled that an agency's statements cannot create a payment obligation that Congress did not authorize. In *Richmond*, the Supreme Court expressly rejected the contention that "erroneous oral and written advice given by a Government employee" may "entitle the claimant to a monetary payment not otherwise permitted by law." 496 U.S. at 415-16. The Supreme Court held that "payments of money from the Federal Treasury are limited to those authorized by statute," and it "reverse[d] the contrary holding of" the Federal Circuit. *Id*. at 416.

The Supreme Court emphasized that a contrary holding could "render the Appropriations Clause a nullity." *Id*. at 428. "[I]f 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.

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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 v. United States*, 391 F.3d 1212, 1225 (Fed. Cir. 2004), and the extent of a statutory obligation may be determined by appropriations, *Highland Falls*, 48 F.3d at 1170-72.

[28] *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).

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

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

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

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

The Liquidator'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*, 131 Fed. Cl. at 478-80; *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).

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

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

For the last twenty years, consistent Federal Circuit precedent has followed the Supreme Court's test set out in *National Railroad Passenger* and required contractual intent to be expressed either in the terms of the statute or in the circumstances surrounding enactment, *i.e.*, in the statute's legislative history. In *Brooks v. Dunlop Manufacturing, Inc.*, 702 F.3d 624 (Fed. Cir. 2012), the Federal Circuit rejected an implied contract claim based on a repealed *qui tam* provision for bringing false patent marking claims. *Id.* at 631. Looking to the language of the *qui tam* provision, the Federal Circuit noted that "[a]lthough not necessarily determinative, no words typically associated with contract formation, such as 'offer' or 'acceptance,' were used." *Id.* The court then consulted legislative history of the provision and found no intent to create vested contractual rights. *Id.* at 631-32.

Similarly, in *Hanlin v. United States*, 316 F.3d 1325 (Fed. Cir. 2003), the Federal Circuit noted that the statutory provision at issue was "a directive from the Congress to the [agency], not a promise from the [agency] to" third parties. *Id.* at 1329. The Court could "discern no language in the statute or regulation that indicates an intent to enter into a contract," nor could the Court "discern any past course of dealing or practice from which the [agency's] intent to enter into such a contractual relationship can be inferred." *Id.* at 1330.

And in *Bay View, Inc. v. United States*, 278 F.3d 1259 (Fed. Cir. 2001), the Federal Circuit rejected a contract claim arising from an amendment to the Alaska Native Claims Settlement Act ("ANCSA"). The Court reasoned that "[b]ecause ANCSA does not purport to create an express contract between the United States and Bay View, the record of ANCSA's enactment would have to support an implied contract." *Id.* at 1266. Finding no evidence of an offer, acceptance, or consideration in the circumstances surrounding enactment, the Federal Circuit held that ANCSA "was a unilateral act by the United States" that did not create contractual rights. *Id.*

The Liquidator's implied contract claim cannot be squared with this precedent, nor can the Liquidator overcome the presumption against finding a contract in section 1342 or the regulations. Like the issuer in *Land of Lincoln*, the Liquidator points to section 1342, 45 C.F.R. § 153.510, and HHS's "conduct" as allegedly indicating both an intent to contract for, and an offer of, "full payment" of risk corridors. Pl. MSJ at 42-45. Nothing in the text or in the legislative history of the ACA contains any indicia of intent by Congress to bind the government in contract to make risk corridors payments. "Although [section 1342] may mandate payment from HHS . . . when a qualified health plan satisfied statutory and regulatory conditions, that alone does not demonstrate intent to contract." *Land of Lincoln*, 129 Fed. Cl. at 111-12 (citing *ARRA Energy Co. I v. United States*, 97 Fed. Cl. 12, 27 (2011)) ("[T]o overcome th[e] presumption [that general laws do not

create private rights in contract], plaintiffs must point to specific language in [the statute or regulation] or to conduct on the part of the government that allows a reasonable inference that the government intended to enter into a contract.").

When courts have found an intent to contract with program participants, the statutes at issue clearly expressed Congress's intent for the government to enter into contracts. *See, e.g.*, *Grav v. United States*, 14 Cl. Ct. 390, 392 (1988) (finding an implied-in-fact contract where statute provided that "Secretary shall offer to enter into a contract"), *aff'd*, 886 F.2d 1305 (Fed. Cir. 1989); *Radium Mines, Inc. v. United States*, 153 F. Supp. 403, 405 (Ct. Cl. 1957) (opining that agency regulation could give rise to implied contract where it stated that "[u]pon receipt of an offer" the agency would "forward to the person making the offer a form of contract containing applicable terms and conditions ready for his acceptance"). In contrast, neither section 1342 nor 45 C.F.R. § 153.510 contains any contract language; they simply provide for the creation of a program and a formula for determining charges and payments.

Nor do HHS's statements regarding its risk corridors duties, Pl. MSJ at 44, evince an intent to contract; they merely recognize HHS's understanding of its existing *statutory* duties. *See, e.g.*, 79 Fed. Reg. at 30,260, A211 ("HHS recognizes that the *Affordable Care Act* requires the Secretary to make full payments to issuers."); 80 Fed. Reg. at 10,779, A214 (same). Judge Griggsby recognized that these and other statements by HHS not only did not evince intent, they also came years after the ACA's enactment. *BCBSNC*, 131 Fed. Cl. at 479. In any event, an agency's description of a statutory duty is not evidence of an intent to contract. *AAA Pharmacy, Inc. v. United States*, 108 Fed. Cl. 321, 328 (2012). Congress did not intend the risk corridors program to operate as a contractual obligation. *Cf. Hanlin*, 316 F.3d at 1329-30 (noting that statute and regulation "set forth the [agency's] authority and obligation to act, rather than a promissory

undertaking" and "[w]e discern no language in the statute or the regulation that indicates an intent to enter into a contract"); *AAA Pharmacy, Inc.*, 108 Fed. Cl. at 329 (finding no intent to contract in Medicare statute and regulations where statute "only provides for payment" and regulation "provides for a review process"); *ARRA Energy Co. I*, 97 Fed. Cl. at 28 (dismissing implied-in-fact contract claim because statute "simply provides that the government will make an outright payment to any applicant who meets specified conditions").[29] Accordingly, Count II must be dismissed.

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

Contrary to the Liquidator's allegations, an unambiguous offer and acceptance cannot be inferred from the language or circumstances of the risk corridors program. Pl. MSJ at 45. "Section 1342 and the implementing regulations make no explicit reference to an offer or contract." *Land of Lincoln*, 129 Fed. Cl. at 112 (citing *AAA Pharmacy, Inc*., 108 Fed. Cl. at 329 and *ARRA Energy Co. I*, 97 Fed. Cl. at 27-28). And HHS's rulemaking and guidance similarly contain no language that can plausibly be construed as an unambiguous offer. HHS's statements in the context of proposed rulemaking cannot constitute an unambiguous offer because those statements, by their

[29] In finding intent, Judge Wheeler announced a sweeping new rule for inferring congressional intent to contract based on a statute's structure: Congress intends to contract when it (1) creates a voluntary "incentive program" and (2) promises fixed payment to those parties if they perform the required services. *Moda*, 130 Fed. Cl. at 462-64. This rule cannot be reconciled with Federal Circuit precedent. First, considering the "structure" of the statute instead of the text and legislative history is inconsistent with *Brooks*. *See also Wells Fargo Bank, N.A. v. United States*, 88 F.3d 1012, 1018 (Fed. Cir. 1996) (finding unilateral offer in "promissory words" that upon issuance of "Conditional Commitment for Guarantee" government "will execute" agreement and loan guarantee). Second, the *qui tam* provision at issue in *Brooks* had the same "structure" Judge Wheeler found determinative in *Moda*—a voluntary incentive program whereby individuals could bring suit on behalf of the United States against false patent markers and a firm government promise to pay a fixed amount—but the Federal Circuit found no intent to contract in this "structure." *Brooks*, 702 F.3d at 626 & 630-31.

nature, and by HHS's express reservation, were and are subject to change. Moreover, the Liquidator "agree[d] to become a QHP issuer," Complaint ¶ 87, *before* HHS established the final "terms" for the risk corridors program, demonstrating that neither party considered the risk corridors program to be a contractual, as opposed to a statutory, obligation.[30]

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

Regarding authority to enter an implied contract with issuers, the Liquidator again relies on HHS's representations and assurances. *See* Pl. MSJ at 46-47; Complaint ¶ 86.[31] However, the Liquidator does not and cannot allege, beyond a mere legal conclusion, that Mr. Counihan, Mr. Slavitt, or "other [unnamed] CMS officials," *id.*, enjoyed authority to bind the government in contract for risk corridors payments, as she must to avoid dismissal. *Trauma Serv. Grp. v. United States*, 104 F.3d 1321, 1327 (Fed. Cir. 1997) (the plaintiff "must allege facts sufficient to show that the Government representative who entered into its alleged implied-in-fact contract was a contracting officer or had implied actual authority to bind the Government").

[30] The Liquidator alleges that KYHC provided consideration to the United States "by agreeing to become a QHP issuer, complying with the obligations and conditions of the QHP Issuer Agreements, and participating in the marketplaces, as adequate insurer participation was crucial to the Government achieving the overarching goal of the ACA exchange programs." Complaint ¶ 90; *see also* Pl. MSJ 46. However, the Liquidator's assertion that furthering a policy goal of the United States constitutes contractual consideration is a theory with no limiting principle and lacks legal support.

[31] Not only were many of the representations relied upon by the Liquidator made two or three years after the time of purported contract formation, at all times, HHS's assurances were expressly grounded in the statute—not a contract—and often were accompanied by the qualifying language "subject to the availability of appropriations." *See, e.g.*, Complaint ¶ 93 (relying on May 27, 2014 [identified erroneously in the Complaint as 2015] final rule containing the qualifying language: "[i]n the unlikely event of a shortfall for the 2015 program year, . . . HHS will use other sources of funding for the risk corridors payments, *subject to the availability of appropriations*.") (emphasis added).

Nothing in section 1342 or the ACA authorizes *any* federal official to enter into a contract to make risk corridors payments. "A government agent possesses express actual authority to bind the government in contract only when the Constitution, a statute, or a regulation grants it to that agent in unambiguous terms." *McAfee v. United States*, 46 Fed. Cl. 428, 435 (2000). Absent statutory authority, no federal official can form a binding contract. *See Schism v. United States*, 316 F.3d 1259, 1288 (Fed. Cir. 2002) (en banc) (holding that neither Secretaries of the Armed Forces nor the President had authority to contract with service members for free, lifetime healthcare). 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).

Moreover, budget authority is a prerequisite to contract formation with the United States. 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)); 31 U.S.C. § 1341(a)(1)(B). 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 Anti-Deficiency Act prohibits government officials from involving the "government in a[n] . . . obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341(a)(1)(B).

Without such authorization (or appropriation), a valid contract for the payment of money cannot be formed. *See, e.g.*, *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. at 631 (recognizing that "without . . . special authority, a[n] . . . officer cannot bind the Government in the absence of an appropriation") (citations omitted). As explained above, no appropriation for risk corridors payments was enacted until Congress passed the 2015 and 2016 Spending Laws. The Liquidator's contrary arguments, Pl. MSJ at 47, lack merit.[32]

Nor do the Liquidator's cited authorities support the proposition that a contract entered into by a government official without authority is still binding on the United States "unless the illegality . . . was patent and 'palpably illegal.'" Pl. MSJ at 48 (citing *John Reiner & Co. v. United States*, 325 F.2d 438 (Ct. Cl. 1963); *Trilon Education Corp. v. United States*, 578 F.2d 1356 (Ct. Cl.

[32] Misplaced is the Liquidator's reliance on *California v. United States*, 271 F.3d 1377 (Fed. Cir. 2001). There, the Federal Circuit noted that "Congress passed a public law expressly authorizing the Secretary of the Interior . . . to negotiate and enter into an agreement with the State of California." *Id.* at 1384. Here, Congress has passed no such law authorizing any government official to enter into contracts for risk corridors payments.

1978)). Both *John Reiner* and *Trilon* dealt with the competitive bidding process in government procurement contracts. Those cases do not address the issue of authority to contract. And neither of those cases address alleged implied-in-fact contracts that were entered into by officials without authorization.

As noted above, HHS lacked budget authority in fiscal years 2013 or 2014 to contract to make risk corridors payments in fiscal year 2015, and HHS's "assurances" on which KYHC allegedly relied are immaterial as a matter of law. An agency simply cannot bind itself to the payment of money through its oral or written statements absent express authority bestowed by Congress. *See Richmond*, 496 U.S. at 428.

D. The QHP Agreements Preclude Any Implied Contract

The Liquidator also contends that an implied-in-fact bilateral contract is evidenced by the QHP Agreement. Pl. MSJ at 49-50. This argument must fail because an implied contract cannot be grounded on an express contract. *Durant v. United States*, 16 Cl. Ct. 447, 452 (1998) ("Because plaintiffs' implied-in-fact contract argument is grounded on the same facts as the express contract, the existence of the express contract precludes the court from finding an implied in fact contract"); *accord Bank of Guam v. United States*, 578 F.3d 1318, 1329 (Fed. Cir. 2009) (citing cases). The QHP Agreements established the relevant contractual parameters of KYHC's offering of QHPs on an Exchange, and those parameters required only that KYHC meet certain data transmission and security requirements before it could participate on a Federally-facilitated Exchange. The Liquidator cannot inject additional contractual obligations by recourse to an implied contract theory.

E. The Liquidator Cannot Establish that HHS Breached any Contractual Obligation

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

CONCLUSION

The Liquidator's motion for summary judgment should be denied, and the Complaint should be dismissed.

Dated: October 10, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October 2017, a copy of the foregoing, *The United States' Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion to Dismiss*, was filed electronically with the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing will be sent to all parties by operation of the Court's ECF system.

/s/ Terrance A. Mebane
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