No. 19-2102

IN THE
United States Court of Appeals for the Federal Circuit

MAINE COMMUNITY HEALTH OPTIONS,
Plaintiff-Appellee,

v.

UNITED STATES,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS

CORRECTED BRIEF FOR *AMICI CURIAE* ANTHEM, INC., LOCAL INITIATIVE HEALTH AUTHORITY FOR L.A. COUNTY, d/b/a L.A. CARE HEALTH PLAN, AND MOLINA HEALTHCARE OF CALIFORNIA, INC. IN SUPPORT OF PETITIONER AND REHEARING EN BANC

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CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 29(a) and 47.4, counsel for *Amici Curiae* certifies that:

1. The full names of the *amici* represented by me are:

Anthem, Inc., Local Initiative Health Authority for L.A. County, d/b/a L.A. Care Health Plan, and Molina Healthcare of California, Inc.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

N/A.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the *amici curiae* represented by me are:

Molina Healthcare, Inc. is the parent corporation of Molina Healthcare of California, Inc.

4. The name of all law firms and the partners or associates that appeared for the party or *amici* now represented by me in the trial court or are expected to appear in this Court (and who have not entered or will not enter an appearance in this case) are:

None.

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal:

Sanford Health Plan v. United States, No. 2019-1290(L), *Montana Health Co-Op v. United States*, No. 2019-1302, and *Community Health Choice, Inc. v. United States*, No. 2019-1633 are companion cases to the instant case.

The following cases pending before the Court of Federal Claims are related cases within the meaning of Federal Circuit Rule 47.5:

Case	**Docket No.**	**Judge**
Linda A. Lacewell, in her capacity as Liquidator of Health Republic Insurance of New York, Corp. v. United States	17-1185	Judge Wolski
Local Initiative Health Authority for Los Angeles County v. United States	17-1542	Judge Wheeler
Common Ground Healthcare Cooperative v. United States	17-877	Judge Sweeney
Guidewell Mutual Holding Corp. v. United States	18-1791	Judge Griggsby
Harvard Pilgrim Health Care, Inc. v. United States	18-1820	Judge Smith
Blue Cross & Blue Shield of North Dakota v. United States	18-1983	Judge Hertling
Molina Healthcare of California, Inc. v. United States	18-333	Judge Wheeler
Health Alliance Medical Plans, Inc. v. United States	18-334	Judge Campbell-Smith
Blue Cross & Blue Shield of Vermont v. United States	18-373	Judge Horn
EmblemHealth, Inc. v. United States	19-1164	Judge Campbell-Smith
Montana Health Co-Op. v. United States	19-568	Judge Kaplan

Case	Docket No.	Judge
Sanford Health Plan v. United States	19-569	Judge Kaplan
Blue Care Network of Michigan v. United States	20-1000	Judge Horn
Blue Cross & Blue Shield of South Carolina v. United States	20-1014	Judge Smith
Maine Community Health Options v. United States	20-458	Judge Sweeney
Cigna Health and Life Insurance Company v. United States	20-546	Judge Holte
Montana Health Co-Op v. United States	20-561	Judge Kaplan
Health Alliance Medical Plans, Inc. v. United States	20-565	Judge Campbell-Smith
Harvard Pilgrim Health Care, Inc. v. United States	20-578	Judge Smith
Sanford Health Plan v. United States	20-746	Judge Kaplan
Aetna Health Inc. v. United States	20-905	Judge Smith
Humana Inc. v. United States	20-996	Judge Firestone

6. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6):

N/A.

Dated: October 20, 2020

s/ Lawrence S. Sher
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STATEMENT OF INTEREST

Pursuant to Federal Circuit Rule 35(g)(1), Anthem, Inc., Local Initiative Health Authority for L.A. County, d/b/a L.A. Care Health Plan, and Molina Healthcare of California, Inc. submit this brief of amici curiae in support of petitioner Maine Community Health Options (MCHO) and rehearing en banc. Amici provide health insurance to millions of customers throughout the United States, including hundreds of thousands of customers on various Patient Protection and Affordable Care Act (ACA) health insurance exchanges. Amici have a substantial interest in this and the companion appeals because, like petitioner and other insurers, amici have been denied substantial "cost-share reduction" (CSR) payments by the government under statutory obligations set forth in ACA § 1402—to the tune of well over one-half-*billion* dollars—yet the panel's decision erroneously provides for mitigation of those CSR payments based on "premium tax credits" insurers received under a separate ACA provision resulting from premium increases on certain ACA Exchange plans.

PRELIMINARY STATEMENT [1]

Prior to the panel's decision, neither this Court nor any other federal court had ever concluded that *contract* mitigation-of-damage principles apply to a claim for

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for amici represents that counsel and amici authored this brief and none of the parties or their counsel, or any person or entity other than amici or its counsel, made a monetary contribution to fund the preparation or submission of this brief.

specific monetary relief mandated by federal *statute* where the statute itself does not incorporate those principles. The reason is clear: courts must enforce statutes as written. The same result should follow here, and compellingly so, because neither the remedy-creating statutory provision at issue—ACA § 1402, 42 U.S.C. § 18071—nor the purported mitigation-imposing statutory provision—the ACA's premium-tax-credit provision, § 1401, 26 U.S.C. § 36B—makes any mention of contract mitigation principles, or even allude to each other.

The panel does not, and cannot, deny this textual silence. It seizes, instead, on a supposed different textual silence—the purported absence of a remedy provision in § 1402—and then arrogates to itself the power to infuse § 1402 with contract mitigation-of-damages principles based on two Supreme Court precedents involving statutes that provided no remedy, or even an express private right of action at all. And it rests this newly-minted statutory mitigation duty on a separate ACA provision Congress passed—§ 1401—that indisputably does *not* confine the scope of remedies recoverable under § 1402. But § 1402 is anything but silent when it comes to a remedy. Nor is there any justification—in precedent or elsewhere—for the panel's failure to apply well-worn principles of interpretation, which foreclose its unprecedented conclusion.

Respectfully, and for the reasons set forth more fully in MCHO's rehearing petition,[2] the Court should reconsider the panel's flawed ruling on mitigation *en banc*.

ARGUMENT

I. THE PANEL'S UNPRECEDENTED ENGRAFTING OF MITIGATION-OF-DAMAGE PRINCIPLES ONTO § 1402'S PURELY STATUTORY REMEDY FOR SPECIFIC MONETARY RELIEF FUNDAMENTALLY DEPARTS FROM SETTLED PRINCIPLES OF STATUTORY CONSTRUCTION.

Rehearing is warranted to correct the panel's clear transgression of the most fundamental limit on the judicial function—that courts must enforce statutes as written and have no license to rewrite them. *See Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1815 (2019) ("courts aren't free to rewrite clear statutes under the banner of our own policy concerns"). "[O]ur constitutional structure" simply "does not permit" it. *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1949 (2016) (citation omitted). Thus, courts may not "engraft on a statute additions which [they] think the legislature logically might or should have made[.]" *Return Mail, Inc. v. United States Postal Serv.*, 139 S. Ct. 1853, 1867 n.11 (2019) (citation omitted) (cleaned up). Nor will "[t]he federal judiciary [] engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145 (1981) (citation omitted).

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[2] This brief also supports the pending rehearing petitions filed in Nos. 19-1633 and 20-1286.

The panel's decision to engraft contract mitigation-of-damage principles onto § 1402 disregards these bedrock principles delimiting the proper role of the judiciary. Most notably, there is no textual warrant for doing so. Section 1402(c)(3)(A) states that where an insurer makes CSRs, "the Secretary shall make periodic and timely payments to the issuer equal to the value of the" CSRs. Section 1402 does not mention offsets or mitigation—explicitly or otherwise—nor does it allude to § 1401 or the premium tax credits available thereunder. Where, as here, the statutory language is unambiguous, the court's "'analysis begins and ends with the text.'" *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2380 (2020) (citation omitted). Given the "clear language" in § 1402, it was "improper to conclude that what Congress omitted from the statute is nevertheless within its scope." *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013) (citations omitted).

Considering § 1401's premium-tax-credit provision further reinforces that the plain meaning of § 1402 precludes the panel's invention of its novel "statutory-mitigation" rule. Section 1401 provides that insurers are entitled to a "[r]efundable [tax] credit for coverage under a qualified health plan." 26 U.S.C. § 36B. It does not reference § 1402 or provide that any credit received under § 1401 might result in an offset or mitigation for insurers owed CSRs under § 1402. Had Congress intended § 1401 tax credits to affect, much less offset, the recovery of § 1402 CSRs, Congress would have said so, but it did not.

Indeed, just as Congress knows how "to link the meaning of a statutory provision to a body of [the Supreme] Court's case law" when it "wants to," *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 714 (2014) (citation omitted), the same is true—*a fortiori*—when Congress wants to link together sections of the same *statute*. It is not as if Congress wasn't aware of the two provisions—as the panel pointed out, ACA § 1412, 42 U.S.C. § 18082, references both the premium tax credits and CSRs (though without tying one to the other in any way). Panel Op. 22.

Yet as noted, the "text of § [1402] fails to provide any cross-reference to § [1401]" or vice versa, and "if Congress had intended to create the scheme [the panel now] envision[s], it would have done so in clearer terms." *Whitfield v. United States*, 543 U.S. 209, 215 (2005) (rejecting purported "link between [] two separate statutes" based on one commonality between the statutes' terms). Given the panel's unprecedented importation of contract mitigation principles, this is particularly true here because courts "expect more than simple statutory silence if, and when, Congress were to intend [such] a major departure" from existing law. *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 984 (2017) (citation omitted).

But this is not the end of the panel's break from proper statutory construction. Longstanding precedent treats statutes structured like § 1402 as providing not money damages, but the remedy of "specific relief" (*infra* at 7-8)—a remedy *not* subject to mitigation under black-letter law. MCHO Pet. at 12-13 (citing cases). Congress is presumed to be "'knowledgeable about existing law pertinent to the legislation it

enacts.'" *Wells Fargo & Co. v. United States*, 827 F.3d 1026, 1038 (Fed. Cir. 2016) (citation omitted). Accordingly, the panel should have "assume[d] that Congress, aware of th[e] precedent" deeming similar "shall pay" statutes to provide for specific relief that is immune to offsets or mitigation, "would have intended the" terms "payments ... equal to the value of [insurers' cost-sharing] reductions" to provide for just that (*Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1072 (2020))—payment by the government of CSR amounts as required under the statute, without any offsets or mitigation. It "is not a function of this Court to presume that 'Congress was unaware of what it accomplished'" when it enacted § 1402 (*Albernaz v. United States*, 450 U.S. 333, 342 (1981) (citation omitted))—a provision cast in the same mold as the specific-relief statutes in *Maine Community Health Options v. United States* (*MCHO*), 140 S. Ct. 1308 (2020) and *Bowen v. Massachusetts*, 487 U.S. 879 (1988). *Infra* at 7-8.

This is all the more true because Congress knows how to impose an offset limitation on a statutory remedy it creates. Indeed, this is evidenced by the Back Pay Act, which, as the panel itself acknowledged (Panel Op. at 16 n.8), explicitly provides for an offset of a back-pay remedy due to a government employee. *See* 5 U.S.C. § 5596(b)(1)(A)(i). Thus, it is clear that, "[h]ad Congress" meant to impose a mitigation or offset limitation on § 1402's remedy, "it knew how to say so." *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 826 (2018) (citation omitted).

Accordingly, a proper contextual reading of § 1402, applying settled principles of statutory construction, should have led the panel to affirm the judgment below and

permit MCHO to recover all of the statutory CSR payments the government has withheld—just as § 1402 provides.

II. THE PANEL'S UNPRECEDENTED ENGRAFTING OF CONTRACT MITIGATION-OF-DAMAGE PRINCIPLES ONTO § 1402 CONFLICTS WITH BINDING SUPREME COURT PRECEDENTS AND MISAPPLIES OTHER PRECEDENTS.

Not only did the panel lack support for its ruling in the statutory text or structure of the ACA, it also failed to cite to any applicable precedent to support its novel importation of mitigation principles to limit a clear statutory remedy. The panel attempts to avoid its statutory-text problem by finding that § 1402 "'contains no express remedies' at all with respect to the government's obligation" to make CSR payments. Panel Op. at 17 (quoting *Barnes v. Gorman*, 536 U.S. 181, 187 (2002)). With that pivotal "no express remedies" conclusion in hand, the panel then claimed the authority to treat § 1402 like a contract and to engraft contract mitigation-of-damage principles onto the statute that its text nowhere mentions. This was clear error at each turn.

First, § 1402 explicitly *does* provide a remedy—CSR "payments … equal to the value of reductions" made. That remedy, as the Supreme Court explained in *Bowen*, is one for "specific relief" in the form of the "payment of money" required by "the statutory mandate itself[.]" 487 U.S. at 900 (describing similar statute imposing "shall pay" obligation). The Supreme Court recently reinforced this conclusion in *MCHO*, where it described the remedy provided in the ACA's risk-corridors provision—which, like § 1402, imposes a "shall pay" obligation—as one for "specific sums,

already calculated, past due, and designed to compensate for completed labors." 140 S. Ct. at 1330-31. The necessary predicate for the panel's novel invocation of *Barnes*' "contract-law analogy" principle—the supposed absence of any "express remedies" in § 1402—thus is simply incorrect.

Rather than acknowledging the squarely applicable holdings in *Bowen* and *MCHO*, however, the panel inexplicably quoted *Bowen*'s observation that "the Court of Claims has no [general] power to grant equitable relief." Panel Op. at 15 n.6. That is true, but irrelevant, because the relief sought here was not equitable relief, but rather the payment of money owed under a statute, which falls comfortably within the jurisdiction of the Court of Federal Claims to award. *See Suburban Mortg. Assocs. v. U.S. Dep't of Hous. & Urban Dev.*, 480 F.3d 1116, 1126 (Fed. Cir. 2007). Indeed, such relief against the government not only *can* be pursued in the Court of Federal Claims—it *must* be. *See*, *e.g.*, *Brazos Elec. Power Coop. v. United States*, 144 F.3d 784, 787 (Fed. Cir. 1998).

Second, the broad authority to effectively rewrite § 1402 that the panel purports to derive from *Barnes* and *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998) has no application to § 1402. For one thing, unlike here, the statutes at issue in those cases "mention[ed] *no remedies*" *at all*. *Barnes*, 536 U.S. at 187 (discussing Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972) (emphasis added); *Sossamon v. Texas.*, 563 U.S. 277, 288 (2011) (pointing out that in *Barnes*, the Court had "no statutory text to interpret") (citation omitted).

In fact, unlike § 1402—which, as the panel correctly noted, creates a money-mandating obligation enforceable through a cause of action authorized under the Tucker Act (Panel Op. at 11)—Title VI and Title IX "fail[ed] to mention even a private right of action" and were found enforceable only through an *implied* right of action not explicitly provided in the statutory text. *See Karasek v. Regents of the Univ. of Cal.*, 956 F.3d 1093, 1107-1108 (9th Cir. 2020) (noting that a "damages remedy for Title IX violations is judicially implied, not statutorily created") (citation omitted). Thus, § 1402 is plainly distinct from those statutes and their implied rights and remedies.

This distinction, moreover, contemplates a very different and more expansive judicial function than the one called for in this case. As the Court noted in *Gebser*, "[b]ecause the private right of action under Title IX is judicially implied, we have a measure of latitude to shape a sensible remedial scheme that best comports with the statute." 524 U.S. at 284 (citations omitted). "That endeavor[,]" the Court reasoned, thus "inherently entails a degree of speculation, since it addresses an issue on which Congress has not specifically spoken." *Id.* (citation omitted).

Even with this broad mandate, however, the Court in *Gebser* was careful to note that "[t]o guide the analysis, we generally examine *the relevant statute* to ensure that we do not fashion the parameters of an implied right in a manner *at odds with the statutory structure and purpose*." *Id.* (citations omitted) (emphasis added). In other words, even in circumstances where a court does have some "measure of latitude to shape a sensible

remedial scheme" in a statute that is silent on the question, it still must hew closely to the statute's text, structure, and purpose. Here, where Congress actually created both a statutory right of action and an accompanying remedy in § 1402, the Court has no such latitude—otherwise it would impermissibly usurp the legislative function. *See Alabama v. North Carolina*, 560 U.S. 330, 352 (2010) ("We do not—we cannot—add provisions to a federal statute ... especially [if] ... separation-of-powers concerns ... would [thereby] arise").

Beyond this, the panel's application of *Barnes*—the first time this Court has cited the 18-year-old case—ignores its limited holding. The Supreme Court there stressed that it had "been careful not to imply that *all* contract-law rules apply to Spending Clause legislation[.]" *Barnes*, 536 U.S. at 186 (citation omitted) (emphasis added). Nor did it imply "that suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to all issues that they raise." *Id.* at 189 n.2; *see also Sossamon*, 563 U.S. at 290 (same) (citing *Barnes*, 536 U.S. at 189 n.2). Yet the panel did not mention any of these crucial admonitions and limitations in *Barnes*, seizing instead on its isolated "contract-law analogy" aspect, which is inapposite when applied to § 1402.

Properly understood, *Barnes* and *Gebser* provide no support for the panel's ruling. Without them and the rules the panel lifted from their limited holdings, the panel's decision here cannot stand.

CONCLUSION

For the foregoing reasons, and those set forth in MCHO's rehearing petition, the Court should grant the petition and affirm in their entirety the judgments of the Court of Federal Claims in MCHO's (and other insurers') favor.

Dated: October 20, 2020

Respectfully submitted,

s/ Lawrence S. Sher

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CERTIFICATE OF COMPLIANCE

On this 20th day of October, 2020, the undersigned certifies that:

1. This corrected brief complies with the type-volume limitation of Federal Circuit Rule 35(g) because this brief contains 2,585 words, as determined by the word-count function of Microsoft Word; and

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because the body of the brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond font.

s/ Lawrence S. Sher
Lawrence S. Sher

CERTIFICATE OF SERVICE

The undersigned certifies that on this 20th day of October, 2020, he caused this Corrected Brief for *Amici Curiae* to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished on this 20th day of October, 2020, by the CM/ECF system via electronic mail.

s/ Lawrence S. Sher
Lawrence S. Sher