No. 2020-1292

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

MICHAEL CONWAY, in his capacity as Liquidator of
Colorado Health Insurance Cooperative, Inc.,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

On Appeal from the United States Court of Federal Claims,
Case No. 1:18-cv-01623 (Judge Richard A. Hertling)

REPLY BRIEF FOR THE UNITED STATES

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INTRODUCTION AND SUMMARY

The risk adjustment and reinsurance programs under the Patient Protection and Affordable Care Act (ACA) were designed to stabilize insurance markets by mandating certain financial transfers among health insurers. The programs were budget neutral, and administering them required the Department of Health and Human Services (HHS) to manage numerous "payments in" from and "payments out" to insurers each year. When, as here, an insurer owed funds under one ACA program and was due funds under another, HHS "netted" (*i.e.*, offset) the two balances pursuant to a duly promulgated ACA regulation. *See* 45 C.F.R. § 156.1215(b) (the Netting Regulation). That regulation enabled HHS to expedite the distribution of payments to the insurers that were entitled to them, thus advancing the ACA's core purposes of stabilizing insurance markets and expanding access to health coverage.

As our opening brief explained, HHS properly applied the Netting Regulation in administering debts owed to and by the Colorado Health Insurance Cooperative for 2015. There is no dispute that Colorado Health owed more under the risk adjustment program than it was due under the reinsurance program. HHS thus collected part of Colorado Health's risk adjustment debt via offset against amounts it was due in reinsurance, and it then used the funds collected to make risk adjustment payments to other Colorado insurers, thereby protecting their financial stability.

Plaintiff's brief provides no plausible basis to uphold the trial court's $24.5 million damages award. Assuming *arguendo* that Colorado law would otherwise

prohibit collecting an insolvent insurer's regulatory debt via offset—an issue this Court need not decide—the state law was preempted. Section 1321 of the ACA preempts any state law that prevents the application of Title I of the ACA, which includes the risk adjustment program. 42 U.S.C. § 18041(d). It is difficult to imagine a greater interference than a state law that bars HHS from collecting the amounts that insurers owe the federal government under the risk adjustment program. Contrary to plaintiff's contention, the ACA neither exempted insolvent insurers from payment obligations nor allowed a State to do so. Such an exemption would undermine the purpose of the (permanent) risk adjustment program by enabling defunct insurers to siphon off funds that are needed to pay insurers still operating, thus jeopardizing the financial stability of the functional insurers. Plaintiff's reliance on the McCarran-Ferguson Act is wholly misplaced because the ACA "specifically relates to the business of insurance," 15 U.S.C. § 1012(b), as plaintiff concedes (Pl. Br. 17).

In any event, the $24.5 million award must also be vacated on independent grounds. The federal statutes that govern the jurisdiction of the Court of Federal Claims mandate that the trial court itself offset a plaintiff's debts to the government. 28 U.S.C. § 2508; *see id.* § 1503. Likewise, the federal statute that authorizes the Secretary of the Treasury to pay a damages award requires the Secretary to withhold the part of the judgment equal to a debt the plaintiff owes the government. 31 U.S.C. § 3728(a). These statutes protect the federal fisc—protections that have taken on even greater importance in light of the Supreme Court's recent ruling that insurers

(including many defunct insurers) are permitted to claim damages under the ACA's risk corridors program. All of those awards must be reduced to the extent of an insurer's debt to the government.

ARGUMENT

I. STATE LAW CANNOT EXTINGUISH OR DELAY AN INSURER'S OBLIGATION TO MAKE PAYMENTS OWED UNDER THE ACA'S RISK ADJUSTMENT PROGRAM

A. Section 1321 Of The ACA Preempts Any State Law That Interferes With The Risk Adjustment Program.

Congress enacted the ACA to expand coverage in the individual health insurance market. *See King v. Burwell*, 135 S. Ct. 2480, 2485 (2015). To that end, the ACA prohibited insurance companies from denying coverage or charging higher premiums based on an individual's health. *Id.* Congress understood that these requirements created uncertainty for insurers that "could have given carriers pause and affected the rates they set." *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1316 (2020). "So the Affordable Care Act created several risk-mitigation programs," including the risk adjustment and reinsurance programs at issue here. *Id.* at 1316 & n.1.[1]

[1] The third risk-mitigation program, risk corridors, was at issue in *Maine Community* but is not at issue here. *See* U.S. Br. 5-6 n.1. As the Supreme Court noted, the risk corridors and reinsurance programs were temporary, but the risk adjustment program is permanent. *See Maine Community*, 140 S. Ct. at 1316 n.1. Plaintiff's risk-corridors claim, asserted in a separate class action, is for $110 million, not accounting for countervailing debts owed to HHS.

As plaintiff recognizes (Pl. Br. 10), the ACA's risk adjustment program is designed to transfer funds from low actuarial risk plans to high actuarial risk plans within the same State. Plaintiff does not dispute that, for benefit year 2015, Colorado Health owed more under the risk adjustment program than it was owed under the reinsurance program. *See* U.S. Br. 7-8. Accordingly, HHS collected certain amounts that Colorado Health owed under the risk adjustment program via offset against amounts that Colorado Health was due under the reinsurance program, and distributed the collected funds to other Colorado insurers that were due payment under the risk adjustment program for 2015. *See id.* at 8; *see also New Mexico Health Connections v. U.S. Dep't of Health & Human Servs.*, 946 F.3d 1138, 1147-50 (10th Cir. 2019) (describing the mechanics of risk adjustment transfers).

The premise of plaintiff's suit is that Colorado law somehow extinguished or delayed Colorado Health's obligation to make the risk adjustment payments that were required by federal law. Even assuming *arguendo* that plaintiff's understanding of Colorado law were correct—an issue of state law that this Court need not decide—the state law would unquestionably be preempted by the ACA.

Section 1321 of the ACA directed HHS to issue regulations establishing requirements for (*inter alia*) the risk adjustment program, 42 U.S.C. § 18041(a); required HHS to administer these requirements in any State that opted not to do so, *see id.* § 18041(c); and directed HHS to take "such actions as are necessary to implement such . . . requirements," *id.* § 18041(c)(1). Section 1321 saved from

preemption only a state law that "does not prevent the application of the provisions of this title," that is, Title I of the ACA. *Id.* § 18041(d). Thus, under the terms of Section 1321, federal law preempts any state law that interferes with HHS's administration of the risk adjustment program (which is part of Title I).[2]

It is difficult to imagine a greater interference with the ACA's risk adjustment program than a state law that (according to plaintiff's theory) bars HHS from accounting for or collecting the amounts owed by insolvent insurers under the risk adjustment program. As plaintiff concedes (Pl. Br. 38), because the risk adjustment program is "budget neutral, if CMS does not receive a risk adjustment payment from a particular insurer because it is insolvent—an always present risk—that limits what is paid out." Thus, under plaintiff's legal theory, an insurer's insolvency would have an immediate destabilizing impact on all other insurers in the State that still remain in business, by redirecting funds from solvent insurers to augment the failed insurer's liquidation estate. Plaintiff's interpretation thus would undermine the central purpose of the risk adjustment program, which is to stabilize the insurance markets in each State. Nothing in the ACA suggests that this Court should "interpret [the] statute[] to negate [its] own stated purposes." *King*, 135 S. Ct. at 2493 (quotation marks omitted);

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[2] *Cf. St. Louis Effort for AIDS v. Huff*, 782 F.3d 1016, 1024-27 (8th Cir. 2015) (concluding that the ACA preempted a state law that interfered with the federal duties of Exchange "navigators"); *Coons v. Lew*, 762 F.3d 891, 902 (9th Cir. 2014) (concluding that the ACA preempted a state law that purported to supersede the ACA's "individual mandate").

see id. (rejecting an interpretation of the ACA that "would destabilize the individual insurance market in any State with a Federal Exchange").

Plaintiff's assertion that HHS's Netting Regulation is simply a matter of "payment convenience," Pl. Br. 2, is manifestly incorrect. As our opening brief explained—and plaintiff does not dispute—this regulation enables HHS to make timely payments to insurers of amounts owed under the ACA's risk adjustment program and other ACA programs. Quite sensibly, neither the ACA nor the Netting Regulation exempts insolvent insurers. Had federal law done so, the consequence would be to allow *defunct* insurers to siphon off funds that Congress directed HHS to distribute to protect the financial stability of *operating* insurers—thus undermining the very purpose of the ACA's premium-stabilization programs.

B. The McCarran-Ferguson Act Is Inapplicable To Federal Laws That Regulate Insurance, Such As The ACA.

Plaintiff's reliance on the McCarran-Ferguson Act is wholly misplaced. The McCarran-Ferguson Act provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . *unless such Act specifically relates to the business of insurance*." 15 U.S.C. § 1012(b) (emphasis added).

By its plain terms, the McCarran-Ferguson Act has no application to a federal regime like the ACA, which "specifically relates to the business of insurance." *Id.* As the Supreme Court has emphasized, the McCarran-Ferguson Act "does not seek

to insulate state insurance regulation from the reach of all federal law" but only "to protect state regulation primarily against *inadvertent* federal intrusion," such as through "a federal statute that describes an affected activity in broad, general terms, of which the insurance business happens to constitute one part." *Barnett Bank of Marion Cty. v. Nelson*, 517 U.S. 25, 39 (1996).

Plaintiff concedes that "the ACA is assuredly a statute relating to insurance." Pl. Br. 17. Under the express language of the McCarran-Ferguson Act, that is the end of the matter. It is irrelevant that the ACA does not specifically address an insurer's "liquidation," Pl. Br. 22, because the sole inquiry under the McCarran-Ferguson Act is whether the ACA "specifically relates to the business of insurance." 15 U.S.C. § 1012(b). The Supreme Court has squarely "reject[ed] any suggestion that Congress intended to cede the field of insurance regulation to the States, saving only instances in which Congress expressly orders otherwise." *Humana Inc. v. Forsyth*, 525 U.S. 299, 308 (1999). Rather, so long as the federal law "relates to the business of insurance," 15 U.S.C. § 1012(b), federal law controls regardless of the specificity with which it addresses insolvency or other insurance subtopics. *See, e.g.*, *United States v. Rhode Island Insurers' Insolvency Fund*, 80 F.3d 616, 619-23 (1st Cir. 1996) (holding that federal Medicare secondary payer statute, rather than state law, governed the United States' rights in insurance insolvency); *Geston v. Anderson*, 729 F.3d 1077, 1079 (8th Cir. 2013) (holding that federal Medicaid Act preempted state insurance law regarding treatment of annuity payments).

The case on which plaintiff principally relies, *U.S. Department of Treasury v. Fabe*, 508 U.S. 491 (1993), is inapposite because the federal law there at issue did not specifically relate to insurance. Instead, *Fabe* concerned a conflict between a federal law of general applicability (the federal priority statute, 31 U.S.C. § 3713) and a state insurance liquidation priority scheme. The only question before the Supreme Court was whether the state statute was "enacted . . . for the purpose of regulating the business of insurance," 15 U.S.C. § 1012(b). *See, e.g.*, *Greene v. United States*, 440 F.3d 1304, 1311-12 (Fed. Cir. 2006) (explaining that the McCarran-Ferguson Act "is triggered only by a clear conflict between state insurance law and a *federal statute of general applicability*") (emphasis added). Contrary to plaintiff's contention (Pl. Br. 21), *Fabe* did not establish a "clear statement" rule for deciding whether a federal law that relates to insurance preempts state insurance law. The Supreme Court in *Barnett* expressly rejected the contention "that *Fabe* imposes any such requirement," given that *Fabe* "did not purport authoritatively to interpret the 'specifically relates' clause," which was "not at issue" in that case. *Barnett*, 517 U.S. at 43.[3]

Plaintiff asserts that "the Netting Regulation is not a provision of the ACA" and argues that, "[t]o be faithful to the text of McCarran-Ferguson," the grant of authority to take offsets "must be found in an 'Act of Congress.'" Pl. Br. 31.

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[3] Moreover, *Fabe* involved a dispute about the priority rules for distributing the assets of an insurer's estate once those assets have been assembled, not (as here) a dispute about whether an alleged debt remains owed to the estate in the first place.

Plaintiff cannot seriously mean to make this argument, which would be self-defeating from plaintiff's own perspective. The McCarran-Ferguson Act provides that "[n]o *Act of Congress* shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b) (emphasis added). By plaintiff's logic, the McCarran-Ferguson Act would be irrelevant in its entirety, because the Netting Regulation itself is not an "Act of Congress."[4]

In sum, the Netting Regulation was duly promulgated under 42 U.S.C. § 18041, the statute that empowers and directs HHS to issue regulations and take other necessary actions to administer the reinsurance and risk adjustment programs. Because that federal statute and its implementing regulations specifically relate to the business of insurance, the McCarran-Ferguson Act by its terms is inapplicable. *Cf. Hanover Ins. Co. v. Commissioner*, 598 F.2d 1211, 1218 (1st Cir. 1979) (McCarran-Ferguson Act did not bar application of a federal regulation because the federal regulation "specifically relate[d] to the business of insurance").[5]

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[4] Although unnecessary for this Court to decide whether federal common law preempts state law, plaintiff's contention that the McCarran-Ferguson Act is not implicated unless an "Act of Congress" is at issue, Pl. Br. 31, would foreclose any argument that the McCarran-Ferguson Act displaces federal common law. *Cf.* U.S. Br. 24-27 (explaining that HHS's offsets were authorized by federal common law).

[5] Plaintiff's brief reflects a preoccupation with federal bankruptcy practice (*e.g.*, Pl. Br. 2, 14, 29-31, 35) that is difficult to understand. The dispositive issue here is whether federal law (rather than state law) controls the administration of federal insurance programs under the ACA, not whether there are differences within federal

II. THE $24.5 MILLION JUDGMENT ALSO SHOULD BE VACATED OR REVERSED ON INDEPENDENT GROUNDS

As our opening brief explained, the trial court's $24.5 million damages award also must be vacated for independent reasons, because federal law requires the trial court itself to offset Colorado Health's risk adjustment debt against the (smaller) amount it claimed under the reinsurance program. *See* 28 U.S.C. § 2508; *see also id.* § 1503. Moreover, even if that judgment were not vacated, federal law will require the Secretary of the Treasury to "withhold paying that part of the judgment" equal to Colorado Health's debt, thus reducing any payment for this case to zero. 31 U.S.C. § 3728; *see also id.* § 3716(c). These statutory protections for the federal fisc are always critical, and they have taken on particular importance in light of the Supreme Court's ruling in *Maine Community* that insurers (including many defunct insurers) are entitled to claim billions of dollars under the ACA's risk corridors program. All such damages awards must be reduced to the extent of an insurer's debt to the government, regardless of the source of that debt and regardless of whether the insurer happens to be insolvent.

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law between bankruptcy and non-bankruptcy practice. The fact that domestic insurance insolvencies are statutorily "exempt[ed] . . . from federal bankruptcy law," Pl. Br. 21, is likewise without significance. The question here is whether the United States owes plaintiff any debt under the ACA, not what rules apply in distributing Colorado Health's assets among its creditors once assembled.

A. The Tucker Act Requires The Trial Court Itself To Offset Plaintiff's Debt, Reducing Its Damages To Zero.

The Tucker Act's waiver of sovereign immunity allows the Court of Federal Claims to enter monetary relief against the United States only to the extent that a plaintiff proves "actual, presently due money damages" and complies with other statutory conditions upon the court's jurisdiction. *Lummi Tribe of the Lummi Reservation v. United States*, 870 F.3d 1313, 1319 (Fed. Cir. 2017). As our opening brief explained, any order unwinding HHS's prior offsets would simply resuscitate the parties' countervailing debts, and applicable jurisdictional statutes then would require the Court of Federal Claims to account for the federal government's offsetting claim. Congress specifically mandated that "[u]pon the trial of any suit in the United States Court of Federal Claims in which any setoff, counterclaim, claim for damages, or other demand is set up on the part of the United States against any plaintiff making claim against the United States in said court, the court shall hear and determine such claim or demand both for and against the United States and plaintiff." 28 U.S.C. § 2508; *see also id.* § 1503 ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any set-off or demand by the United States against any plaintiff in such court.").

The Supreme Court and this Court's predecessor have recognized that these federal statutes impose a mandatory duty to give effect to the government's offsets. *See, e.g.*, *United States v. Munsey Tr. Co.*, 332 U.S. 234, 239-40 (1947) (concluding that the

Court of Claims was "under statutory duty to recognize the undisputed claim for damages of the United States" when adjudicating a claim against the government); *Blake Constr. Co. v. United States*, 585 F.2d 998, 1005 (Ct. Cl. 1978) ("By special statute, set-off is allowed in this court where the Government is always the defendant."); *Atlantic Contracting Co. v. United States*, 35 Ct. Cl. 30, 33-34 (1899) (recognizing that when a claimant "seeks the jurisdiction" of the Claims Court, "he is subjected to . . . determination of whatever claims the United States may have against him which can be properly pleaded by way of set-off"). That duty follows from the fundamental principle of sovereign immunity that a court may award monetary relief against the government only on the terms and conditions allowed by Congress. *United States v. Testan*, 424 U.S. 392, 399 (1976); *see Kaufman v. United States*, 118 Ct. Cl. 91, 105 (1950) (government's right of setoff under sections 1503 and 2508 is "one of the conditions" on its "consent to be sued," "as plain as the English language can make it").

The trial court's statutory obligation to recognize the government's offsets under 28 U.S.C. §§ 1503 and 2508 is unaffected by a claimant's insolvency. In *Preuss v. United States*, 412 F.2d 1293 (Ct. Cl. 1969), this Court's predecessor considered an insolvent party's claim that the government should not be permitted to effectuate its offset in the same litigation but instead should be forced to pursue its claim in bankruptcy court. The Court disagreed and sustained the government's claim for a "one hundred percent" offset, even though the value of the government's claim in bankruptcy court "would in all probability be worth only a few cents on the dollar."

Id. at 1304. The Court explained that the government's right of offset was "encompassed within the jurisdiction conferred on this [C]ourt by Congress" and that the Court was "'not at liberty'" to "'limit or restrict'" it. *Id.* (quoting *Frantz Equip. Co. v. United States*, 122 Ct. Cl. 622, 630 (1952)); *see Frantz*, 122 Ct. Cl. at 629-30 (explaining that a plaintiff, by filing suit in the Court of Claims, "undeniably subject[s] itself" to the government's "right to assert counterclaims and claims for offsets" in the same suit, even if the government's claims otherwise must be brought elsewhere).

Plaintiff does not dispute the foregoing principles. Indeed, aside from briefly acknowledging that the Court of Federal Claims has jurisdiction to entertain "offset claim[s]," Pl. Br. 5, plaintiff nowhere cites or discusses 28 U.S.C. §§ 1503 and 2508 or the precedential opinions applying those statutes. Nor does plaintiff dispute that even if the trial court were to declare that HHS's offsets had been unauthorized at the time they were taken, that would simply unwind both sides of the transaction, and both sides then must be considered in determining the amount of any Tucker Act judgment—in this case, zero. *See, e.g.*, *Benjamin v. United States*, 172 Ct. Cl. 118, 148 (1965) (exercising Tucker Act jurisdiction but ultimately concluding that plaintiff was "entitled to no affirmative monetary recovery" because of government's setoff claim); *Western Cas. & Sur. Co. v. United States*, 124 Ct. Cl. 156, 164 (1953) ("Since [contractor] owes the Government for unpaid taxes more than the Government owes [contractor] for the materials purchased, the set-off exhausts the funds, and the plaintiff is not entitled to recover").

B. The Federal Statute Authorizing The Secretary Of The Treasury To Pay Judgments Against The United States Requires Offset.

Furthermore, as our opening brief explained, the federal statute that authorizes the Secretary of the Treasury to pay judgments against the United States requires the Secretary to offset a claimant's debts to the government. That statute provides that "[t]he Secretary of the Treasury shall withhold paying that part of a judgment against the United States Government presented to the Secretary that is equal to a debt the plaintiff owes the Government." 31 U.S.C. § 3728(a); s*ee also id.* § 3716(c)(1)(A) (directing disbursing officials at Treasury, HHS, and other agencies to "offset at least annually the amount of a payment which a payment certifying agency has certified to the disbursing official for disbursement, by an amount equal to the amount of a claim which a creditor agency has certified").

In light of those statutes, even "if the court were to determine that plaintiff was entitled to a return of the offset funds and entered a monetary judgment against defendant, the government would then be required to apply that judgment toward" plaintiff's outstanding debt. *Greene v. United States*, 124 Fed. Cl. 636, 645 (2015); *see generally Parsons v. United States*, 35 Ct. Cl. 393, 394-95 (1900) (emphasizing Treasury's "power to guard the United States against the payment of judgments or claims when there exists in the Department a demand against the claimant which is a proper subject of set-off"). A court should not impose a judgment that would be "futile" for plaintiff to collect. *Greene*, 124 Fed. Cl. at 645.

Plaintiff's principal response is to declare that the government did not call the trial court's attention to 31 U.S.C. § 3728. *See* Pl. Br. 39 (arguing that the government "forfeit[ed]" this point). The briefing below addressed whether HHS's offset was permissible at the time it was made, however, not the question of remedy. The trial court preempted the consideration of that remedial issue by directing the entry of a money judgment in the amount of the challenged offsets, Appx16, an amount to which the parties then stipulated. In any event, the Secretary of the Treasury has not yet been called upon to pay the judgment in this case. Assuming *arguendo* that the judgment were not vacated, the Secretary will be obligated to comply with the mandate in 31 U.S.C. § 3728 to withhold payment of amounts equal to plaintiff's debt(s) to the government.

Plaintiff argues that 31 U.S.C. § 3728 is "not specifically addressed to insurance and, therefore, under McCarran-Ferguson, it cannot supersede state laws governing the business of insurance." Pl. Br. 39. That argument reflects a basic misunderstanding of the McCarran-Ferguson Act, which has effect only where there is a conflict with a valid state law regulating the business of insurance. Although States have authority to regulate insurance, no State has authority to dictate the scope of a damages award payable under the Tucker Act or the terms on which the Secretary of the Treasury may make payments from the Judgment Fund. Unsurprisingly, Colorado law does not purport to address such matters, which are exclusively the province of Congress. The McCarran-Ferguson Act neither grants States the license

to override Congress's instructions to the Secretary of the Treasury on whether and how to make disbursements from the public fisc, nor does it allow a State to override Congress's mandate that the Court of Federal Claims itself recognize and give effect to the government's countervailing claims for payment.

III. In Any Event, Colorado Law Does Not Conflict With Federal Law.

This Court can, and should, vacate the damages award on the federal-law grounds just identified. But if the Court concludes that it is necessary to examine the content of state law, it should hold that Colorado law did not prohibit HHS's offsets.

As our opening brief explained, at common law, it is "only the balance, if any, after the set-off is deducted, which can justly be held to form part of the assets of the insolvent," and thus available for distribution in accordance with relevant priority rules. *Scott v. Armstrong*, 146 U.S. 499, 510 (1892).[6] The Colorado legislature codified that principle in the context of insurance liquidations, consistent with the prevailing nationwide practice. Colo. Rev. Stat. § 10-3-529(1); *see, e.g.*, *Commissioner of Ins. v. Munich Am. Reins. Co.*, 706 N.E.2d 694, 696-97 (Mass. 1999) (affirming the "general principle" that "setoff is appropriate between mutual debtor-creditors, even if one of

[6] The Colorado Supreme Court's decision in in *Bluewater Ins. Ltd. v. Balzano*, 823 P.2d 1365 (Colo. 1992), did not hold otherwise. As we explained (U.S. Br. 28-29), and as plaintiff does not dispute, the Court expressly assumed an equitable right of offset, but held that the reinsurers had waived that right by contract. *See id.* at 1369. The Court's later policy observations were acknowledged to be dicta. *Id.* at 1374.

them is insolvent," and citing the Colorado statute as support in the context of "insolvent insurers").

Plaintiff's brief does not demonstrate otherwise. Plaintiff again asserts a theory that the Colorado statute only allows offsets of contractually based debts. But the statute expressly authorizes offset "whether" the debts arise under one or more contracts, Colo. Rev. Stat. § 10-3-529(1), and it nowhere makes an exception for debts owed to state or federal governments. Indeed, plaintiff offers no reason why the legislature would have intended to permit offsets only for contractual debts.

Plaintiff similarly misses the mark in asserting that the relevant debts were not mutual. Mutuality does not require debts to arise under the same government program or be of the same "character"; rather, a debt is mutual so long as it is "owed in the same right and between the same parties standing in the same capacity." *Meyer Med. Physicians Grp., Ltd. v. Health Care Serv. Corp.*, 385 F.3d 1039, 1041 (7th Cir. 2004). For both the reinsurance and risk-adjustment programs, HHS acted in the same right and same capacity: as a regulator and administrator with responsibility for receiving payments from, and making payments to, insurers.[7]

[7] Indeed, though both debts here arise under ACA risk-mitigation programs and the same agency (HHS) is involved in both, neither is a requirement for mutuality. Because it is a unitary creditor, the United States may offset debts even across different federal agencies and federal programs. *See, e.g.*, *Cherry Cotton Mills v. United States*, 327 U.S. 536, 539 (1946) (recognizing right to effect interagency setoffs in the Court of Claims); *In re Myers*, 362 F.3d 667, 671 n.2, 674 (10th Cir. 2004) (explaining that "[f]or purposes of setoff, the government is considered a 'unitary creditor,'" and

Indeed, the fact that plaintiff has brought a Tucker Act suit for damages, rather than an APA suit seeking reallocation of program funds among insurers, confirms the mutuality of the debts at issue. Plaintiff's suit is proper in the Court of Federal Claims only to the extent that it is the government that owes the debt.[8] Plaintiff cannot have it both ways: either the United States is the party financially responsible for receiving and making payments to insurers, in which case the debts are mutual, or the United States is a mere "conduit" (*cf.* Pl. Br. 38, 49) with no financial liability, in which case plaintiff has no right to seek damages from the government.

upholding agency's right to use setoff "to collect debts owed to other agencies"); *United States v. Maxwell*, 157 F.3d 1099, 1102 (7th Cir. 1998) ("[T]he federal government is considered to be a single-entity that is entitled to set off one agency's debt to a party against that party's debt to another agency.").

[8] As plaintiff does not dispute, the funds that HHS collected via offset have already been distributed to the other Colorado insurers who were entitled to them.

CONCLUSION

For the foregoing reasons, and those set forth in our opening brief, the judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2020, I electronically filed the foregoing reply brief with the Clerk of Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Circuit Rule 32(b)(1) because it contains 4,793 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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