No. 20-1432

In the Supreme Court of the United States

UNITED STATES OF AMERICA, CROSS-PETITIONER

v.

MAINE COMMUNITY HEALTH OPTIONS, ET AL.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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As our brief in opposition in No. 20-1162 explains, the Court should deny the petition in that case. 20-1162 Br. in Opp. at 15-29. That petition seeks review of the court of appeals' determination that the damages of the plaintiffs (petitioners there, cross-respondents here) must be offset by the amount of increased premium tax credits they received "as a direct result of the government's nonpayment of cost-sharing reduction [(CSR)] reimbursements." Pet. App. 23.[1] In so ruling, the court correctly applied this Court's precedent and well-settled contract-law principles in determining that those amounts must be deducted from cross-respondents' damages because they reflect the "benefit that resulted from the mitigation efforts that [cross-respondents] in fact undertook." Pet. App. 21.

[1] Unless otherwise indicated, the term "Pet. App." in this brief refers to the appendix to the petition for a writ of certiorari in No. 20-1162.

As our conditional cross-petition in this case further explains, however, if the Court grants review in No. 20-1162 of the Federal Circuit's damages-mitigation determination, then review of the court's antecedent liability ruling—which it adopted in *Sanford Health Plan* v. *United States*, 969 F.3d 1370 (Fed. Cir. 2020), and applied in this case, Pet. App. 2, 12—would also be warranted. 20-1432 Pet. (Cross-Pet.) 13-21. The court of appeals' liability ruling in *Sanford* was expressly premised in part on the court's damages determination in this case. 969 F.3d at 1383. And the practical consequences of the court of appeals' liability ruling—which its damages-mitigation holding in this case largely ameliorates—would be greatly magnified if that damages holding were set aside. Cross-Pet. 20-21.

Cross-respondents identify no sound reason why, if the Court grants review of their petition (No. 20-1162) addressing the damages determination, it should not also grant, or at a minimum hold, the conditional cross-petition presenting the antecedent liability issue. They acknowledge (but seek to downplay the fact) that, in addressing liability in *Sanford*, the court of appeals expressly relied in part on the court's approach to damages in this case. Br. in Opp. 29. And cross-respondents do not dispute, but instead underscore (*id.* at 31), the magnitude of the sums the government would be required to pay if the liability ruling stands but the damages ruling is set aside—asserting (*id.* at 30) only that, on cross-respondents' own theory of damages (which the court of appeals rejected), those redundant recoveries should not be viewed as duplicative. None of those contentions provides a valid basis for the Court, if it grants review on damages, to leave the court of appeals' liability ruling in place without further review.

Cross-respondents devote most of their submission to contending (Br. in Opp. 1-3, 15-28) that the court of appeals' liability ruling was compelled by this Court's decision in *Maine Community Health Options* v. *United States*, 140 S. Ct. 1308 (2020), addressing a markedly different program under the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119. Like the court of appeals, however, cross-respondents overstate that decision's import here and disregard important differences between the time-limited risk-corridors program at issue in *Maine Community* and the CSR payments at issue in this case. See Cross-Pet. 17-20. In any event, if this Court concludes that the damages issue presented in No. 20-1162 warrants review, then this Court should determine for itself whether its decision in *Maine Community* extends to these quite different circumstances. If the petition in No. 20-1162 is granted, the conditional cross-petition should be granted as well, or at a minimum held pending the Court's decision on the merits.

1. Cross-respondents acknowledge (Br. in Opp. 29) that the Federal Circuit in *Sanford* expressly relied in part on its damages determination in this case in concluding that the government may be liable in a suit for money damages under the Tucker Act, 28 U.S.C. 1491, for unpaid CSR payments. See *Sanford*, 969 F.3d at 1383; Cross-Pet. 15-16. Cross-respondents seek to minimize that aspect of the court's *Sanford* decision by portraying it (Br. in Opp. 29) as confined to "one sentence" of the panel's opinion, and they invite this Court to disregard that express component of *Sanford*'s reasoning as somehow irrelevant or unimportant to its liability conclusion. That characterization is inaccurate.

The court of appeals in *Sanford*, which was decided on the same day by the same panel as the decision below, stated that, in its view, precluding Tucker Act liability in these circumstances

> is especially unwarranted because there is a separate body of law that more precisely addresses the problem the government identifies. The premise of the government's argument is that the premium tax credit provision can indeed lead to partial or complete offsetting of losses from non-reimbursement of cost-sharing reductions and that the government should not in effect be charged twice for a section 18071(c)(3) violation, once through raised premium tax credits and again through a damages award under the Tucker Act. But a categorical displacement of the availability of Tucker Act damages actions is not necessary to avoid such overpayment. Damages law deals in a more targeted way with matters such as appropriate accounting for offsets and avoidance of double recoveries, as we conclude today in *Community Health Choice, Inc. v. United States*, No. 2019-1633, and *Maine Community Health Options v. United States*, No. 2019-2102 [*i.e.*, the decision below]. That body of law accommodates the practical interaction of the two subsidy mechanisms without departing from the established principles governing Tucker Act coverage of payment-mandating provisions as most recently set forth in *Maine Community*.

Sanford, 969 F.3d at 1383. Contrary to cross-respondents' suggestion (Br. in Opp. 29), that extended discussion cannot fairly be dismissed as insignificant to the court of appeals' analysis.

Cross-respondents' contention (Br. in Opp. 29) that the Court should disregard or discount that portion of the *Sanford* court's reasoning because its preceding analysis of other points spanned more pages, see *Sanford*, 969 F.3d at 1378-1383, is unsound. The court in *Sanford* had no need to expound further on its analysis of damages precisely because the same panel's simultaneous decision in this case, which the *Sanford* decision cross-referenced, discussed that damages question at length. See Pet. App. 12-33. Just as the decision below relied without elaboration on *Sanford*'s analysis of liability, see *id.* at 2, 12, the decision in *Sanford* effectively incorporated by reference the panel's damages reasoning in this case, see 969 F.3d at 1383.

Cross-respondents' only remaining reason (Br. in Opp. 29) for writing off *Sanford*'s reliance on the court of appeals' damages determination in addressing liability is their speculation—based on their own view of the merits of the liability issue—that the court of appeals would have reached the same conclusion even without regard to its damages analysis in this case. But that point should not be left to conjecture. If this Court elects to review the damages question in No. 20-1162, the Court itself may determine that the damages and liability issues are interdependent, and in addressing the damages issue the Court should not be artificially constrained to accept the Federal Circuit's liability analysis as a given.

2. Cross-respondents also do not meaningfully dispute that, if the court of appeals' damages-mitigation determination in this case were set aside, then its liability ruling would have substantial prospective practical significance. See Cross-Pet. 20-21. As our conditional cross-petition explains, without the court's ruling that

insurers' damages must be offset to reflect the increased premium tax credits they obtained from the government, the government would confront massive potential liability now and into the future. Cross-Pet. 20. The public fisc would face billions of dollars per year in potential liability, even though most insurers have already benefitted from those increased tax credits, and even though the government is projected to spend many billions of dollars more subsidizing health insurance through those tax credits than through CSR payments. Cross-Pet. 20-21.

These sums implicated by the Federal Circuit's liability ruling would warrant review of that ruling if its effects were not ameliorated by the court's damages-mitigation decision. Cross-respondents' only rejoinder (Br. in Opp. 30-31) is their assertion that the recoveries they and other insurers would obtain if the court of appeals' damages decision is set aside but its liability ruling is left unexamined would not amount to inappropriate "double recoveries." *Id.* at 30 (citation omitted). That assertion goes not to the practical importance of the question presented in the conditional cross-petition, but to the merits of the damages question raised in cross-respondents' own petition.

Moreover, although the basis of cross-respondents' contention (Br. in Opp. 30) that money damages would not be duplicative of increased premium tax credits is somewhat unclear, it lacks merit however it is interpreted. To the extent the argument is a variation on cross-respondents' arguments below that increased premium tax credits were not the direct result of their own mitigation efforts or constitute a collateral source of recovery to which mitigation principles should not apply, the court correctly rejected those arguments, see

Pet. App. 27-29, and cross-respondents have not sought review in their petition of that aspect of its decision, see 20-1162 Br. in Opp. at 21, 24-25. To the extent the claim is instead a reformulation of the principal argument in the petition that, in light of *Maine Community*, *supra*, Section 1402 of the ACA, 42 U.S.C. 18071, should be interpreted to foreclose offsets altogether, that contention lacks merit for the reasons set forth in our brief in opposition to their petition. 20-1162 Br. in Opp. at 21-24; see Pet. App. 12 (recognizing that *Maine Community* did not resolve the damages-mitigation issue); see also *id.* at 23-26 (noting that cross-respondents "appear[ed] not to dispute that if the elimination of [CSR] payments directly triggered increased premium tax credits, an offset would be appropriate under a contract theory," and rejecting their argument that premium tax credits were not a direct result of their mitigation efforts in response to the cessation of CSR payments). Cross-respondents' effort to minimize the importance of the question presented in the conditional cross-petition based on merits arguments the court of appeals properly rejected thus is unpersuasive on its own terms.

3. Cross-respondents principally contend (Br. in Opp. 1-3, 15-28) that the conditional cross-petition should be denied based on their view that this Court's decision in *Maine Community*, *supra*, compelled the court of appeals' liability conclusion. The government's conditional cross-petition explains in detail why that view is unsound. Cross-Pet. 17-20. To be sure, the government has acknowledged that *Maine Community* forecloses certain arguments that the government advanced in the litigation below—which the government withdrew below and has not advanced in this Court. Cross-Pet. 17. But cross-respondents, like the court of appeals, overstate

Maine Community's scope by erroneously discounting significant differences between the temporary risk-corridors program at issue in that case and the CSR payments program here. Cross-Pet. 17-20.

In particular, cross-respondents err in contending (Br. in Opp. 18-28) that *Maine Community*'s holding extends to this context where the ACA's structure itself already provides insurers a built-in mechanism to recover their costs of reducing their cost-sharing in the event the government did not make CSR payments. Cross-Pet. 19-20. The predictable and predicted effect of the loss of CSR payments was the very increase in premiums that occurred, which by operation of the ACA's interlocking provisions yielded a massive increase in premium tax credits paid directly to insurers, including increased credits for non-silver-plan enrollees. *Ibid.* And although cross-respondents assert (*e.g.*, Br. in Opp. 27 n.2) that insurers set annual premiums "before Congress decided whether to appropriate funds to" make CSR payments, insurers (including cross-respondents) set their premiums for 2018 on the express assumption that direct CSR payments would cease. See 20-1162 Br. in Opp. at 7-8 & n.2, 26-27.

Maine Community does not lead to the conclusion that Congress intended an unstated money-damages remedy in this context. And if the only options available to Congress had been (A) to allow the ACA's structure to operate by making insurers whole (and more) through increased premium tax credits, or (B) to provide an unstated money-damages remedy *without* any offset for insurers' own successful mitigation efforts, it is especially unlikely that Congress would have elected the latter approach. That result is even less likely in light of this Court's and the court of appeals' precedent

recognizing that, where a statute such as the CSR provision imposes an obligation but provides no remedial framework, courts *should* look to background principles of contract-law remedies, including mitigation of damages, in ascertaining the contours of any implied remedy. See Pet. App. 14-15 (discussing, *inter alia*, *Barnes* v. *Gorman*, 536 U.S. 181, 186-189 (2002)).

Cross-respondents express surprise (Br. in Opp. 21-23) that the applicability of damages-mitigation principles might bear on the liability analysis. But the court of appeals recognized that those analyses are connected. See *Sanford*, 969 F.3d at 1383. Interpreting a statute to provide insurers who do not receive contemplated subsidies both a statutory mechanism to recover the value of those subsidies and a separate, implied money-damages remedy to recover the same amounts would create a considerable incongruity. That incongruity is much less stark, however, if those alternative paths operate in a complementary rather than duplicative manner, such that an insurer cannot recover as damages sums that it has already recovered from the government through the statutory avenue—here, by obtaining increased premium tax credits. The court of appeals did not view those parallel avenues to be problematic because it viewed the implied damages remedy and premium tax credits as providing "alternative way[s] for an insurer to try to obtain money (from the federal government) to offset the loss caused by" the failure to make CSR payments. *Ibid.* Those avenues would not be "alternative[s]," *ibid.*, but duplicative, if the damages remedy were not subject to offset for prior recoveries.

The Court in *Maine Community* did not confront a statutory scheme that not only enabled, but in its design contemplated, that insurers who did not receive expected

subsidies could obtain those same amounts (and more) through a mechanism built in to the ACA's structure. To the contrary, the insurer-plaintiffs there (including cross-respondent Maine Community Health Options here) were at pains to emphasize that, at the time Congress eliminated the only available funding source to make retroactive risk-corridors payments, insurers could not recoup unpaid risk-corridor payments by raising premiums because those premiums had already been set and the policies sold. Cross-Pet. 18 (citing briefing).

Cross-respondents now assert (Br. in Opp. 26) that insurers did subsequently raise their premiums.[2] To whatever extent premium increases occurred, however, they bear little resemblance to the premium increases at issue here, which enabled insurers to take advantage of built-in features of the ACA's structure to obtain more-than-offsetting increases in tax credits in real time, and which the Department of Health and Human Services had anticipated years earlier would occur. 20-1162 Br. in Opp. at 4. Cross-respondents' assertion that these cases are on all fours with *Maine Community* does not withstand scrutiny.

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[2] Contrary to cross-respondents' characterization, the government's brief in *Maine Community* did not represent that the cessation of risk-corridors payments "did 'cause[] premiums to increase.'" Br. in Opp. 26 (quoting Gov't Br. at 49, *Maine Cmty.*, *supra* (No. 18-1023 et al.)) (emphasis omitted; brackets in original); cf. Gov't Br. at 49, *Maine Community*, *supra* (No. 18-1023 et al.) (stating that, "[i]f, as petitioners posit, those congressional funding decisions caused start-up insurers to fail and caused premiums to increase, see Moda Br. 59-60, then Congress was fully accountable").

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For the foregoing reasons and those stated in the conditional cross-petition for a writ of certiorari, if the petition in No. 20-1162 is granted, the conditional cross-petition for a writ of certiorari should be granted or be held pending the Court's decision on the merits in No. 20-1162.

Respectfully submitted.

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JUNE 2021