2017-1224

In The

United States Court of Appeals

For The Federal Circuit

LAND OF LINCOLN MUTUAL HEALTH INSURANCE COMPANY, an Illinois Non-Profit Mutual Insurance Corporation

Plaintiff − Appellant,

v.

UNITED STATES,

Defendant − Appellee.

Appeal from the United States Court of Federal Claims in Case No. 16-cv-00744, Judge Charles F. Lettow

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CORRECTED BRIEF OF AMICI CURIAE AVERA HEALTH PLANS, INC., DAKOTACARE, AND MODA HEALTH PLAN, INC. IN SUPPORT OF APPELLANT

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February 7, 2017

STATEMENT AND CERTIFICATE OF INTEREST

Amici curiae are Moda Health Plan, Inc., Avera Health Plans, Inc., and DAKOTACARE, health insurance issuers that provided Qualified Health Plans through the Affordable Care Act's ("ACA") Health Benefit Exchanges. Having received consent from all the parties in accord with Federal Rule of Appellate Procedure 29(a), *amici curiae* respectfully submit this brief in support of Appellant Land of Lincoln Mutual Health Insurance Co. ("Land of Lincoln").

None of the lawyers representing the parties in this case authored this brief, in whole or in part. None of the parties or their counsel contributed money intended to fund the preparation or submission of this brief, and no person other than the *amici* or their counsel contributed money that was intended to fund the preparation or submission of this brief.

All of the *amici curiae* are owed Risk Corridors payments for 2014 and 2015, and thus have a strong interest in the Federal Circuit enforcing the right of Qualified Health Plans to recover the Risk Corridors payments which they are owed.

Counsel certifies that the full name of amicus Moda Health Plan, Inc. is Moda Health Plan, Incorporated, which is the real party in interest. There is only one parent company that owns its stock: Moda Inc. No other company that owns 10 percent or more of Moda Health Plan, Inc.'s stock. The following attorneys, at

Covington & Burling LLP, will appear for Moda Health Plan, Inc. in this case or have appeared for Moda Health Plan, Inc. in its lawsuit pending before the Court of Federal Claims: Steven J. Rosenbaum; Caroline M. Brown; Philip J. Peisch.

Counsel certifies that the full name of amicus Avera Health Plans, Inc., is Avera Health Plans, Incorporated, which is the real party in interest. Avera Health Plans, Inc. is a wholly owned subsidiary of Avera Health. Avera Health Plans, Inc. is represented by Daniel G. Jarcho at Alston & Bird LLP.

Counsel certifies that the full name of amicus DAKOTACARE is South Dakota State Medical Holding Company, Inc. d/b/a DAKOTACARE, which is the real party in interest. DAKOTACARE is a wholly owned subsidiary of Avera Health. DAKOTACARE is represented by Daniel G. Jarcho at Alston & Bird LLP.

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INTRODUCTION

The Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 ("ACA") set forth a straightforward bilateral arrangement: if a health insurer would voluntarily agree to provide "Qualified Health Plans" through the "Health Benefit Exchanges", the Government would make a "Risk Corridor" payment to the insurer that would cover a statutorily-defined portion of any losses the insurer incurred during each of the first three years of ACA operation. This promise of payment was repeated by the U.S. Department of Health and Human Services ("HHS") in its implementing regulations. The statute and regulations also provided that plans earning profits over specific thresholds would share a specified portion of those profits with the Government.

Amici, like appellant Land of Lincoln Mutual Health Insurance Co. ("Land of Lincoln"), accepted the Government's offer and provided Qualified Health Plans on the Exchange. Like Land of Lincoln, amici's costs of providing health care coverage to their enrollees exceeded premium revenue, in part due to the Government's own actions, and they incurred significant losses in 2014 and 2015. Under the plain terms of the ACA and its implementing regulations, the Government was obligated to reimburse the plans for its designated share of those losses. The Government did not do so. The Government has instead paid only 16

cents on the dollar for the amounts it owed for 2014, and nothing for 2015, even though it has continued to acknowledge its obligation to pay the full amount due.

The trial court rejected Land of Lincoln's claim for payment, deferring to a purported HHS interpretation of the ACA, found neither in the statutory language nor implementing regulations, that the Risk Corridor program was intended to be "budget neutral," such that the Government need only pay out in Risk Corridor payments to unprofitable insurers the amounts it had collected in Risk Corridor revenues from profitable insurers. The court found this to be a reasonable reading of an ambiguous statute to which it owed *Chevron* deference. But the ACA Risk Corridor provision is not ambiguous, and the only regulations to which *Chevron* deference could conceivably be owed provide the exact opposite of the trial court's position. The trial court also relied upon (and misinterpreted) extra-regulatory statements by HHS and others, most made long after the ACA program had gone into operation, and gave those statements the same legal effect as a regulation implemented through notice-and-comment rulemaking. That was error.

The alternative ground advanced by the Government, that certain HHS appropriations riders should be interpreted to have vitiated insurers' rights under

the Risk Corridors program, is precluded by this Court's binding legal precedents. The decision below accordingly should be reversed.[1]

ADDITIONAL FACTUAL BACKGROUND

Additional background beyond that set forth in the Land of Lincoln brief explicate the history, purpose and effect of the Risk Corridors Program, including how the Risk Corridor Program directly benefited the Government.

The ACA sets forth an unambiguous methodology for calculating the Government's Risk Corridor obligations to unprofitable insurers. That methodology was in no way tied to whether, or the extent to which, other insurers would be sufficiently profitable to trigger the statutory provision requiring them to share some of their profits with the Government. HHS's implementing regulation straightforwardly provided that unprofitable insurers "**will receive**" the Risk Corridors payment provided for through this statutory formula, without any limitation, including any limitation based on the amount of payments received by the Centers for Medicare & Medicaid Services ("CMS") from profitable insurers. 45 C.F.R. § 153.510(b) (emphasis added). That regulation was never changed or amended, and remains in effect today. *See id.* In March 2013 preamble language, CMS confirmed what the statute and regulation themselves already provided: that

[1] *Amici curiae* are addressing only the trial court's decision on the statutory claim in this brief. *Amici* believe the court also erred in dismissing Land of Lincoln's other claims, for the reasons set forth in Land of Lincoln's brief.

"the risk corridors program is not statutorily required to be budget neutral," and that HHS "will remit payments as required under Section 1342" "[r]egardless of the balance of payment receipts" from profitable plans. Brief of Appellant Land of Lincoln ("LoL Br.") at 9.

In that same rulemaking, HHS described why this Risk Corridor program was a benefit not only to insurers but to the Government itself. The ACA provides for tax credits to low-income individuals to assist in their purchase of Qualified Health Plans.[2] Because tax credits are based on the difference between the premium paid and the income of the enrollee, 26 U.S.C. § 36B, lower premiums reduce the tax credits that the Government must pay. As HHS explained, the Risk Corridors Program "permit[s] issuers to lower rates [they charge to enrollees] by not adding a risk premium to account for perceived uncertainties in the 2014 through 2016 markets." 78 Fed. Reg. 15,410, 15,413 (Mar. 11, 2013).

Shortly after HHS provided its March 2013 assurance that it would make risk corridor payments "regardless of the balance of payment receipts," issuers of Qualified Health Plans finished setting their premium rates and went through the process of obtaining federal and state regulatory approval, followed by the

[2] Tax credits are available to persons not otherwise eligible for comprehensive health care coverage with incomes between 100 percent and 400 percent of the federal poverty level. ACA § 1401; 45 C.F.R. § 155.305(f).

commencement of open enrollment on October 1, 2013, with coverage to become effective January 1, 2014. *See* 45 C.F.R. § 155.410(b), (c).

In accordance with ACA dictates, many insurers in the final months of 2013 began canceling existing health insurance policies that did not satisfy ACA requirements that would become effective January 1, 2014. *See* ACA §§ 1201, 1302(a). These policy cancellations caused a political uproar, as many people had been lead to believe that the ACA would not cause them to lose their existing coverage ("if you like your health plan, you can keep it").

On November 14, 2013, after insurer premiums had already been set and open enrollment begun, HHS responded to the political uproar by announcing a "transitional policy" designed to curb the cancellation of existing policies. Letter from Gary Cohen, Dir., Ctr. for Consumer Info. & Ins. Oversight ("CCIIO"), CMS, to State Insurance Commissioners (Nov. 14, 2013), https://www.cms.gov/cciio/resources/letters/downloads/commissioner-letter-11-14-2013.pdf. Under the transitional policy, any coverage in effect on October 1, 2013 was not considered noncompliant for failure to comply with ACA requirements that otherwise became effective on January 1, 2014. *Id.*[3]

[3] CMS subsequently extended this transitional policy for two additional years, until October 1, 2017. Memorandum from Kevin Counihan, Dir. CCIIO, CMS, *Insurance Standards Bulletin Series – INFORMATION – Extension of Transitional Policy through Calendar Year 2017* (Feb. 29, 2016), https://www.cms.gov/CCIIO/Resources/Regulations-and-
(continued…)

Absent this transitional policy, which was not announced until after *amici* and other issuers had already set and obtained approvals for their premiums and began selling Qualified Health Plans for 2014, millions of individuals with existing individual market coverage that did not comply with the ACA would have had that coverage terminated and thus enrolled in a Qualified Health Plan effective January 1, 2014. These potential Qualified Health Plan enrollees, who ended up stay in their old plans under the transitional policy, were generally less expensive than those who were uninsured prior to their Qualified Health Plan enrollment, because the former group was less likely to have uninsurable and untreated health care conditions. Thus, the ACA enrollee risk pool was considerably less healthy, and thus more expensive to insure, than insurers could have anticipated when setting premiums a few months earlier.

HHS recognized that Qualified Health Plan issuers had set rates based on the assumption that individuals whose existing individual market coverage that did not comply with ACA requirements would enroll in a Qualified Health Plan effective January 1, 2014. HHS assured issuers that Risk Corridors payments would at least partially offset losses arising out of the new transition policy: "Though this

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Guidance/Downloads/final-transition-bulletin-2-29-16.pdf; Memorandum from Gary Cohen, Dir., CCIIO, CMS, *Insurance Standards Bulletin Series – Extension of Transitional Policy through October 1, 2016* (Mar. 5, 2014), https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/transition-to-compliant-policies-03-06-2015.pdf.

transitional policy was not anticipated by health insurance issuers when setting rates for 2014, the risk corridor program should help ameliorate unanticipated changes in premium revenue." *Id.* at 3. That promise was never fulfilled.

ARGUMENT

Land of Lincoln's brief, and Judge Sweeney's opinion in *Health Republic Insurance Co. v. United States*, No. 16-259C, 2017 WL 83818 (Fed. Cl. Jan. 10, 2017), comprehensively explain why the ACA requires CMS to make ***annual*** Risk Corridor payments, and why it was error for the trial court to defer to CMS's "determination" that it could instead wait until after the end of three years to do so. *Amici* endorse those arguments and do not repeat them here. *Amici* instead address why the trial court erred in holding that the Risk Corridor Program can be interpreted to be budget neutral, and why the alternative ground advanced by the Government, in reliance upon the HHS appropriations riders, is equally unavailing.

I. The Trial Court's *Chevron* Deference Analysis Was Fatally Flawed.

"If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *accord N.Y. Life Ins. Co. v. United States*, 190 F.3d 1372, 1379-80 (Fed. Cir. 1999). If the text of a statute is ambiguous with respect to the question presented, a court must defer to a reasonable agency interpretation, ***but only if*** it

promulgated through notice-and-comment rulemaking or a similar process. *See Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1361, 1365 (Fed. Cir. 2005); *N.Y. Life*, 190 F.3d at 1379-80.[4]

In this case, the trial court made three errors in its *Chevron* analysis, any one of which warrants a complete reversal of the decision below. First, the ACA is not ambiguous about whether the program is budget neutral. Second, even if the statute were ambiguous, deference is owed only to reasonable agency interpretation promulgated through notice-and-comment rulemaking or a similar process. In this case, the agency did engage in notice-and-comment rulemaking, and the rules it adopted do not support a budget neutral interpretation. To the contrary, the regulations' payment scheme is plainly ***not*** budget neutral. Third, HHS's statements regarding its Risk Corridor payment obligations do not support the proposition that HHS believed the Risk Corridor Program was intended to be budget neutral. In other words, the trial court has misunderstood the agency position to which it was purportedly paying deference.

[4] A more liberal rule may apply when the government is promulgating procedural requirements or making policy statements, *see Cooper Techs. Co. v. Dudas*, 536 F.3d 1330 (Fed. Cir. 2008), but the regulations at issue here are substantive.

A. The Plain Text Of Section 1342 Requires That the Government Make Full Risk Corridors Payments.

Where the statute's language is clear, that is where the statutory interpretation "begins and ends," *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016), "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress," *Chevron*, 467 U.S. at 842-43.

The Government's obligation under ACA Section 1342 to make Risk Corridor payments to unprofitable insurers is: (a) unfettered, and (b) unrelated to whether, and the extent to which, the Government receives Risk Corridors payments from profitable insurers in the applicable year:

> (a) IN GENERAL.—The Secretary ***shall*** establish and administer
> a program of Risk Corridors for calendar years 2014, 2015, and
> 2016 . . . .
>
> (b) PAYMENT METHODOLOGY.—
> (1) PAYMENTS OUT.—The Secretary ***shall provide*** under the program established under subsection (a) that if—
> (A) a participating plan's allowable costs for any plan year are more than 103 percent but not more than 108 percent of the target amount, the Secretary ***shall pay*** to the plan an amount equal to 50 percent of the target amount in excess of 103 percent of the target amount; and
> (B) a participating plan's allowable costs for any plan year are more than 108 percent of the target amount, the Secretary ***shall pay*** to the plan an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of allowable costs in excess of 108 percent of the target amount. . . .

ACA § 1342, 42 U.S.C. § 18062(a), (b) (emphasis added). This statutory language provides that the Government "shall" make Risk Corridor payments, in statutorily-defined amounts, to unprofitable insurers whose plans meet the criteria of Section 1342(b)(1), without limit or condition, including whether, or the extent to which, the Government received payments from profitable insurers. This is an unambiguous statute whose interpretation begins and ends with its language.

B. Any Ambiguity In the ACA Was Resolved By HHS's Regulations, Which Do Not Create a Budget Neutral Program.

Any ambiguity in the ACA was eliminated in HHS's risk corridor regulations. Those regulations straightforwardly dictate that unprofitable insurers "***will receive payment*** from HHS," pursuant to the formula set forth in the statute and repeated in the regulations, § 153.510 (emphasis added), without any caveats or conditions indicating that those payments would be limited by the amount of Risk Corridors receipts from profitable plans, *see generally* 45 C.F.R. § 153.510-540. The regulations implement the statutory directive to the Secretary ("shall pay") as an entitlement for insurers ("will receive") that meet the criteria for payment.

These unambiguous HHS regulations, promulgated through notice-and-comment rulemaking, are the only HHS pronouncements entitled to *Chevron* deference, if the ACA itself was found ambiguous. *See supra* at pp. 7-8.

The plain meaning of the Risk Corridor regulations is confirmed by the regulations governing the two other ACA "3R" programs, Reinsurance and Risk Adjustment, which ***are*** specifically made budget neutral. *See* 45 C.F.R. § 153.230(d) (if reinsurance payments out exceed reinsurance collections in, "HHS will determine a uniform pro rata adjustment to be applied to all such requests for reinsurance payments for all States"); 77 Fed. Reg. 73,118, 73,139 (Dec. 7, 2012) ("Risk adjustment payments would be fully funded by the charges that are collected from plans with lower risk enrollees (that is, transfers. . . would net to zero)."). Thus, HHS knew exactly what to say when it meant for a program to be budget neutral. HHS said it for Reinsurance. HHS said it for Risk Adjustment. HHS did not say it for Risk Corridors. Instead, HHS said just the opposite: that unprofitable insurers "will receive" the amounts owed pursuant to the prescribed formula.

Because the regulations implementing the Risk Corridor Program that did not provide for budget neutrality were adopted through notice-and-comment rulemaking, HHS cannot amend or repeal them except through subsequent notice-and-comment rulemaking. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199,

1206 (2015) ("[A]gencies [must] use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.") HHS had never taken that step. The Risk Corridor Program regulation, with its unfettered "shall pay" promise, remains intact, and legally binding on the Government.

C. None of the Sources Relied Upon By the Trial Court Create Ambiguity.

Rather than applying the straightforward ACA statutory language, or the even more explicit implementing regulations, the trial court inappropriately read ambiguity into the statute, relying on the fact that the ACA "does not specify the timing of the [] payments," does not specify a "statutory source of funding," and uses different language than the Medicare Part D risk corridor program. *Land of Lincoln Mutual Health Ins. Co. v. United States*, 129 Fed. Cl. 81, 104-06 (2016). The trial court also relied on a 2010 CBO scoring report that did not assign a cost to the Risk Corridors program. *See id.* at 104-05, 107. None of these inject ambiguity into the pellucid ACA statutory and regulatory mandate.

1. The Timing of Payments Due Does Not Impact the Amount Owed.

First, even if the statute did not specify the *timing* of the payments (*but see Health Republic*, 2017 WL 83818, at *13-16), this would not create any ambiguity as to the *amount* to be paid. The statute clearly establishes the amount to be paid -

- an amount "equal to" the statutory formula. Identifying a date for payment would not make that amount any clearer.

2. The Lack of a Specified Source of Funding Is Irrelevant, But There Were In Fact Funding Sources Available.

As explained in Section II, *infra*, the absence of appropriated funds may affect the HHS's ability to make Risk Corridor payments, but has no impact on Land of Lincoln's right to pursue its claims in this Court and be paid from the Judgment Fund. The absence of a specified statutory funding source for Risk Corridor payments in the ACA likewise does not inject ambiguity as to the amount mandated to be paid.

As the Government Accountability Office ("GAO") has explained, "[t]he existence of a statute (organic legislation) imposing substantive functions upon an agency that require funding for their performance is itself sufficient authorization for the necessary appropriations;" there need not be (and often is not) a specific reference to appropriations. I GAO, *Principles of Federal Appropriation Law*, 2-41 (3d ed. 2004) [hereinafter "GAO Redbook"], http://www.gao.gov/legal/red-book/overview. Such GAO opinions are "give[n] special weight" on appropriations matters. *Nevada v. Dep't of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005) (internal marks and citation omitted).

Congress enacted the ACA in 2010, and would not typically have appropriated Risk Corridor funds at that time, given that the program was not to

become operational until January 1, 2014, § 1342(a). When GAO examined the question in 2014, it concluded that CMS's fiscal year ("FY") 2014 general program management ("PM") appropriation, which included the authority to spend approximately $3.6 billion for CMS's "other responsibilities", "would have been available for making the payments pursuant to section 1342(b)(1)." GAO, B-325630, HHS—Risk Corridors Program, at 3-4 (Sept. 30, 2014), http://gao.gov/assets/670/666299.pdf. The GAO concluded that, "with the enactment of section 1342," CMS's "other responsibilities" "include the risk corridors program," and thus "the CMS PM appropriation for FY 2014 would have been available for making the payments pursuant to section 1342(b)(1)." *Id.* The GAO thus saw no need for there to have been a specific source of funding provided in the ACA itself.

The trial court dismissed the GAO report by noting "that CMS's program-management appropriation for 2014 was spent." *Land of Lincoln*, 129 Fed. Cl. at 93 n.9. That is a non sequitur. Whether moneys appropriated in 2014 had been spent by the time the trial court heard argument in 2016 is irrelevant to the question whether the ACA was ambiguous as to the nature of the Risk Corridors obligations

the Government had assumed.[5] As already shown, both the statute ("shall pay") and the regulations ("will receive") are not ambiguous.

Although irrelevant in determining Congressional intent, we note that FY 2015 appropriations were also available for Risk Corridors payments. The first of the appropriations riders (*see infra* at p. 26) was not enacted until December 17, 2014, almost three months into FY 2015. *See* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 227, 128 Stat. 2130 (2014). For the first two-and-a-half months of FY 2015, *i.e.*, from October 1, 2014 until December 17, 2014, continuing resolutions provided appropriations to CMS, none of which limited in any manner the use of the $750 million CMS PM appropriation for making Risk Corridors payments. *See* H.R.J. Res. 124, 113th Cong. (2014); H.R.J. Res. 130, 113th Cong. (2014); H.R.J. Res. 131, 113th Cong. (2014).[6] That provided more than enough money to satisfy the Government's commitments to Land of Lincoln, and it is irrelevant to its claim whether there was

[5] The FY 2014 CMS appropriation expired on September 30, 2014, and the first calendar year of ACA operations did not end until December 31, 2014. While an annual appropriation is only available for the fiscal year to which it applies, "the general rule is that the availability relates to the authority to obligate the appropriation, and does not necessarily prohibit payments after the expiration date for obligations previously incurred, unless the payment is otherwise expressly prohibited by statute." GAO Redbook at 5-3 - 5-4 (citations omitted).

[6] The FY 2014 appropriations statute provided $3.6 billion for the CMS Program Management fund, an average of $300 million a month. The FY 2015 continuing resolutions continued CMS funding at the same rate, with an across-the-board decrease of .06 percent. H.R.J. Res. 124, 113th Cong., § 101(a)(8).

enough money to pay everyone else, *see Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2189-90 (2012) ("[I]t is not reasonable to expect the contractor to know how much of that appropriation remains available for it at any given time.").

3. The Medicare Part D Statute Does Not Create Ambiguity With Respect to the ACA.

The court found it significant that the Medicare Part D risk corridor provisions explicitly provides budget authority for appropriations, s*ee* 42 U.S.C. § 1395w-115(a)(2). However, as explained above, there is no requirement that a statute explicitly contain appropriation authority, and no reason why Congress had to use in the ACA the same language used seven years previously when it enacted the Medicare Part D statute.

Moreover, the two statutes are different in ways that explain a different treatment. The Part D statute provides only that the Secretary "shall establish a risk corridor," 42 U.S.C. § 1395w-115(e)(3), and lacks the mandatory "shall pay" language found in ACA Section 1342. Congress may for that reason have included appropriation authority that Section 1342 did not need. In any event, payments mandated by statute are sufficient to support a Tucker Act claim, even if the statute did not expressly state that the payment obligation constitutes budget authority or represented an obligation of the United States. *See, e.g.*, *N.Y. Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966) (government had statutory obligation to pay; statute did not expressly specify that payments were an "obligation" of the

Government); *District of Columbia v. United States*, 67 Fed. Cl. 292 (2005) (same).

4. The Congressional Budget Office Supports Land Of Lincoln, Not the Trial Court Decision.

The trial court relied upon the Congressional Budget Office ("CBO") for the proposition that the Risk Corridor program should be read to be budget neutral. But the only time the CBO has ever addressed that question, it reached precisely the opposite conclusion:

> By law, [ACA] risk adjustment payments and reinsurance payments will be offset by collections from health insurance plans of equal magnitudes; those collections will be recorded as revenues. As a result, those payments and collections can have no net effect on the budget deficit. ***In contrast, [ACA] risk corridor collections (which will be recorded as revenues) will not necessarily equal risk corridor payments, so that program can have net effects on the budget deficit***.

CBO, The Budget and Economic Outlook 2014 to 2024, at 59 (emphasis added), https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/45010-outlook2014feb0.pdf.

The trial court abjured this clear CBO proclamation, *Land of Lincoln*, 129 Fed. Cl. at 105 n.22, and pointed instead to a 2010 CBO scoring report that said nothing about Risk Corridors, but scored "Reinsurance and Risk Adjustment Payments," both of which ***are*** budget neutral. 45 C.F.R. § 153.230(d); 77 Fed. Reg. at 73,139. The trial court inferred a purported congressional intent that Risk

Corridors should be budget neutral based on Risk Corridors' ***absence*** from a CBO listing of programs that indisputably ***are*** budget neutral.

Even assuming that the absence of a separate specific score for Risk Corridors has any implications (*but cf. Sharp v. United States*, 580 F.3d 1234, 1238-39 (Fed. Cir. 2009) ("the CBO is not Congress, and its reading of the statute is not tantamount to congressional intent."); *Ameritech Corp. v. McCann*, 403 F.3d 908, 913 (7th Cir. 2005) ("Congress did not vote [on], and the President did not sign" the CBO opinion, and thus it "cannot alter the meaning of enacted statutes"), that absence suggests at most that CBO *predicted* that the Risk Corridors Program would be approximately budget neutral, as had been the case with the actual operation of Medicare Part D risk corridor program.[7] HHS so interpreted CBO's action, *see* 76 Fed. Reg. 41,930, 41,948 (July 15, 2011) (HHS statement that CBO "assumed [risk corridors] collections would equal payments to plans in the aggregate."). But whether the ACA Risk Corridor Program was *predicted* to have roughly offsetting outflows to unprofitable plans and inflows from profitable plans, and whether the ACA *legally required* budget neutrality, are two completely different questions. Furthermore, whatever early predictions

[7] The Medicare Risk Corridors program has vacillated between being a net revenue, and a net cost, to the Government. *See* CBO, *Budget and Economic Outlook 2014 to 2024*, at tbl. 2-1.

may have been, the actual economics of the ACA were sharply and negatively affected by the Government's "transitional" policy, *see supra* at pp. 5-6.

D. Other CMS Statements Are Not Entitled to Deference And Do Not In Any Event Support the Court's Interpretation.

Instead of deferring to the ACA regulations, as *Chevron* dictates if the ACA itself ambiguous, the trial court improperly deferred to statements made by HHS months ***after*** the ACA had come into operation. Specifically, the court recited, *Land of Lincoln*, 129 Fed. Cl. at 92, an informal April 11, 2014 CMS "Question and Answer" document stating that "we anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments. However, if risk corridors collections are insufficient to make risk corridors payments for a year, all risk corridors payments for that year will be reduced pro rata to the extent of any shortfall." CMS, *Risk Corridors and Budget Neutrality* (Apr. 11, 2014), https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/faq-risk-corridors-04-11-2014.pdf. The court also referenced preamble language from May 2014, in which HHS expressed its intent "to administer risk corridors in a budget neutral way over the three-year life of the program, rather than annually." 79 Fed. Reg. 30,240, 30,260 (May 27, 2014). (While Land of Lincoln's brief mistakenly refers to this language as "codif[ing]" the budget neutral policy in a "rule" (LoL. Br. 10), the statement appears in a ***preamble,*** which does not have the legal status of a ***rule***, *Wyo. Outdoor Council v.*

U.S. Forest Servs., 165 F.3d 43, 53 (D.C. Cir. 1999); HHS never codified any budget neutral policy.)

Together, the trial court refers to these statements as HHS's "three-year, budget-neutral interpretation of Section 1342." *Land of Lincoln*, 129 Fed. Cl. at 106. But these HHS statements did not cite or analyze any statutory or regulatory language; nor did HHS ever withdraw the statement it had made in its March 2013 preamble language, when it did directly addressed the statute and concluded that "the risk corridors program is not statutorily required to be budget neutral," and promised that HHS "will remit payments as required under Section 1342" "[r]egardless of the balance of payment receipts" from profitable plans. *See supra* at p. 4.

Moreover, these later HHS statements at most went to the question whether Risk Corridor payments were to be made annually or at the end of three years (the issue resolved in favor of the former by Judge Sweeny in *Health Republic*, *see supra* at p. 7). In the May 2014 statement upon which the court relies, HHS made clear that while it "anticipate[d] that risk corridors collections will be sufficient to pay for all risk corridor payments," "[i]n the unlikely event of a shortfall for the 2015 program year, HHS recognizes that ***the Affordable Care Act requires the Secretary to make full payments to issuers."*** 79 Fed. Reg. at 30,260 (emphasis added). That statement supports Land of Lincoln's claim of entitlement to

payment. HHS similarly took the position as that "risk corridors payments [are] due as an obligation of the United States Government," which it "will record" its full, unpaid obligations on its balance sheets. CMS, *Risk Corridors Payments for 2015* (Sept. 9, 2016), https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/Risk-Corridors-for-2015-FINAL.PDF. The trial court failed to recognize this consistent HHS position of its statutory obligations, and instead ascribed to HHS an "interpretation" of Section 1342 that HHS never adopted, *i.e.*, that it did not owe full Risk Corridor payments.

The trial court focused on HHS's statements that payments by it were "subject to the availability of appropriations," 79 Fed. Reg. at 30,260; 80 Fed. Reg. 10,750, 10,779 (Feb. 27, 2015); *see Land of Lincoln*, 129 Fed. Cl. at 93, but such statements simply recognized that, under the Anti-Deficiency Act, HHS itself cannot make payments without appropriations, which is an entirely separate issue from an "interpretation" of the underlying statutory obligation. As explained in the following section, the inability of an agency to make payments due to the Anti-Deficiency Act has no bearing on Tucker Act relief in this Court.

II. The Tucker Act Entitles Land of Lincoln to Full Payment.

By mistakenly turning a simple statement regarding the Anti-Deficiency Act's impact on any agency's ability to spend funds into an erroneous "interpretation" of the scope of the underlying statutory mandate, the trial court

lost sight of the long line of binding precedent establishing that Congress's failure to appropriate funds "does not in and of itself defeat a Government obligation created by statute." *Greenlee Cty., Ariz. v. United States*, 487 F.3d 871, 877 (Fed. Cir 2007) (quoting *N.Y. Airways, Inc. v. United States*, 369 F.2d 743, 748 (1996)); *see also, e.g.*, *United States v. Langston*, 118 U.S. 389 (1886); *Prairie Cty., Mont. v. United States*, 782 F.3d 685, 689-90 (Fed. Cir. 2015); *Gibney v. United States*, 114 Ct. Cl. 38, 50-51 (1949).

While a limitation on agency appropriations may mean that the agency cannot itself comply with the statutory mandate to pay, that does not change the jurisdiction of the court to entertain claims against the Government for its failure to pay and to provide relief, including an award from the permanent appropriation Congress has made for the Judgment Fund, 31 U.S.C. § 1304(a). To the contrary, "[t]he failure [of Congress] to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements, but such rights are enforceable in the Court of Claims." *N.Y. Airways*, 369 F.2d at 748. As the Government itself noted in recent litigation, "[t]he mere absence of a more specific appropriation is not necessarily a defense to recovery from th[e] [Judgment] Fund." Defs.' Mem. in Supp. of their Mot. for Summ. J. at 11, *U.S. House of Representatives v. Burwell*, No. 1:14-cv-01967-RMC, 2015 WL 9316243 (D.D.C. Dec. 2, 2015).

III. The Appropriations Riders Do Not Affect Land of Lincoln's Rights in This Court.

The Government argued below as an alternative ground for relief that the 2014 and 2015 HHS appropriations riders cut off the insurers' rights to Risk Corridor payments. But the legal standard for finding that statutory language limiting the use of appropriated funds vitiates a preexisting statutory right is quite stringent. While Congress may possess the legal authority prospectively to amend preexisting substantive statutory obligations, Congress must do so "expressly or by clear implication." *Prairie Cty.*, 782 F.3d at 689 (internal quotation marks and citations omitted). Moreover, and of direct relevance here, "[t]his rule applies with ***especial force*** when the provision advanced as the repealing measure was enacted in an appropriations bill." *United States v. Will*, 449 U.S. 200, 221-22 (1980) (emphasis added).

Because appropriations laws "have the limited and specific purpose of providing funds for authorized programs," the statutory instructions included in them are presumed ***not*** to impact substantive law. *See TVA v. Hill*, 437 U.S. 153, 190 (1978). "The intent of Congress to effect a change in the substantive law via provision in an appropriation act must be *clearly manifest*." *N.Y. Airways*, 369 F.2d at 812 (emphasis added); *accord District of Columbia*, 67 Fed. Cl. at 335. Absent such a clear manifestation, the statutory obligation remains, and may be

vindicated in this Court, with the resulting judgment satisfied through the Judgment Fund.

In *Gibney v. United States*, 114 Ct. Cl. 38 (1949), the Court of Claims addressed whether appropriations language indistinguishable from that at issue in this case altered a statutory payment obligation. The appropriations language in *Gibney* provided: "None of the funds appropriated for the Immigration and Naturalization Service shall be used to pay compensation for overtime services other than as provided" in two statutes not at issue in the case. *Id.* at 48-49. *Gibney* held that a preexisting statutory obligation to pay overtime was ***not*** affected by this appropriations language, because "a pure limitation on an appropriation bill does not have the effect of either repealing or even suspending an existing statutory obligation." *Id.* at 50-51.

Additional precedents are to the same effect. For example, in *United States v. Langston*, a statute specified that the U.S. ambassador to Haiti would be paid an annual salary of $7,500, but Congress only appropriated $5,000 for this purpose. The Supreme Court noted that the relevant appropriations legislation did not have "any language to the effect that such sum [$5,000] shall be 'in full compensation' for those years; nor was there . . . an appropriation of money 'for additional pay,' from which it might be inferred that congress intended to repeal the act fixing his annual salary at $7,500." *Langston*, 118 U.S. at 393. The

Court held that the Government had a statutory obligation to pay the ambassador the full $7,500, given that the appropriations bill "contained no words that expressly, or by clear implication, modified or repealed the previous law." *Id.* at 394.

In *New York Airways*, a statute authorized the Civil Aeronautics Board to fix a monthly subsidy for helicopter companies, which the Board did in 1964. *See* 369 F.2d at 744. But from fiscal years 1962 through 1965, "Congress successively reduced the subsidy payments for helicopter operations under the immediately preceding year, making it clear that it did not want the budgeted amounts to be exceeded." *Id.* at 747. In the specific fiscal year at issue , in an effort "to curtail and finally eliminate helicopter subsidies," the appropriations bill provided that specified that payments to the helicopter companies must "not to exceed $3,358,000 . . . during the current fiscal year, $82,500,000, to remain available until expended." *Id.* at 749, 751. The Court of Claims explained the longstanding rules that govern whether appropriations language alters the Government's statutory obligation to make payments to the plaintiff:

> It has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute. . . . The failure to appropriate funds to meet statutory obligations prevents the accounting officers of

> the Government from making disbursements, but such rights are enforceable in the Court of Claims.

Id. at 748 (internal citations omitted). The *New York Airways* court ruled in favor of the plaintiffs, holding that Congress's limit on appropriations did not alter the underlying statutory obligation, because a change in substantive law was not "clearly manifest" from the text of the appropriations bill. *Id.* at 749.

As with the appropriations act at issue in *Gibney*, *Langston*, and *New York Airways*, Congress may have limited the availability of the 2015 and 2016 CMS appropriations available for Risk Corridor payments, but those appropriations provisions did not include any "words that expressly, or by clear implication, modified or repealed the previous law." Specifically, the 2015 and 2016 appropriations riders read in full:

> None of the funds made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, 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).

Pub. L. No. 113-235, § 227; *see also* Pub. L. No. 114-113, § 225. Nothing in this language alters or eliminates, "expressly or by clear implication," the Government's statutory obligation to make full Risk Corridor payments under Section 1342 of the ACA. In fact, the Risk Corridors appropriations riders are substantially less restrictive than the appropriations language in *New York*

Airways. The latter capped outright all payments to the helicopter companies at a specific dollar amount, whereas the former simply limits the use of certain specific sources to make Risk Corridor payments.

Some members of Congress undoubtedly wanted to make the Risk Corridors Program budget neutral; Senator Rubio, for example, introduced a bill that would have amended Section 1342 to require that the program be budget neutral. *See* Obamacare Taxpayer Bailout Protection Act, S. 2214, 113th Cong. (2014). But these legislators failed to enact Senator Rubio's bill, and the statutory language in the appropriations riders fell far short amending the statutory obligation. *Cf. Gibney*, 114 Ct. Cl. at 55 (Whitaker, J. concurring) (while some legislators wanted the appropriations bill to suspend the Government's obligation, "they did not accomplish their purpose; they merely prohibited the use of certain funds to discharge the obligation under that Act," which "did not repeal the liability the Act created").

In the proceedings below, the Government relied upon several cases every single one of which involved appropriations act language that clearly overrode the underlying statutory obligation. *See United States v. Dickerson*, 310 U.S. 554, 555-57 (1940) (the preexisting statutory obligation "is hereby ***suspended***"; "no part of ***any appropriation*** contained in this or ***any other Act*** for the fiscal year . . . shall be available for the payment . . . ***notwithstanding the applicable provisions of***" the

statute (emphasis added)); *United States v. Will*, 449 U.S. 200, 205-08 (1980) (involving four consecutive appropriations bills) ("[n]o part of the funds appropriated in this Act ***or any other Act*** shall be used" to meet the statutory obligation; the preexisting statutory obligation that "***shall not take effect***;" "No part of the funds appropriated for the fiscal year ending September 30, 1979, by this Act ***or any other Act*** may be used to pay . . ." the statutory obligation; "funds available for payment . . . shall not be used to" meet the statutory obligation (emphasis added)); *Republic Airlines, Inc. v. U.S. Dep't of Transp.*, 849 F.2d 1315, 1317 (10th Cir. 1988) (capping payments for the preexisting statutory obligation "***notwithstanding any other provision of law***," and expressly directing the Government that to "the extent it is necessary to meet this limitation, the compensation otherwise payable by the Board [under the preexisting statutory obligation] ***shall be reduced by a percentage which is the same for all air carriers receiving such compensation***" (emphasis added)); *United States v. Mitchell*, 109 U.S. 146, 150 (1883) (underlying statutory obligation to pay and limitation were contained in appropriations acts, and both involved the special case of Indian appropriations; the Court held that Congress's "purpose" in the subsequent appropriations act was "to suspend the law").

The appropriations rider language at issue here is far more limited. Moreover, reading the appropriations riders as stripping unprofitable insurers'

rights to Risk Corridor payments, after they voluntarily delivered insurance for over a year pursuant to a statutory scheme in which such payments had been guaranteed, would constitute a retroactive application of law, because it "'would impair rights a party possessed when [it] acted . . . ,'" and impose new rules on a transaction already completed. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 31 (2006) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)). Retroactive application of statutes is "disfavored," and thus "it has become 'a rule of general application' that 'a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication.'" *Id.* at 37 (quotation omitted). No such language or necessary implication is presented by the appropriations riders.

CONCLUSION

The Court should reverse the trial court's dismissal of Land of Lincoln's claims and remand with instructions to enter judgment in favor of Land of Lincoln.

Respectfully submitted,

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February 7, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this brief complies with the type-volume requirements in Federal Rule of Appellate Procedure 32 and Federal Circuit Rule 32. This brief contains 6995 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Federal Circuit Rule 28.1 and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in proportionately spaced typeface using Microsoft Word 2010 in 14-point, Times New Roman Font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February, 2017, a copy of the foregoing, 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.

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