Nos. 18-1023, 18-1028, 18-1038

IN THE

Supreme Court of the United States

MAINE COMMUNITY HEALTH OPTIONS, *PETITIONER*,
v.
UNITED STATES, *RESPONDENT*.

MODA HEALTH PLAN, INC., ET AL., *PETITIONER*,
v.
UNITED STATES, *RESPONDENT*.

LAND OF LINCOLN MUTUAL HEALTH INSURANCE COMPANY, AN ILLINOIS NONPROFIT MUTUAL INSURANCE CORPORATION, *PETITIONER*,
v.
UNITED STATES, *RESPONDENT*.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY IN SUPPORT OF RESPONDENT

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BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY IN SUPPORT OF RESPONDENT

Pursuant to Supreme Court Rule 37.2, Americans for Prosperity ("AFP") respectfully submits this *amicus curiae* brief in support of Respondent.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFP is a 501(c)(4) social-welfare organization that drives long-term solutions to the country's biggest problems. AFP and its activists engage friends and neighbors on key issues and encourage them to take an active role in building a culture of mutual benefit where people succeed by helping one another.

AFP has an interest in this case because both it and its constituents have been continually involved in the debate about healthcare in America. A ruling for Petitioners would adversely affect AFP's constituents by improperly directing taxpayer money to private industry. And judicial intervention overriding Congress's intent in the healthcare market will reduce market efficiencies and harm the overall quality of healthcare in America.

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[1] In accordance with Supreme Court Rule 37.2(a), all Petitioners granted blanket consent. Respondent granted consent directly to AFP. No counsel for a party authored this brief in whole or in part, and neither the parties, their counsel, nor anyone except AFP and its counsel, Cause of Action Institute, financially contributed to preparing this brief.

SUMMARY OF ARGUMENT

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]

— U.S. Const. art. 1, § 9, cl. 7.

The Framers exclusively granted Congress the power of the purse—and did so with good reason. It is a serious responsibility to tax and spend the People's money. Such decisions are inherently political and must derive from a political process. Yet Petitioners ask the judiciary to act as appropriator and override Congress's constitutional authority.

Petitioners focus on points of jurisprudential finery: implied repeal, appropriation riders, legislative history, and intertwined court precedent. But this case is not so complicated. Congress enacted the "risk-corridors" program in Section 1342 of the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. § 18062. The Government Accountability Office ("GAO") and the Federal Circuit found there were two sources of risk corridors funding. The first—the payments-in/payments-out fund—purported to self-fund the program. Insurers who sold insurance but faced lower programmatic risk and thus profited from the program would pay into the fund, which the Department of Health and Human Services ("HHS") manages. HHS would then disburse the payments-in to insurers who participated in the program but faced higher risk and lost money. Barring availability on monies in this fund, HHS could reimburse insurers from the second fund: the Center for Medicare and Medicaid Services ("CMS") program fund. Although

the Government tried to argue that the statute was "budget neutral," the Federal Circuit rejected that argument, finding that the statute initially mandated that Congress "shall pay" insurers for the losses they suffered under the program.

But according to Petitioners, unpredictable actions by HHS caused the payments-in/payments-out fund to become depleted. And then Congress explicitly excluded the backup CMS program fund as a source to make risk-corridor payments. With this action, Congress exercised its exclusive fiscal authority and severed all available appropriations.

Petitioners now come to this Court asking for an appropriation. They argue HHS's actions draining the payments-in/payments-out materially affected their bottom line. That may be true, but actions by the Executive cannot bind Congress's constitutional authority—and thus should not impact this Court's decision. Petitioners knew about HHS's changes and decided to continue in the program anyway. They voluntarily took this risk, and now they bear the consequences, just like any other business.

Finally, the Judgment Fund, out of which Petitioners seek payment, is unavailable. Its enabling statute restricts the Fund's jurisdiction to situations when *no other* source of funding is available, regardless of its sufficiency. Here, the payments-in/payments-out mechanism is still available—even if it is depleted. This Court cannot award Petitioners the relief that they seek.

ARGUMENT

I. Congress has the power of the purse.

The Framers based the sacrosanct power of the purse on the British House of Commons, "considered the ultimate check on royal authority." *Power of the Purse*, History, Art & Archives, U.S. House of Rep., *available at* http://bit.ly/2kEGTzO (last visited Oct. 24, 2019). "The framers were unanimous that Congress, as the representatives of the people, should be in control of public funds—not the President or executive branch agencies." *Id.* James Madison confirmed Congress's exclusive authority both to appropriate and *refuse* to appropriate in Federalist 58. "The House of Representatives cannot only refuse, but they alone can propose the supplies requisite for the support of the government." The Federalist No. 58 (James Madison). "This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." *Id.*

The Framers did not assign this power lightly. It "reflected their belief that a proper governmental system would have the legislature at its core. The Framers understood the significance of the fiscal power." Hon. Abner J. Mikva, *Congress: The Purse, The Purpose, and The Power*, 21 Ga. L. Rev. 1, 3 (1986). This power of the purse is, after all, "the most far-reaching and effectual of all governmental powers." *Id.* at 1. But lodging this power with Congress was not without downsides, and "[d]oubtless

[the Framers] knew that granting the power of the purse would have costs." *Id.* Yet they chose, "for good reason, to suffer this cost and bear this risk." *Id.* at 2. The Framers knew this power should be in the body most readily answerable to the people: Congress.

These costs can be burdensome, especially when money is involved—"the hurdles that stand in the way of legislative effectiveness are at their highest when Congress attempts to make fiscal decisions." *Id.* But this is a feature, not a bug. "The appropriate response to these difficulties . . . is not to concede budgetary power to the executive branch, but to improve Congress'[s] own budgetary procedures." *Id.* at 6. Action or inaction by Congress is, by its nature, a *political* question. The courts have neither the constitutional right nor jurisdiction to enter that fray.

In defense of the three branches of government, Madison discussed the nature of legislatures, both state and federal. He noted that because "the legislative department alone has access to the pockets of the people . . . a dependence is thus created in" that branch. The Federalist No. 48 (James Madison). This dependence is critical, as it is the pockets of the people that fund the government. And the people have the power to choose the representatives who best speak to their individual interests. As Alexander Hamilton wrote, "[t]he legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated." The Federalist No. 78 (Alexander Hamilton).

If the legislature makes a decision that is unpopular with a certain political group or industry,

such as healthcare insurance companies, it is not the provenance of the judiciary to step in and correct it unless there is a constitutional violation. As this Court stressed when faced with a previous lawsuit challenging the ACA, "[m]embers of this Court are vested with the authority to interpret the law; possess neither the expertise nor the prerogative to make policy judgments." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 537–38 (2012). Instead, this Court insisted that "[t]hose decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices." *Id.* Following the initial passage of the ACA, the electorate chose a new Congress that wisely decided to defund the risk-corridors program. And this Court's "respect for Congress's policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed." *Id.* at 538.

The Framers were clear that the judiciary "has no influence over either the sword or the purse; no direction either of the strength or the wealth of the society, and can take no active resolution whatever." The Federalist No. 78 (Alexander Hamilton). In *United States v. Butler*, this Court acknowledged that "the governmental power of the purse is a great one [and this] is not now for the first time announced. Every student of the history of government and economics is aware of its magnitude and of its existence in every civilized government." 297 U.S. 1, 86 (1936). "The suggestion that it must now be curtailed by judicial fiat because it may be abused by unwise use hardly rises to the dignity of argument. So

may judicial power be abused." *Id.* at 87. The Constitution affirmatively restricts this Court from reversing otherwise constitutional acts of Congress.

II. Petitioners ask this Court to step where it may not.

When Congress cut off all appropriations for the risk corridors program, that was a *political* decision exclusively within its power. Neither actions by administrative agencies nor reliance on legislative history can change that.

A. Petitioners may not rely on administrative actions to bolster their case.

Congress controls the purse, not the Executive, and certainly not HHS. Yet Petitioners cite HHS's "transitional policy" and subsequent promises to bolster their argument for payment—and imply that insurers continued to offer risk corridor payments only because of these assurances. *See, e.g.*, Br. of Pet'r Me. Cmty. Health Options at 10–13 (No. 18-1023); Br. of Pet'r Land of Lincoln at 8–10 (No. 18-1038); Br. of Pet'rs Moda Health Plan & Blue Cross & Blue Shield of N.C. at 12–14, 16–17 (No. 18-1028). As one Petitioner notes, this "unexpected policy change had marked and predictable effects." Br. of Pet'rs Moda Health & Blue Cross & Blue Shield of N.C. at 10 (No. 18-1028). It lowered enrollment and since "the announcement came after premiums had been set[,]" Petitioners were stuck with the prices they set, forced to "'[b]ear greater risk than they accounted for[.]'" *Id.* at 11 (citation omitted). Petitioners argue that HHS

recognized "that its unexpected policy shift could subject insurers on the exchanges to unanticipated higher average claims costs . . . [b]ut," the agency allayed their fears by providing reassurance that the risk corridors program would cover any losses. *Id.* The Petitioners go through a lengthy history of HHS's actions, pinning much of the blame on HHS's "rosy scenario" of how things would work out. *Id.* at 12.

Taking Petitioners' arguments at face value, it appears they would not have continued in the risk-corridors program but for HHS's repeated, empty assurances. But therein lies the problem, and that is why the history of the appropriations power is so critical. HHS's actions cannot bind Congress to appropriations it never intended or later revoked. Petitioners are essentially asking this Court to enforce a form of estoppel against Congress based on the actions of an administrative agency.

Although it is not the subject of this litigation, HHS's bending of the statute may have pushed it beyond congressional intent, making it impossible, according to the insurance companies, to balance payments-in/payments-out—but no party ever successfully challenged this in court. If "agents of the Executive"—that is, HHS officials—"were able, by their unauthorized oral or written statements to citizens, to obligate the Treasury for the payment of funds, the control over public funds that the [Appropriations] Clause reposes in Congress in effect could be transferred to the Executive." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 428 (1990). Here, HHS may have acted in a fashion incompatible with the Congressional grant of authority. In *Richmond*,

"displeas[ure]" with a congressional restriction on funding led the Executive to "advise citizens that the restrictions were inapplicable[.]" *Id.* A private party then sought to enforce against the federal government to fulfill these promises, but the Court declined, deferring to Congress's appropriations authority. *Id.* at 434 ("[T]his Court has never upheld an assertion of estoppel against the Government by a claimant seeking public funds . . . . [C]ourts cannot estop the Constitution.").

So too it is here. HHS's unfounded promises cannot bind Congress and create rights where they do not exist. As discussed below, the general CMS appropriations fund also served as a possible backstop. Rather than looking to the statute, the Petitioners instead relied on HHS's assurances, which promised money that Congress decided was not the agency's to give. They voluntarily assumed risk and entered a market facing almost-certain losses. To bail out insurers for this decision would violate the "general rule that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 63 (1984). And, as one Petitioner concedes, the Anti-Deficiency Act, 31 U.S.C. § 1341, "places limits on the ability of government agents and agencies to create binding commitments for the United States[.]" Br. of Me. Cmty. Health Options at 33. HHS's assurances are thus irrelevant here.

B. Petitioners try to bait this Court with a red herring in legislative history.

The lower court gave high regard to a GAO report, requested by Congress, that "concluded that the FY 2014 CMS Program Management fund 'would have been available for risk-corridors payments.'" *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1326 (Fed. Cir. 2018). The Federal Circuit held that language only "addressed what funds from FY 2014 would have been available . . . *for that fiscal year*." *Id.* It further wrote that "GAO specifically noted that 'for funds to be available for this purpose in FY 2015, the CMS PM [("Program Management")] appropriation for FY 2015 must [have] include[d] language similar to the language included in the CMS PM appropriation for FY 2015'" *Id.* (citation omitted). But "Congress enacted the rider for FY 2015 instead." *Id.* In sum, the Federal Circuit found that "GAO's opinion was correct." *Id.*

Thus, by declining the appropriation in FY 2015, the first year that insurers could receive payment from the risk corridors, Congress severed the only avenue outside payments-in/payments-out to fund the insurers' demands. Petitioners paint this as scant legislative history and caution the Court from relying on it. But it is more than that. The GAO found, and the Federal Circuit confirmed, what the state of the world was then: two available funding mechanisms—payments-in/payments-out and the CMS program

fund.[2] One was depleted; Congress cut the other off.[3] Congress exercised its power of the purse. The Court should not rely on legislative history to rule for the Government. Instead, it need only recognize that Congress altered the state of fiscal being at that time—nothing more.

Consider the argument laid out by one petitioner. Maine Community Health Options states that Congress created the risk corridors program without an appropriation and argues that "[i]t is not surprising that Congress did not make its Section 1342 obligations conditional on subsequent appropriations." Br. for Pet'r Me. Cmty. Health Options at 29. Maine Community Health Options then asserts that "[t]here is nothing odd about Congress creating financial obligations without identifying a source of funding, particularly when Congress does not know how much money (if any) will be required to meet that obligation." *Id.* at 30. But that is incorrect. The risk corridors program, as confirmed by the GAO and the Federal Circuit, *did* have two sources of possible funding: (1) the primary one, payments-in/payments-out, and (2) the secondary, the CMS program fund. When the primary source was depleted, the agency and Petitioners were forced to look to the second. Unfortunately for them,

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[2] The Federal Circuit rejected the Government's argument that Congress intended the program to be budget neutral and held the CMS Program Fund would cover shortfalls if Congress had not excluded it. *Moda Health Plan, Inc.*, 892 F.3d at 1320–1321.

[3] Or, as Respondent argues, Congress never funded it to begin with. *See, e.g.*, Br. for Resp. United States at 24 (Nos. 18-1023, 18-1028, 18-1038). Either way, Congress enacted no appropriation.

Congress, as is its constitutional right, took that source away.

Maine Community Health Options tries to dismiss this and argues that this approach puts insurers at the whim of "the budgetary mood of a later Congress." *Id.* at 29. But this "budgetary mood" is no mere trifle; it is the authority given to Congress by the Constitution. This is one of the costs of locating the power of the purse in the legislature. *See supra* pp. 4–7; *see generally* Mikva, *supra*, at 4. Sometimes it results in unpopular outcomes. Other times, as here, it reflects the will of the people. Either way, the solution is found at the ballot box, not in the courts.

III. The Judgment Fund is unavailable here.

If this Court decides that Congress did not repeal the statute, Petitioners still cannot receive relief from the Judgment Fund. It is unavailable here. The statute that created the fund only allows its use if "payment is not otherwise provided for[.]" 31 U.S.C. § 1304(a)(1). At least one Circuit has interpreted this to mean that where "payment of a particular judgment is otherwise provided for as a matter of law, the fact that the defendant agency has insufficient funds at that particular time does not operate to make the Judgment Fund available." *Cty. of Suffolk, N.Y. v. Sebelius*, 605 F.3d 135, 143 (2d Cir. 2010) (citing Gov't Accountability Office, 3 *Principles of Federal Appropriations Law* at 14-39 (3d ed. Sept. 2008), *available at* https://bit.ly/2khCwuw).

The Congressional Research Service also noted that the "actual funding level is irrelevant; so long as

the appropriation exists, it precludes payment from the Judgment Fund." Cong. Research Serv., *The Judgment Fund: History, Administration, and Common Usage*, No. 7-5700 (Mar. 7, 2013), *available at* https://bit.ly/2keid0V.

Here, there is an available fund: the payments-in/payments-out formulation. That Congress severed a secondary source, the CMS program fund, does not eliminate the availability of payments-in/payments-out and throw this dispute into the jurisdiction of the Judgment Fund. Surely if enough money were available in the payments-in/payments-out coffers, Petitioners would not be asking this Court to circumvent those resources. Petitioners may be upset that Congress's design of the program and HHS's actions depleted the payments-in/payments-out fund, but that is not the judiciary's problem to resolve. "The judiciary are the weakest of the three departments of government, and least dangerous to the political rights of the constitution. They hold neither the purse nor the sword; and even to enforce their own judgments and decrees, must ultimately depend upon the executive arm." *Cohens v. Virginia*, 19 U.S. 264, 358 n.23 (1821) (citation and internal quotation marks omitted). The dispute over funding the risk corridor program is a political dispute—and thus it calls for a political, *not* judicial, resolution.

If Petitioners otherwise prevail, the "agency's only recourse in this situation is to seek additional appropriations from Congress, as it would have to do in any other deficiency situation." Gov't Accountability Office, *supra*, at 14-39. As the lower court correctly held, "[t]he question is what Congress

intended, not what funds might be used if Congress did *not* intend to suspend payments in exceeding payments out." *Moda Health Plan, Inc.*, 892 F.3d at 1326. And, indeed, Maine Community Health Options seemingly concedes as much, stating that under the Tucker Act, 28 U.S.C. § 1491, "it was still frequently left to the prevailing party to seek an appropriation or source of funds to pay the judgment." Br. of Pet'r Me. Cmty. Health Options at 32. Petitioner tries to argue that the availability of the Judgment Fund supersedes this requirement. *Id.* But where the Judgment Fund is unavailable, Petitioner's only recourse is to follow the very path it lays out in its brief—an appeal to the legislature.

In sum, even if this Court finds that Congress did not impliedly repeal the statutory obligation to pay, the appropriate remedy would be for Petitioners to ask Congress to appropriate money by, for example, again making the CMS program fund available.

IV. Ruling for the government will not harm future contracting.

An adverse ruling for Petitioners will not hamper the government's future public-private partnerships. This is not a contract case. There was no "quid pro quo" between the government and the health insurance companies. *See Moda Health Plan*, 892 F.3d at 1327. Unlike an "exchange for services," the risk-corridors program "is an incentive program[.]" *Id.* If the Government had contracted with Petitioners to, for example, provide health insurance to federal workers, this would be a different dispute. Instead, Congress created a program to share risk, not

eliminate it, and to incentivize insurers to participate in a market Congress assumed would be profitable.

The federal government does over $500 billion dollars' worth of *contract* business with private industry annually. *Contract Explorer*, Datalab, Dep't of the Treasury, *available at* https://bit.ly/2kQJjeM (last visited Oct. 24, 2019). It is hard to imagine the Government defunding an incentives program—*not* a contracting program—through an act of Congress could materially harm this booming industry.

What the insurance companies really want is a bailout for their bad decisions. They tried to reap guaranteed profit from a risky industry by participating in a poorly designed government program. It did not work, and Congress decided not to issue a bailout. But this does not eliminate the enormous benefits many other contractors and industries get from doing business with the Government. As one scholar observed, "the financial bailouts of 2008 were but one example in a long list of privileges that governments occasionally bestow upon particular firms or particular industries [including] . . . monopoly status, favorable regulations, subsidies, bailouts, loan guarantees, targeted tax breaks, protection from foreign competition, and noncompetitive contracts." Matthew Mitchell, *The Pathology of Privilege: The Economic Consequences of Government Favoritism* at 1 (2014), *available at* https://bit.ly/2kktLQi.

And even if a ruling for Respondent could have a "deleterious" effect on contracting with private parties, *see* Br. of Pet'r Land of Lincoln at 46, it would

not have disastrous effects for the government or economy. In fact, confirming Congress's ability to cutoff incentive programs, appropriations, or other private-industry bailouts may *improve* economic efficiencies and reduce cronyistic abuse. Government favoritism of an industry can be "an extraordinarily destructive force. It misdirects resources, impedes genuine economic progress, breeds corruption, and undermines the legitimacy of both the government and the private sector." Mitchell, *supra*, at 1–2.

If this Court upholds Congress's ability to sever incentive appropriations through legislation signed by the President, it would not upset precedent or the market. Instead, it would fortify precisely what the Founders intended when they delegated the power of the purse to the representatives of the people.

CONCLUSION

The Court should affirm the United States Court of Appeals for the Federal Circuit's judgment.

Respectfully submitted,

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