

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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MAINE COMMUNITY HEALTH OPTIONS, )  
  ) Petitioner, )  
  ) v. ) No. 18-1023  
UNITED STATES, )  
  ) Respondent. )

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MODA HEALTH PLAN, INC., )  
  ) Petitioner, )  
  ) v. ) No. 18-1028  
UNITED STATES, )  
  ) Respondent. )

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LAND OF LINCOLN MUTUAL HEALTH )  
INSURANCE COMPANY, AN ILLINOIS )  
NONPROFIT MUTUAL INSURANCE )  
CORPORATION, )  
  ) Petitioner, )  
  ) v. ) No. 18-1038  
UNITED STATES, )  
  ) Respondent. )

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Pages: 1 through 68

Place: Washington, D.C.

Date: December 10, 2019

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4                                    Petitioner,        )

5                                    v.                                    ) No. 18-1023

6   UNITED STATES,                            )

7                                    Respondent.        )

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24                                   Washington, D.C.

25                                   Tuesday, December 10, 2019

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The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:11 a.m.

APPEARANCES:

PAUL D. CLEMENT, ESQ., Washington, D.C.;  
on behalf of the Petitioners.

EDWIN S. KNEEDLER, Deputy Solicitor General,  
Department of Justice, Washington, D.C.;  
on behalf of the Respondent.

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P R O C E E D I N G S

(10:11 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 18-1023, Maine Community Health Options versus United States, and the consolidated cases.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONERS

MR. CLEMENT: Mr. Chief Justice, and may it please the Court:

This case involves a massive government bait-and-switch and the fundamental question of whether the government has to keep its word after its money-mandating promises have induced reliance.

The government suggests that there is no such thing as an enforceable congressional promise and that even the clearest command to pay money is subject to a caveat that it's subject to appropriations, and reliance, even on clear language, is "inherently unreasonable."

That position is inconsistent with all this Court's cases, including the ones that go the government's way by finding an implied

1 repeal for, in the government's view, there is  
2 nothing to repeal. Simply failing to  
3 appropriate the money cancels the obligation.  
4 The government's position would also make it  
5 impossible to accomplish many important  
6 government objectives that require a clear and  
7 enforceable promise to pay, as this case well  
8 illustrates.

9           When Congress made the health benefit  
10 exchanges a centerpiece of the Affordable Care  
11 Act, it faced a problem. The exchanges depended  
12 on the participant of private health insurance  
13 companies, and those companies were being asked  
14 to insure previously uninsured people on  
15 unprecedented terms.

16           The natural reaction of the insurers  
17 would have been to charge a substantial premium  
18 to account for the uncertainties, but that  
19 premium would have worked against the government  
20 in two fundamental ways. First, it would have  
21 made the policies relatively unaffordable,  
22 contrary to the whole purpose of the Affordable  
23 Care Act; and, second, the government would have  
24 ended up paying for those heightened premiums  
25 through tax subsidies.

1                   So the risk corridor programs at issue  
2 here was an important component of the  
3 government's solution to the problem. The  
4 program depended on a clear and enforceable  
5 promise that the government would pay for a  
6 portion of any losses incurred by the health  
7 insurance companies that stepped forward.

8                   In order for that promise to work, it  
9 had to be clear and enforceable. If the  
10 government had simply said we will make these  
11 risk corridor payments subject to  
12 appropriations, the promise would have made no  
13 difference whatsoever.

14                   If all the insurance companies were  
15 doing was trading the uncertainties about the  
16 risk pool for the uncertainties over the funding  
17 priorities of future Congresses, they would have  
18 gained nothing in the process. So Congress made  
19 a clear money-mandating promise to pay.

20                   Based on that promise, my clients and  
21 others got state-approved rates to offer  
22 policies on the exchanges. After those rates  
23 were already set, then HHS adopted its so-called  
24 transitional policy, which kept some healthy  
25 people off the exchanges and, as the government

1       itself recognized, meant that more insurers  
2       would lose more money. But HHS said to the  
3       insurers: Don't worry, we have the risk  
4       corridors program in place, and we will cover  
5       some of those excess losses as a result of the  
6       transitional policy.

7               So the policies went forward and  
8       losses were incurred, and when it became time to  
9       pay, the government then started pointing to  
10      some ambiguous appropriations riders.

11              But those riders by their plain terms  
12      did not repeal the obligations of 1342 or even  
13      say prospectively that we're going to limit the  
14      payments out to the extent of payments in.

15              JUSTICE ALITO: What if they had been  
16      included in the original legislation? If the  
17      appropriations riders had been included in the  
18      original legislation, would that make a  
19      difference?

20              MR. CLEMENT: Well, ultimately, I  
21      don't think it would make a difference in the  
22      sense that I think it's a little hard to -- to  
23      figure out exactly what that would look like.  
24      And I think the reason you didn't have  
25      appropriation riders in the 2010 legislation is



1 because, for this part of the policy, the  
2 policies wouldn't be offered until 2014 and you  
3 really wouldn't be in a position to know whether  
4 or not there was an obligation until 2015.

5 JUSTICE ALITO: But what if the law  
6 said the government shall pay and the money  
7 shall come from the premiums, but it may not  
8 come from the only other identified source that  
9 could be used to pay?

10 MR. CLEMENT: So, Justice Alito, I  
11 think if they tried to do that ex ante in 2014,  
12 that I think people would say -- that would be  
13 sufficiently strange that I think people would  
14 say, well, what exactly do you mean by that?  
15 And I think there probably would have been a  
16 clarification before anybody relied.

17 But, of course, back in 2010, there  
18 was none of that kind of language whatsoever,  
19 and you had what, I think, anybody would  
20 recognize as a clear money-mandating promise  
21 that the government shall pay certain  
22 obligations. And the --

23 JUSTICE GINSBURG: Mr. Clement, you  
24 are relying on what you call an implied damages  
25 action based on 1342, but this Court has been

1 reluctant to imply any right of action, has  
2 insisted on Congress providing the right of  
3 action. And, here, the right of action -- your  
4 -- your -- your complaint is not based on any  
5 right of action provided by Congress.

6 MR. CLEMENT: Well, ultimately, we  
7 think it is, Justice Ginsburg, but it has to be  
8 inferred from the money-mandating promise  
9 itself. And I think it's telling that there was  
10 nobody on this Court who was a greater skeptic  
11 of implied cause of actions than Justice Scalia,  
12 but, in his opinion, in Bowen against  
13 Massachusetts, he recognized it had been long  
14 established that this kind of "shall pay"  
15 language gave rise not just to jurisdiction  
16 under the Tucker Act but to a cause of action  
17 for damages.

18 I think the reason that even Justice  
19 Scalia, no fan of the implied cause of action,  
20 was able to recognize that is because, if you  
21 think about the kind of obligations that are at  
22 issue in the jurisdiction over the Tucker Act,  
23 they are all clear obligations to pay, and  
24 whether it's the Takings Clause, whether it's a  
25 contract, whether it's a money-mandating

1 statute. In each case, there's a clear  
2 obligation to pay specific amounts to specific  
3 people.

4 And in that situation, I don't think  
5 that you need to have a separate cause of  
6 action. I mean, you think about a contract.  
7 You generally don't have in the contract a cause  
8 of action to bring a breach of contract action.  
9 It's implicit that if the government or any  
10 other counterparty doesn't uphold their end of  
11 the bargain, there is a cause of action for  
12 damages.

13 JUSTICE ALITO: Well, what is the --

14 JUSTICE KAGAN: Are there any --

15 JUSTICE ALITO: -- what is the  
16 difference between a statutory provision that  
17 says a person shall have some non-monetary right  
18 and a statutory provision that says a -- an  
19 entity, a company, shall be paid? Why should we  
20 be more willing to infer a cause of action in  
21 the latter situation than in the -- in the  
22 former?

23 MR. CLEMENT: Well, I -- I think --

24 JUSTICE ALITO: Because of special  
25 solicitude for insurance companies?

1           MR. CLEMENT: Well, no, obviously not,  
2 Justice Alito, but I think, first of all, if you  
3 have the sort of "shall do" something other than  
4 pay money, you don't have to look for an implied  
5 cause of action because I think you would have a  
6 cause of action that would arise under the APA  
7 to enforce the particular whatever it was,  
8 "shall" fill in the blank. The action you can  
9 enforce under the APA. If the action is --

10           JUSTICE ALITO: No, no, a damages  
11 remedy for that.

12           MR. CLEMENT: Well, I don't know that  
13 you would necessarily infer a damages remedy for  
14 that, but I think you would get very much the  
15 same thing under the APA. And I think as -- you  
16 know, as the majority held in Bowen against  
17 Massachusetts, sometimes you can get relief  
18 under the APA that's not strictly limited to  
19 injunctive relief but includes other kinds of  
20 monetary relief but not damages.

21           In all events, we're not asking you to  
22 break any new ground here. And I think compared  
23 to cases of this Court like White Mountain  
24 Apache and the Mitchell case from 1983, it's  
25 sometimes called Mitchell II, this case is a

1 very straightforward case of saying that a  
2 money-mandating statute is enforceable in the  
3 Court of Claims under the Tucker Act.

4 JUSTICE KAGAN: Are there any limits  
5 to that, Mr. Clement? Is the "shall pay"  
6 language sufficient in all cases no matter what  
7 the kind of program or entitlement or grant? Is  
8 -- is it just "shall pay" does it?

9 MR. CLEMENT: Well, I -- I think,  
10 Justice Kagan, if you look at the Federal  
11 Circuit's precedents on this, "shall pay" alone  
12 might not do it, but when you combine that with  
13 specific -- specificity about what amounts are  
14 going to be paid and to whom and under what  
15 circumstances, that's clearly sufficient for a  
16 money-mandating promise and it always has been.

17 And, again, I think if you think about  
18 this case in comparison to this Court's  
19 precedents involving Indian trust obligations,  
20 this is a much more specific and much more  
21 enforceable promise. This is not a direction to  
22 the Secretary of Interior to take certain  
23 property in trust. This is a direction that you  
24 shall pay certain amounts.

25 And I think one thing that makes this

1 a very easy case, if you're concerned about sort  
2 of opening up the -- the sort of money-mandating  
3 statute too wide is that you have the exact same  
4 language here in the parallel provision, "shall  
5 pay" and nobody thinks, not even the government  
6 thinks, that the "shall pay" direction to those  
7 insurance companies that made profits on the  
8 exchanges is anything but an enforceable  
9 promise.

10 CHIEF JUSTICE ROBERTS: You make a  
11 case at some length about the reliance of the  
12 insurance companies, they were basically seduced  
13 into this program, but they have good lawyers  
14 and the Constitution says no money shall come  
15 out of the Treasury except pursuant to an  
16 appropriations clause, and I would have thought  
17 at some point they would have sat down and said,  
18 well, why don't we insist upon an appropriations  
19 provision before we put ourselves on the hook  
20 for \$12 billion?

21 MR. CLEMENT: Well, Mr. Chief Justice,  
22 I think they -- they did have very good lawyers  
23 and they looked at this Court's precedents, they  
24 looked at the precedents of the Federal Circuit,  
25 and although those court cases all stand for the

1 proposition that, obviously, Congress has the  
2 power of the purse, with all respect, they don't  
3 stand for the proposition that the only way that  
4 Congress can open the purse is by making a  
5 specific appropriation.

6           It has long been the law recognized by  
7 this Court and by the government in its GAO red  
8 book, which is sort of the bible for these kind  
9 of things, that the government can obligate  
10 itself and Congress can obligate itself without  
11 using any magic words of appropriation. And the  
12 governing standard is, if a statute is  
13 money-mandating, then that obligates the  
14 government.

15           And the reason that's not a problem  
16 under the Antideficiency Act or the  
17 appropriations clause is that's Congress itself  
18 opening up the purse for specific amounts for  
19 specific purposes.

20           CHIEF JUSTICE ROBERTS: No, I know.  
21 But I think the reliance argument has to be  
22 taken at least subject to the qualification.  
23 Yeah, I understand your argument, but, if  
24 somebody raised their hand and said, hey,  
25 shouldn't we get an appropriations provision

1 here, nobody would have said, well, you know, we  
2 don't need it because this is a money-mandating  
3 statute and this and this and this and, you  
4 know, if something goes wrong, we can get Mr.  
5 Clement to go argue the case.

6 (Laughter.)

7 CHIEF JUSTICE ROBERTS: It -- it  
8 strikes me that you do have the appropriations  
9 clause sitting out there and it's a pretty clear  
10 yellow light.

11 MR. CLEMENT: Well, Mr. Chief Justice,  
12 I don't think it's as clear as you think,  
13 because, look, the government's position is what  
14 we needed to do was include language in 2010  
15 that said that this constitutes budget  
16 authority.

17 But, of course, that would be subject  
18 to a subsequent Congress's amendment as well.  
19 So, for purposes of the retroactivity argument,  
20 I think what's important here is, in 2010, they  
21 made a money-mandating promise that I think  
22 anyone who looked at all the sources would say,  
23 that's good enough.

24 Now could it be better? Could it have  
25 belt and suspenders? Sure, but it's good



1 enough. And then they relied on that, they  
2 provided the service. The government had no  
3 problem saying, based on the same "shall pay"  
4 language in 1342, we need you insurance  
5 companies that made money in 2014 to make your  
6 payments in.

7 And at that point in 2000 -- late  
8 2014, after the insurance companies had upheld  
9 their end of the bargain, they simply imposed  
10 some appropriations riders that said, we're not  
11 going to use -- by their terms, we're not going  
12 to use this one fund to make these payments.

13 And they didn't use language that this  
14 Court has looked to in other cases like from  
15 this fund or any other or this act or any other.  
16 They didn't do what they could have done, which  
17 is they could have prospectively repealed 1342  
18 or they could have prospectively limited the  
19 amount of payments out to payments in.

20 JUSTICE ALITO: Was there some other  
21 fund that could have been used?

22 MR. CLEMENT: I -- I -- I don't think  
23 that anybody readily identified another fund  
24 that would have been used by the Secretary of  
25 Health and Human Services to make the payments.

1 But it's Black Letter Law that that doesn't make  
2 the obligation go away. All that --

3 JUSTICE ALITO: But wasn't this the  
4 only fund that was identified by the GAO as a  
5 potential source?

6 MR. CLEMENT: Well, the GAO in its  
7 correspondence with two members of Congress  
8 identified two sources of funds for the  
9 appropriations. These funds were one of them  
10 and then the other one was that the payments in  
11 could be construed as user fees. Interestingly,  
12 GAO said, what -- what were the user fees, what  
13 were they paying for? They were paying for the  
14 guarantee that the government would pay for  
15 their losses.

16 So even GAO's analysis of why it was  
17 that the payments in could be construed as user  
18 fees depends on the notion that these were real  
19 enforceable promises.

20 JUSTICE ALITO: But --

21 MR. CLEMENT: So --

22 JUSTICE ALITO: -- you've now had an  
23 opportunity to study this in detail. Can you  
24 identify any source, other than the Judgment  
25 Fund, that could be used to pay these billions

1 of dollars?

2 MR. CLEMENT: I can't, Justice Alito.  
3 And that's a problem for why the Secretary of  
4 Health and Human Services can't voluntarily make  
5 the payments without violating the  
6 Antideficiency Act.

7 But what happens in that situation --  
8 and this Court made this absolutely clear in the  
9 Ramah decision -- is when there is insufficient  
10 funds for an executive branch officer to make a  
11 payment under which the United States is  
12 obligated, then they can't make the payment  
13 voluntarily. They can't cut the check, but what  
14 happens then is that there's a suit in the Court  
15 of Claims. The fact that the government can't  
16 cut the check to pay its obligation means  
17 there's either a breach of contract or a  
18 violation of the statute.

19 Then there's a judgment, and then you  
20 can collect under the Judgment Fund. But the  
21 fact that the government decides that, you know,  
22 we have these obligations, but we just don't  
23 feel like appropriating enough money for them  
24 just doesn't cancel the obligation or make it go  
25 away.

1                   And as I said, that's really been  
2 Black Letter Law for 100 years in the Court of  
3 Claims. This --

4                   JUSTICE ALITO: But do you think it  
5 would be reasonable for the insurance companies  
6 to say: Look, we know that Congress is now  
7 refusing to appropriate any money to pay us, but  
8 don't worry, we'll sue later and we'll get the  
9 money, billions of dollars, from the Judgment  
10 Fund?

11                   MR. CLEMENT: Justice Alito, at the  
12 time that they're first being told that the  
13 government's not going to pay in 2014, late  
14 2014, it's already too late for 2014. They've  
15 already performed. And so, as to that, there's  
16 a real retroactivity problem.

17                   Now I think, if Congress at that point  
18 had said, as they did in other proposed  
19 legislation that didn't have the votes, if they  
20 had said prospectively we're no longer going to  
21 make payments under 1342 or we're going to limit  
22 the amount of payments out to payments in, at  
23 that point, absolutely, an insurance company  
24 would prudently change its course of conduct.

25                   But, if an insurance company is

1 watching Congress and what it sees is there are  
2 express efforts to repeal this provision  
3 expressly going forward and they fail, and all  
4 there is is an effort by some people to  
5 essentially hobble the Secretary of Health and  
6 Human Services in her ability to discharge what  
7 have to be understood as obligations of the  
8 United States, then, under those circumstances,  
9 the right result is to file a suit and get your  
10 judgment and get your claim from the Judgment  
11 Fund.

12 But it is not the law that the  
13 government can simply make its obligations go  
14 away by deciding that, after the fact, after the  
15 obligations have been incurred, after the  
16 counterparty has been -- has performed, we're  
17 just not going to appropriate the money.

18 JUSTICE KAGAN: The government --

19 JUSTICE BREYER: Why isn't this a  
20 contract?

21 MR. CLEMENT: I think it very much  
22 operates like a contract, Justice Breyer.

23 JUSTICE BREYER: Yeah, but why isn't  
24 it one?

25 MR. CLEMENT: Well, we -- we're saying

1 it is. And -- and I think the -- the -- I think  
2 --

3 JUSTICE BREYER: Is there some  
4 authority that says this isn't a contract?

5 MR. CLEMENT: No, I don't, Justice  
6 Breyer. I -- look, I actually think the best  
7 two paragraphs on this issue is what Justice  
8 Scalia said in his Bowen opinion because what he  
9 said is you could understand this kind of  
10 statutory offer either as a unilateral offer to  
11 contract that's accepted through performance or  
12 you could understand it as a statutory  
13 obligation.

14 And he said, consistent with the  
15 position of the federal government in the Bowen  
16 brief, which is worth a -- worth a read if you  
17 get a chance, but he said consistent with their  
18 position, the better way to think about it is  
19 that it's a statute and it's a statutory --

20 JUSTICE SOTOMAYOR: Mister --

21 MR. CLEMENT: -- obligation that can  
22 be enforced.

23 JUSTICE SOTOMAYOR: -- Mr. Clement,  
24 the problem was that Justice Scalia was in  
25 dissent. So how do we -- how do we salvage his

1 observations when it didn't win the day in that  
2 case?

3 MR. CLEMENT: Well, it's easy to,  
4 Justice Sotomayor, because the majority did not  
5 actually disagree with him on this point. What  
6 the majority held was that the exclusion in the  
7 APA was not necessarily coextensive with the  
8 Tucker Act jurisdiction.

9 So it thought the claims there could  
10 be brought under the APA. But it even said in  
11 Footnote 48 that even if some of the claims  
12 could be brought under the Tucker Act, that  
13 would be fine, you could bring those claims in  
14 the -- in the Court of Claims, but it wouldn't  
15 mean that there was a bar on APA jurisdiction.

16 So I think --

17 JUSTICE SOTOMAYOR: So give me a one-  
18 or two-sentence distinguishing of that case from  
19 this one. Why is this one mandate -- mandating  
20 Tucker Act payment and that one wasn't? Because  
21 they both had the "shall pay" language.

22 MR. CLEMENT: Yes. So, Justice  
23 Sotomayor, I --

24 JUSTICE SOTOMAYOR: Or both statutes  
25 had the "shall" --

1           MR. CLEMENT: Right. So I want to  
2 repeat my point that I don't think anything in  
3 the majority or the dissenting opinion there  
4 said that that wasn't money-mandating language  
5 that could have been brought in the Court of  
6 Claims for at least retrospective relief. I'm  
7 quite confident of that.

8           But there's also a distinction, which  
9 is what the Court relied on there was the  
10 ongoing relationship between the states and the  
11 federal government there and the fact that the  
12 way that the program worked there, what -- what  
13 the state was actually suing for is not having  
14 to -- was in order to not have to reimburse some  
15 funds.

16           I think, if you actually think about  
17 that opinion and read the key footnotes, which  
18 are 31, 38, 42, and 48 -- I think I have that  
19 right -- if you look at that, I don't think  
20 there's any indication that if what was at issue  
21 there is something like this, which is an  
22 entirely retrospective set of obligations for a  
23 program that essentially sunsetted in 2016, I  
24 don't think there's any indication that the  
25 Court would have thought that should be brought



1 as an APA action and not as a Tucker Act claim.

2 And, of course, keep in mind the  
3 government's position is not that we sued in the  
4 wrong court. The government's position is that  
5 there's just not sufficient money-mandating  
6 language in the statute.

7 And I think that's a very difficult  
8 proposition to sustain if you take seriously not  
9 just 100 years of Court of Claims and Federal  
10 Circuit cases but also compare it to White  
11 Mountain Apache, compare it to -- compare it to  
12 the Mitchell case from 1983. This is much more  
13 obviously money-mandating language.

14 And, again, it was in a brief and it  
15 was in a brief where they persuaded Justice  
16 Scalia but not every member of the Court, but  
17 the government in its Bowen brief essentially  
18 said that they couldn't imagine clearer  
19 money-mandating language than the "shall pay"  
20 language in that statute. And, here, it's even  
21 clearer, it's all retrospective, and it's a  
22 "shall pay" obligation to specified individuals  
23 for specified sums under specified circumstance.

24 And then one other distinction -- I'm  
25 like more than two sentences at this point, but

1 one other distinction is unlike another stat --  
2 any other statute I've seen, you have the  
3 parallel language in what was expected of the  
4 counterparty, the same "shall pay" language.  
5 And even the government says that, of course,  
6 that was just an absolutely mandatory  
7 obligation.

8           If you put this all together, what the  
9 government's position is, it's really  
10 extraordinary, because they -- their position is  
11 there never was any binding obligation at all.  
12 They didn't even have to appropriate the  
13 payments in. That just happened -- later  
14 Congresses did that through the user fee  
15 appropriation.

16           So their view is that a promise that  
17 was concededly designed to give comfort to the  
18 insurance companies that they would have some  
19 coverage against losses actually provided no  
20 coverage against losses but absolutely mandated  
21 the payments in no matter what.

22           And -- and I do want to emphasize that  
23 no matter, like, how you look at their position,  
24 it is completely inconsistent with all of this  
25 Court's cases, even the ones that go in their

1 favor. And one way to look at that is, under  
2 their view, there was nothing to repeal. But  
3 the other way to look at that is, if you look at  
4 cases like Langston, like Dickerson, like Will,  
5 in the original statute that provided for a  
6 salary or provided for a payment, none of those  
7 original statutes had language that talked  
8 specifically about budget authority.

9 So, under their view, those cases were  
10 really easy cases and this Court completely  
11 missed the ball and mis-analyzed those cases.

12 JUSTICE KAGAN: Is it possible to  
13 think of those cases as -- as -- as cases we  
14 shouldn't rely on to the extent we usually do  
15 because -- because of the Judgment Fund? In  
16 other words, we live in a different world now?

17 MR. CLEMENT: No, absolutely not,  
18 Justice Kagan, because what happened in those  
19 cases is even before the Judgment Fund, there  
20 were judgments. And there was a judgment in  
21 that case for, I think, \$7,666 against the  
22 federal government.

23 Now, under their theory of the case,  
24 there should have been no judgment. That  
25 judgment should have been affirmed. And back

1 then, of course, once you got the judgment, you  
2 went to Congress and tried to get Congress to  
3 pay it. But -- and -- and -- and -- and, of  
4 course, Congress generally almost always paid  
5 it, so you never had to answer the \$64,000  
6 question of whether there was a taking if they  
7 just refused to pay it.

8 I think another reason to decide this  
9 case in our favor is, if you adopted the  
10 government's position, you'd have to overcome  
11 not just the presumption against implied repeals  
12 but also the presumption against retroactivity.  
13 And none of the cases that the government can  
14 point to ever held the private party essentially  
15 was on the hook and the government didn't have  
16 to pay once the obligation was already incurred.

17 The cases like Dickerson and Will,  
18 they were talking about prospective obligations  
19 for the next year. When this Court has  
20 confronted cases where the government was saying  
21 that it didn't have to pay for past obligations,  
22 cases like the Twenty Per Cent Cases and the  
23 Larionoff case that are cited in the reply brief  
24 of Land of Lincoln, the government never won  
25 those cases.

1           And the reason there's a big  
2 difference is when the government says we're not  
3 going to pay, and they're talking about only a  
4 prospective obligation, maybe it's fair to infer  
5 that they want that prospective obligation to go  
6 away. But, if they're to say we don't want to  
7 pay for something that's an obligation they  
8 already incurred, then they're actually risking,  
9 I think, a very serious takings violation.

10           Again, Justice Breyer for the Court  
11 noted that there was a potential constitutional  
12 problem with retroactive legislation of this  
13 type in the Cherokee Nation case. So it's  
14 always been recognized that there's a big  
15 difference in this context between retrospective  
16 obligations and prospective obligations.

17           So there's really no precedent on the  
18 government's side of this case, and it would be  
19 a terrible precedent to start because this is  
20 not going to be the only context where it's very  
21 important for the government and Congress to be  
22 able to make enforceable promises to pay.

23           JUSTICE ALITO: Has there ever been a  
24 case where this Court has, in effect, required  
25 Congress to appropriate, through the Judgment

1 Fund or in any other way, billions of dollars  
2 for private businesses?

3 MR. CLEMENT: Well, look, I -- I don't  
4 -- I mean, if -- it's a contract case, but if  
5 you cut right down to it and you adjust for  
6 inflation, I would think Winstar got you into  
7 the billions of dollars as well.

8 And I think Winstar is another good  
9 example, although it was conceived of as a  
10 contracting case. The government came in after  
11 the fact and tried to tell this Court that its  
12 original promises to make good on the goodwill  
13 were just illusory, and they just -- you know,  
14 they just didn't bind future Congresses. And  
15 this Court didn't buy the argument then. It  
16 shouldn't buy the argument now.

17 I totally get the point that Congress  
18 has the power of the purse, but Congress is not  
19 disabled from making an enforceable promise to  
20 open the purse in the future on specified terms.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 Mr. Kneedler.

24

25

1                   ORAL ARGUMENT OF EDWIN S. KNEEDLER  
2                   ON BEHALF OF THE RESPONDENT

3                   MR. KNEEDLER: Mr. Chief Justice, and  
4 may it please the Court:

5                   As the Chief Justice has said, the  
6 Appropriations Clause of the Constitution is  
7 central to this case. This Court has described  
8 it as a straightforward and explicit command in  
9 OPM versus Richmond. That command is a central  
10 feature of the separation of powers under the  
11 Constitution, and it's reinforced by the  
12 requirement that appropriations bills originate  
13 in the House of Representatives, which was  
14 designed to ensure that the representatives of  
15 the people would have and would jealously guard  
16 the power of the purse. And that system --  
17 constitutional framework is reinforced by the  
18 Antideficiency Act.

19                  That is all part of the framework  
20 under which 1342 operates. 1342 did not make an  
21 appropriation; therefore, the Secretary could  
22 not make a payment. Any payment was contingent  
23 upon a future appropriation.

24                  As soon as Congress passed the first  
25 appropriations act after this, it passed an

1 appropriation, not a rider, which is usually  
2 something tangential. It is the very  
3 appropriations act. And the only thing they  
4 appropriated was payments in, the user fees.  
5 They prohibited, as Justice Alito pointed out,  
6 the only other possible source of funds.

7           The -- the Secretary's compliance with  
8 that constitutional and statutory framework does  
9 not constitute a violation for which a cause of  
10 action can be inferred under the Tucker Act.

11           Despite all of that, Petitioners do  
12 rely on 1342 in the absence of an appropriation  
13 as an obligation to pay. And that would impose  
14 unprecedented liability on the United States of  
15 billions of dollars. Nothing in Section 1342  
16 requires that extraordinary result.

17           It's particularly telling that 1342,  
18 Congress said, it should be based upon the Part  
19 D risk corridors provision. The Part D risk  
20 corridors provision contains express language  
21 that -- it states an obligation of the Secretary  
22 to pay for Medicare Part D drugs, and it  
23 represents budget authority. None of that is in  
24 1342 --

25           JUSTICE BREYER: You can explain it --



1                   MR. KNEEDLER: -- which is patterned  
2 after it.

3                   JUSTICE BREYER: -- in simple terms.  
4 Day one of contracts. Jack Dawson. I say to  
5 you: My hat's on the flagpole. If you bring it  
6 down, I'll pay you \$10. You bring it down. I  
7 owe you \$10.

8                   Now how does this differ?

9                   MR. KNEEDLER: It didn't --

10                  JUSTICE BREYER: And if it -- if it  
11 didn't differ. So why does the government not  
12 have to pay its contracts, just like anybody  
13 else? And that's -- is there some language? I  
14 guess they could pass a statute and say we won't  
15 pay our contract. Okay? Then you have to  
16 follow the statute, until -- unless the Court  
17 sets it aside, but they didn't say that.

18                  They didn't say they didn't -- you  
19 know, you've read the argument. They didn't say  
20 they wouldn't pay. They just said: Don't pay  
21 it out of this fund. That's common. What it  
22 means is don't pay it out of this fund. End of  
23 the case.

24                  If you have some other fund, pay it  
25 out of that. It doesn't say don't pay it out of

1 that. So that's very simple-minded, what I've  
2 just said, but what's the answer to it?

3 MR. KNEEDLER: The -- the answer is  
4 that this is not a contract.

5 JUSTICE BREYER: Why not?

6 MR. KNEEDLER: This -- this Court --

7 JUSTICE BREYER: Well, I mean, it's  
8 pretty close. But why -- why -- why isn't it  
9 close?

10 MR. KNEEDLER: I think it's --

11 JUSTICE BREYER: Why isn't it either a  
12 contract or close enough? It says "shall pay."  
13 If you climb the pole, we'll pay. They climbed  
14 the pole. Pay.

15 MR. KNEEDLER: It's very far from a  
16 contract. And I think the starting premise is  
17 what -- what this Court has repeatedly said and  
18 reiterated in the National -- the Amtrak case,  
19 the National Railroad Passenger case, which is  
20 statutes are generally, absent a clear  
21 statement, construed not to establish a  
22 contract, not to establish private contractual  
23 rights or vested rights because a statute states  
24 a policy of the legislature until the  
25 legislature changes that policy.

1           There is nothing in this statute that  
2 -- that creates an express contract. There's --

3           JUSTICE KAVANAUGH: So is --

4           MR. KNEEDLER: -- the language --

5           JUSTICE KAVANAUGH: -- is every  
6 congressional promise to pay, therefore, subject  
7 to an implicit subject to appropriations caveat?

8           MR. KNEEDLER: I -- I believe by and  
9 large that that is correct, yes.

10          JUSTICE BREYER: How did we decide  
11 Winstar? I -- I remember staying here until  
12 July and somebody over the government had  
13 promised all those banks that if they did dah,  
14 dah, dah, they'd get paid about a billion  
15 dollars.

16          MR. KNEEDLER: And those were --

17          JUSTICE BREYER: And they did do dah,  
18 dah, dah.

19          MR. KNEEDLER: And those were -- those  
20 promises were based on contracts. A contract is  
21 very different from a statute. This is a  
22 general statute providing -- it's one of many  
23 subsidies under the Affordable Care Act for  
24 people who participate in a private market.

25          They -- the insurers were not

1 performing services for the government. They  
2 weren't working for the government. They  
3 weren't furnishing goods to the government.  
4 They were participating in a market --  
5 JUSTICE BREYER: All the --  
6 MR. KNEEDLER: -- economy.  
7 JUSTICE BREYER: -- all the statutes  
8 that say, I don't know, but it seems to me there  
9 must be a lot and I haven't looked it up. I  
10 have seen a lot of cases they cited, but all the  
11 statutes that say, if you do X, the government  
12 shall pay you, Mr. Veteran, Mr. Paratrooper,  
13 Mr., you know, you name it, they don't really  
14 mean it. Is that -- is that what it is?  
15 MR. KNEEDLER: No, it --  
16 JUSTICE BREYER: It's not a contract?  
17 I mean --  
18 MR. KNEEDLER: No, it is --  
19 JUSTICE BREYER: -- I don't know how  
20 this works.  
21 MR. KNEEDLER: -- it is -- it is  
22 definitely not a contract. Someone who works  
23 for the government does not work by contract.  
24 Government -- government people are appointed.  
25 And I think it's important, the

1 Langston case and that line of cases had been  
2 mentioned here. First of all, Langston is the  
3 only case in which this Court found liability.  
4 And seven years later, in the Belknap case, the  
5 Court said that's as far as we're going to go.

6 And in -- in Langston, what was  
7 critical is the Court found the appropriations  
8 language ambiguous. They -- Congress had  
9 appropriated, had paid the amount that was  
10 called for in the -- in the salary statute  
11 before, and the Court couldn't believe that  
12 Congress really meant to cut back -- that back.

13 Here, there's no question, the  
14 Appropriations Act is unambiguous. It  
15 specifically refers to 1342 --

16 JUSTICE GINSBURG: But it didn't --

17 MR. KNEEDLER: -- and tells you what  
18 money can be -- can be paid.

19 JUSTICE GINSBURG: -- it didn't -- it  
20 didn't repeal the "shall pay." In fact, they  
21 were billed to repeal, and there weren't  
22 sufficient votes in the Congress to repeal. So  
23 whatever they did, it didn't repeal the  
24 obligation, the risk corridors obligation. It  
25 stayed there. And an appropriation is -- is a

1 temporary -- a temporary legislation. It  
2 controls the appropriations in a particular  
3 fiscal year, but then isn't the -- the fact that  
4 they didn't have the votes, they couldn't repeal  
5 this measure, significant?

6 MR. KNEEDLER: No, I -- I -- I don't  
7 think there's any indication they didn't have  
8 the votes. All the bills that were cited here  
9 were simply bills that were introduced. The  
10 idea that Congress rejected them just because  
11 they were introduced is -- is not correct.

12 There were two types of bills, one --  
13 one of which was to repeal it outright.  
14 Congress -- nobody says the appropriations law  
15 here repealed it. The other was to make  
16 payments in, match payments out so it would be  
17 budget neutral. That's exactly what the  
18 appropriations statute did.

19 CHIEF JUSTICE ROBERTS: I -- I -- I  
20 vaguely recall the government arguing on several  
21 occasions that unenacted bills are entitled to  
22 some weight in the interpretation process, but  
23 you don't question that these insurance  
24 companies would not have participated in the  
25 risk corridor program but for the government's

1 promise to pay?

2 MR. KNEEDLER: I -- I don't -- well,  
3 it's not about participating in the risk  
4 corridor program. The question is they  
5 participated in the -- in the marketplaces that  
6 were set up, the exchanges, and they had a  
7 number of business incentives. This was a vast  
8 new market for customers, many of whom,  
9 90 percent of --

10 CHIEF JUSTICE ROBERTS: Well --

11 MR. KNEEDLER: -- whom would get --  
12 would get tax subsidies.

13 CHIEF JUSTICE ROBERTS: -- customers  
14 who otherwise were largely uninsurable.

15 MR. KNEEDLER: Yes. But they -- but  
16 it was a mark --

17 CHIEF JUSTICE ROBERTS: Well, that's  
18 no great business opportunity for them.

19 MR. KNEEDLER: Oh -- oh, no, it -- it  
20 is, because Congress provided tax credits to  
21 subsidize the -- the -- the persons who -- who  
22 purchased insurance on the exchanges.

23 CHIEF JUSTICE ROBERTS: No, it's a  
24 good business opportunity for them because the  
25 government promised to pay.

1 MR. KNEEDLER: Well, it's a good --  
2 it's a good opportunity for the insurance  
3 companies. There were -- there were a number of  
4 incentives here. This is -- there were two  
5 other risk mitigating provisions in the Act.  
6 There were --

7 JUSTICE KAGAN: Are you saying --

8 MR. KNEEDLER: -- a number of things  
9 working together --

10 JUSTICE KAGAN: -- that the insurance  
11 companies would have done the same thing with or  
12 without this promise to pay?

13 MR. KNEEDLER: I -- I don't think we  
14 know what they -- I think -- I -- I -- I don't  
15 think that they would have declined to  
16 participate. They may have charged greater  
17 premiums, but that's different from not  
18 participating.

19 JUSTICE KAGAN: Okay. Are -- but  
20 that's -- that's a materially different thing.

21 MR. KNEEDLER: Well, it --

22 JUSTICE KAGAN: I mean, the  
23 government -- the Congress that passed this  
24 provision wanted to keep the premiums down,  
25 didn't it? And so it induced a certain kind of



1 reliance --

2 MR. KNEEDLER: Well, it -- it -- it --

3 JUSTICE KAGAN: -- on the part of the  
4 insurers.

5 MR. KNEEDLER: -- it wanted -- it  
6 wanted to encourage -- I think the primary point  
7 was to encourage the insurers to go on the -- on  
8 the marketplace. And as I say, they had a  
9 bunch -- there were a number of subsidies both  
10 to the individuals through the tax credits and  
11 the insurance companies through the risk  
12 mitigation provisions, but -- and Congress  
13 provided in the private sector.

14 Again, the insurance companies were  
15 not performing services for the government.  
16 They were taking advantage of an opportunity in  
17 the private sector that Congress had -- that  
18 Congress had established with a bunch of  
19 subsidies. This is just -- this is just one of  
20 them.

21 JUSTICE KAVANAUGH: They were induced  
22 to -- to charge lower premiums by the "shall  
23 pay" language?

24 MR. KNEEDLER: I -- I think we can  
25 assume that that -- that that contributed to it,

1 but it was a -- it was a subsidy. And there's  
2 something I want to say when we were talking  
3 about the Langston case that -- that very much  
4 differs from this context.

5 Langston and that entire line of cases  
6 were cases about, as I think I mentioned,  
7 employment, salary. There was -- in -- in a  
8 salary situation, while -- while it's not a  
9 contract, there is an exchange of services for  
10 money. And I --

11 JUSTICE BREYER: That's exactly my --  
12 my question. You seem to have two separate  
13 arguments. One depends on the -- on the  
14 appropriations -- on the appropriations measure.  
15 Suppose there were none. Your first --

16 MR. KNEEDLER: No appropriations?

17 JUSTICE BREYER: No, there had never  
18 been any appropriations language. That didn't  
19 exist. I think you want to argue, even so, the  
20 government wouldn't have had to pay?

21 MR. KNEEDLER: That's correct.

22 JUSTICE BREYER: All right. Now, on  
23 that, I don't think you're saying, look through  
24 the statute books. Every time the statute says  
25 to any private citizen, if you do X, we shall

1 pay you, okay, that's the form, and it may exist  
2 all over the place, and you're saying at least  
3 sometimes they don't have to do it, or maybe  
4 you're saying they never have to do it.

5 MR. KNEEDLER: Well --

6 JUSTICE BREYER: Which are you saying?

7 MR. KNEEDLER: -- well, you would have  
8 to look at the particular statute.

9 JUSTICE BREYER: No, no, no, that's  
10 what I wanted. Then you're saying sometimes --

11 MR. KNEEDLER: No, I -- I think --

12 JUSTICE BREYER: -- or --

13 MR. KNEEDLER: -- I think -- I think  
14 almost never, but -- but --

15 JUSTICE BREYER: Almost never --

16 MR. KNEEDLER: -- but -- but if --

17 JUSTICE BREYER: -- okay. What is the  
18 line that distinguishes those instances where  
19 the government says, we shall pay you, Mr.  
20 Private Citizen, if you do X. He does X, but  
21 the government does not have to pay him.

22 What is the line?

23 MR. KNEEDLER: Okay. It's -- when --  
24 when Congress wants to undertake that sort of  
25 obligation, it does it through contracts. It

1 does it by authorizing an agency to enter into  
2 contracts, which then forms a bilateral promise  
3 and performance --

4 JUSTICE BREYER: Why?

5 MR. KNEEDLER: -- back to -- back to  
6 the government.

7 JUSTICE BREYER: That's what I want to  
8 know. You're saying if there isn't a contract,  
9 never. Very well. What is the case that  
10 supports that line, that says, unless,  
11 government, you delegate to a private -- you  
12 delegate to an official the power to enter into  
13 a contract with the private citizen, unless you  
14 do that, even though you said "shall pay," you  
15 don't have to. Okay.

16 What is the case that says that?

17 MR. KNEEDLER: Well, I -- I don't have  
18 -- I don't have a case of this Court that says  
19 it, but, frankly, neither does the other side in  
20 a subsidy -- in a subsidy program like this.  
21 All of the cases -- again, I want to come back  
22 to this.

23 All of the cases in the Langston line  
24 of cases all the way up to Will were about  
25 salaries. And there is, I think, a sense, and

1 it's now, for example, in the civil service  
2 code, a government employee is entitled to a  
3 salary.

4 We all understand that. In fact, in  
5 Langston, the -- the background statute said  
6 that the person was entitled to the salary.  
7 There's no language like that in this --

8 JUSTICE ALITO: Mister --

9 JUSTICE KAGAN: I guess I'm not sure  
10 why it -- it -- that makes a real difference  
11 from this case. I mean, those cases were about  
12 a certain kind of compensation for services  
13 rendered. And this case is about a certain kind  
14 of compensation for services rendered, isn't it?

15 MR. KNEEDLER: No, it's not. It --  
16 it -- it -- this is a -- this is a -- and this  
17 is what's different. This is about subsidies  
18 for people participating in the market. They  
19 are not services rendered to the government.  
20 There is no promise by the government  
21 individualized --

22 JUSTICE KAGAN: It was services that  
23 the government thought were needed to ensure the  
24 working of the program that it wanted --

25 MR. KNEEDLER: Well --

1 JUSTICE KAGAN: -- to carry out.

2 MR. KNEEDLER: -- Congress frequently  
3 enacts subsidy programs, and, yes, it does it  
4 with the hopes that people will -- will carry  
5 out, you know, the -- the incentivized program.  
6 But that doesn't mean Congress has made -- has  
7 created a vested right in them.

8 Again, I want to come back to the  
9 Amtrak case and -- and -- and referring back to  
10 the Dodge case as the canonical statement, and  
11 that is that an act -- that a statute, an act of  
12 Congress, absent clear indications, is not  
13 construed to create a contract and is not  
14 construed to create vested rights. It  
15 establishes a policy which the legislature is  
16 putting together.

17 CHIEF JUSTICE ROBERTS: Absent --  
18 absent clear indication -- what clear indication  
19 would be required, short of a contract?

20 MR. KNEEDLER: Well, we had -- we have  
21 an example -- I mean, tellingly, in this case,  
22 we have an example in the Part D Medicare risk  
23 corridors provision in which Congress --  
24 Congress in 1342, for this risk corridor  
25 program, said base this one upon that one. That

1 one, though, has the express advance budget  
2 authority and expressly says this represents an  
3 obligation of the Secretary to pay.

4 JUSTICE KAVANAUGH: But Mr. Clement --

5 MR. KNEEDLER: This Court -- I'm  
6 sorry.

7 JUSTICE KAVANAUGH: -- Mr. Clement  
8 says that there are also many provisions that  
9 say, in essence, "shall pay" subject to  
10 appropriations.

11 MR. KNEEDLER: Well, the --

12 JUSTICE KAVANAUGH: In other words,  
13 Congress knows how to prevent the obligation  
14 from being -- from taking effect before the  
15 future appropriation and, in fact, does so often  
16 and did so in the Affordable Care Act.

17 MR. KNEEDLER: Well, in the Affordable  
18 Care Act, I -- I think it's -- I just want to  
19 point out to the Court, they -- they cite a  
20 handful of provisions in the Affordable Care  
21 Act, and they're -- they're almost all in  
22 specialized grant programs, but it's telling, if  
23 you look at them, the ones that are immediately  
24 adjacent to them which have parallel grant  
25 provisions and don't have this language.

1           42 U.S.C. 480(k) has this language  
2     that 2 -- immediately preceding it, 280(j)(3)  
3     and 280(k)(1) also grant programs and don't have  
4     it. And the same thing is true with  
5     293(k)(2)(E), which they cite. The one -- the  
6     two immediately preceding don't have that  
7     language. There is no rhyme or reason in the --  
8     in the Act for that.

9           It's not entirely clear what the  
10    "subject to appropriations" language does. We,  
11    frankly, looked to see if there's an  
12    appropriations or statutory principle. We were  
13    unable to find one. It -- I think it may be --

14           JUSTICE KAGAN: Well, I would think  
15    it's pretty clear what the "subject to  
16    appropriations" language does. It puts people  
17    on notice. It says this is not a guarantee. It  
18    says, you know, you should take this with a  
19    grain of salt. And when it's not there, the  
20    government says we're committed.

21           MR. KNEEDLER: I -- I -- I think that  
22    would be a -- a great over-reading of the -- of  
23    -- of those provisions, which I think may be  
24    present just as a matter of habit in particular  
25    committees. They -- I think they are



1 housekeeping within the government. You have an  
2 authorizing committee that sets up the program  
3 but an appropriations committee that comes --  
4 that comes along later.

5 But I -- I don't think the presence or  
6 absence of this -- the -- the Appropriations  
7 Clause and the Antideficiency Act state this  
8 very rule, and Congress is entitled to rely upon  
9 that and not expect that -- that an inferred --

10 CHIEF JUSTICE ROBERTS: The --

11 MR. KNEEDLER: -- cause of action  
12 would be inferred.

13 CHIEF JUSTICE ROBERTS: -- the -- the  
14 -- I've never understood the Antideficiency Act  
15 to apply to the actions of agencies. I  
16 understood it to apply to individuals who go and  
17 obligate the government when they really had no  
18 authority to do that.

19 I never understood it to mean,  
20 whenever the particular agency or department  
21 pays money, that they're going to be prosecuted  
22 under -- under that --

23 MR. KNEEDLER: Well, the agency --

24 CHIEF JUSTICE ROBERTS: -- criminal  
25 provision, right?

1                   MR. KNEEDLER:  -- the agency wouldn't,  
2     but the -- but the criminal statute is the way  
3     in which Congress has enforced --

4                   CHIEF JUSTICE ROBERTS:  Okay, so the  
5     Secretary of the Treasury is going to be  
6     prosecuted criminally because of his  
7     interpretation of whether or not the funds were  
8     authorized?

9                   MR. KNEEDLER:  Well, I mean, it's a  
10    reasonable interpretation is probably not going  
11    to be prosecuted, but -- but that is the way in  
12    which Congress has kept the power of the purse.

13                   One -- one other piece --

14                   JUSTICE KAGAN:  But what does the  
15    Antideficiency Act have to do with Congress's  
16    own ability to commit itself?

17                   MR. KNEEDLER:  The Antideficiency --  
18    this is a statute that speaks -- 1342, as most  
19    "shall pay" statutes would, speaks to an agency.  
20    But that -- but when a -- when 1342 says pay --  
21    first of all, it says the Secretary should set  
22    up a program under which the Secretary would  
23    pay.  It's really a feature of a -- of a  
24    described program, not a direct statutory  
25    command.  But even -- even so, putting that to

1 one side, it speaks to the Secretary. The  
2 Antideficiency Act speaks to the Secretary. It  
3 tells the Secretary, I know we've said that you  
4 shall pay this, but -- but it's contingent upon  
5 the subsequent appropriation. And, here, when  
6 Congress subsequently appropriated, it limited  
7 the amount of funds that were available.

8 And in deciding whether there's an  
9 inferred cause of action, you should look at the  
10 entire statutory framework, which includes the  
11 Constitution, 1342, and the appropriations  
12 language, and the Anti- -- and the  
13 Antideficiency Act.

14 JUSTICE BREYER: Can I interrupt for a  
15 second? I -- I'm -- I'm thinking about your  
16 answer and it's interesting, but let's take a  
17 form of words. If you -- I'm back in that  
18 simple thing.

19 If you do X, we shall pay Y. Now  
20 where we left off was, if that form of words  
21 appears in a statute, Congress doesn't have to  
22 do it. But, if the statute says a GS-12 can use  
23 those form of words, write them down, hand them  
24 to the other side, then they have to do it.  
25 Okay? Because that's a contract. That's where

1 I think we were. And there's no authority  
2 either way.

3 All right. If there's no good  
4 authority either way, to use a word that's not  
5 always appreciated in this Court as much as I  
6 do, what policy could that rule serve? What  
7 policy, constitutional or otherwise, would be  
8 served by a rule that says a GS-12 can make the  
9 United States pay the money, but the Congress of  
10 the United States, House and Senate, signed by  
11 the President, cannot --

12 MR. KNEEDLER: I think fun --

13 JUSTICE BREYER: -- or does not? Does  
14 not.

15 MR. KNEEDLER: I think fundamental  
16 policies.

17 JUSTICE BREYER: What?

18 MR. KNEEDLER: First on the -- first  
19 on the contract side. A contract is a -- is a  
20 document that is bilateral. It is signed by  
21 each party. There are reciprocal undertakings  
22 specific to that individual. And in that -- in  
23 that situation where you have an  
24 appropriation -- and Ramah was a contract case,  
25 not a statutory case. And what the Court said

1       there, when -- when you enter into a contract,  
2       you are entitled to be paid because the  
3       individual contractor who has -- who has  
4       performed services to the government and expects  
5       something in return can't be expected to keep  
6       track of the appropriations account and can't be  
7       responsible if the agency devotes funds to other  
8       purposes.

9                   A statute is fundamentally different.  
10       It is not an individual bilateral relationship  
11       in which the government says we will make a  
12       commitment to you if you do something. And the  
13       fundamental point on the statutory side, I go  
14       back to the Amtrak, National Passenger Railroad,  
15       case, in which the Court said that a statute,  
16       absent a clear statement, is construed not to  
17       impose a contract or vested rights. And that is  
18       in deference to Congress. And in this context,  
19       it's tied back to the --

20                   JUSTICE KAVANAUGH: If we --

21                   MR. KNEEDLER: -- appropriations  
22       clause.

23                   JUSTICE KAVANAUGH: -- if we were to  
24       rule for you, everyone will be on notice going  
25       forward, private parties and Congress itself,

1 that "shall pay" doesn't obligate actual  
2 payments. If we rule against you, Congress also  
3 will be on notice going forward that it needs to  
4 include "subject to appropriations" kind of  
5 language in any mandatory statute.

6 My question is, if we rule against  
7 you, are there other existing statutory problems  
8 lurking out there in the interim?

9 MR. KNEEDLER: Well, one of the  
10 problems is we don't know what -- what may be  
11 out there. Statutes -- I mean, we -- there --  
12 there are other "shall pay" situations, but,  
13 again, they -- there's usually not -- in -- in  
14 this type of program, which is a generalized  
15 subsidy for people participating out there, when  
16 Congress wants to commit itself to making  
17 payments to private people, it usually does it  
18 through specific instruments, through contracts  
19 and through grants. And that is --

20 CHIEF JUSTICE ROBERTS: I don't know  
21 --

22 MR. KNEEDLER: -- that is the way  
23 Congress --

24 JUSTICE SOTOMAYOR: Mr. Kneedler --

25 CHIEF JUSTICE ROBERTS: -- I don't

1 know why legislation can't be regarded as just  
2 as specific as the contracts. And I think -- in  
3 other words, you keep saying a generalized  
4 subsidy. Is that just a repeat of your -- your  
5 argument? In other words, no money-mandating  
6 language can be considered to create an  
7 obligation on the part of the government because  
8 you would call that, without an appropriations  
9 provision, simply a subsidy?

10 MR. KNEEDLER: Well, I -- I -- I'm  
11 trying to draw a distinction between the  
12 situation where there might be a bilateral  
13 relationship either in contract or in all of the  
14 cases --

15 CHIEF JUSTICE ROBERTS: Oh, I know,  
16 and I'm trying to push you to the -- to see  
17 where the limits of your argument are. With --  
18 without regard to any type of appropriations  
19 language, there is no situation -- when the  
20 government makes a promise to an entity to  
21 engage in activity, to climb the flagpole in --  
22 in Justice Breyer's hypothetical, there's no way  
23 that that would be regarded as money-mandating  
24 if it weren't subject -- if there -- there  
25 weren't appropriations language?

1                   MR. KNEEDLER: I -- I think that would  
2 be the general rule, but let me point out here,  
3 there -- there's no language of promise in this  
4 -- in this statute. There's no language of  
5 entitlement on the part of the -- of the  
6 insurance companies.

7                   CHIEF JUSTICE ROBERTS: "Shall pay,"  
8 right?

9                   MR. KNEEDLER: Well, it's an  
10 instruction to an agency to pay, but when you  
11 have an instruction to an agency to do anything,  
12 it is always conditioned --

13                   CHIEF JUSTICE ROBERTS: Well, I guess  
14 --

15                   MR. KNEEDLER: -- upon the --

16                   CHIEF JUSTICE ROBERTS: -- we would  
17 have thought, it's not so much even that the  
18 agency will keep its promise but that the agency  
19 will keep its promise to the government. I  
20 mean, right?

21                   I mean, are you suggesting just  
22 because the government told the agency to pay,  
23 that doesn't mean the agency has to?

24                   MR. KNEEDLER: No, no. Well, the  
25 agency -- the agency can't under the



1 Constitution because an appropriation is not  
2 available. And there is one other piece of the  
3 --

4 JUSTICE SOTOMAYOR: I'm sorry, let  
5 me -- let me stop there just a moment.

6 Following your analogy, and -- and I  
7 do understand it. You're saying it's not a  
8 contract with the recipients because this is an  
9 order to the Secretary. And the order --

10 MR. KNEEDLER: Yes.

11 JUSTICE SOTOMAYOR: -- to the  
12 Secretary says, devise a program, pay out this  
13 amount to the participants who suffer a  
14 shortfall, and it says that's the program you  
15 have to set up. So that's the program that they  
16 set up in 2014.

17 They give assurances that the  
18 government has promised to pay. And in 2015,  
19 they say, the appropriations bill limits how I  
20 can pay you, but it doesn't rescind and it  
21 doesn't tell me not -- that you won't be paid.  
22 They say that over and over again, 2014, at the  
23 end of it, 2015, 2016. The GAO manual, which is  
24 the bible for Congress, says what you tell the  
25 Secretary to do, he will do.

1                   So why isn't this an enforceable  
2 contract where the government is bound?

3                   The agency was -- acted consistent to  
4 the legislation and to the directives of  
5 Congress.

6                   MR. KNEEDLER: Well --

7                   JUSTICE SOTOMAYOR: He didn't offer  
8 the money, because he couldn't, but he did  
9 exactly what this bill told him to do.

10                  MR. KNEEDLER: The -- and -- and  
11 that's why the compliance for the Constitution  
12 and compliance with a statutory framework is not  
13 a violation of law that gives rise to an implied  
14 damage remedy in the -- in the court of claims.

15                  And one other piece of the --

16                  JUSTICE SOTOMAYOR: But you can't --  
17 you can't say to me that Congress is not  
18 empowered to empower the Secretary to act.  
19 Congress can tell the Secretary to enter a  
20 contract, can't he?

21                  MR. KNEEDLER: Yes, but if -- on that  
22 score, if I could just point out, 31 U.S.C.  
23 1302(d), Congress, in implementing its control  
24 over appropriations, has itself adopted a rule  
25 of construction.

1           And under -- under that statute, it  
2           says that a law shall not be construed to make  
3           an appropriation or to authorize contracts in  
4           advance unless it's -- specifically states so.  
5           That is clear -- an --

6           JUSTICE KAGAN: Mr. Kneedler --

7           MR. KNEEDLER: -- a fortiori --

8           JUSTICE KAGAN: Are -- are insurers  
9           obligated to pay in if they have excess profits?

10          MR. KNEEDLER: Yes, it is a user fee.

11          JUSTICE KAGAN: So this is one where  
12          the "shall pay in" is obligatory but the "shall  
13          pay out" on the part of the government is not  
14          obligatory?

15          MR. KNEEDLER: The -- the -- the pay  
16          in is not subject to -- is not an appropriations  
17          question. It's an obligation. And -- and --  
18          and that part -- that part of the arrangement,  
19          the -- the reciprocity in the -- in the program  
20          still exists, the payments in and pay --  
21          payments out, which is how I think most --

22          JUSTICE KAGAN: You pay in, that's  
23          obligatory. We commit ourselves to paying out.  
24          It turns out, if we feel like it. What -- what  
25          kind of -- what kind of a statute is that?

1           MR. KNEEDLER: I -- I -- I don't think  
2 that's a fair characterization because just like  
3 -- just like any -- just like any program where  
4 Congress directs the Secretary of whatever  
5 department to establish a program, the Secretary  
6 can't go forward with that without  
7 appropriations.

8           That includes a subsidy program. That  
9 includes a regulatory program. All manner of  
10 programs. And that's what happened here. It  
11 would be a dramatic change for this Court to say  
12 that when -- when Congress says that an agency  
13 shall establish a program and pay out money  
14 under that, that if Congress declines to  
15 appropriate the money for it, that gives rise to  
16 a implied cause of action in the -- under the  
17 Tucker Act.

18           We have three reasons why that  
19 shouldn't be so. Justice Ginsburg's point that  
20 against implied causes of action, the Amtrak  
21 case that says an act of Congress is not to be  
22 construed to create contractual or -- or vested  
23 rights in private persons, and the  
24 appropriations clause and its implementation in  
25 1302(d) that says, absent a clear statement an

1 Act shall not be -- not be read to be an  
2 appropriation or to provide contract authority.

3 The result the Petitioners seek here  
4 is essentially to make 1342 an appropriation as  
5 the source of money to be paid out under the  
6 judgment fund, but the judgment fund is  
7 available only if there's a violation. And  
8 there's no violation to begin with.

9 But even if -- even if you thought  
10 that there was a -- a commitment, a binding  
11 commitment of some sort, the Appropriations Act  
12 here, Congress clearly intended not to -- not to  
13 provide for payment.

14 So I think in respect for the way in  
15 which appropriations have been understood and  
16 Congress's power over appropriations have been  
17 understood for hundreds of years, it's important  
18 for this Court to not impose monetary -- an  
19 implied monetary liability under the -- under  
20 the Tucker Act and to extend Langston from its  
21 very modest context of a salary to which the  
22 statute said he was entitled, language that is  
23 not present here, to impose liability on the  
24 government in billions of dollars not --

25 JUSTICE KAVANAUGH: It's a modest

1 context --

2 MR. KNEEDLER: -- subject to a funding  
3 --

4 JUSTICE KAVANAUGH: -- but isn't it  
5 the same principle?

6 MR. KNEEDLER: I don't think it is the  
7 same principle because --

8 JUSTICE KAVANAUGH: And the  
9 distinction is the salary?

10 MR. KNEEDLER: The salary of someone  
11 who is working for the government, and one --  
12 the statute said he was entitled to it. Again,  
13 we don't have that here. But even without that  
14 language, I think one would -- one would think  
15 of someone working for the government, he's  
16 delivering services to the government, the pay  
17 that is owed him, is -- is in reciprocity for  
18 that.

19 That's far different from a subsidy  
20 program in which -- in which Congress without a  
21 contract, without a bilateral relationship,  
22 without an individualized promise, has made  
23 money available under a generalized subsidy  
24 program.

25 That's -- that is a huge, huge

1 difference. And all the cases in Justice  
2 Scalia's opinion, dissenting opinion in Bowen  
3 versus Massachusetts, are employment cases.  
4 And -- and he's saying, yes, you can go to the  
5 Tucker Act on employment cases, but -- but  
6 that's vastly different from the statutory  
7 arrangement we have here.

8 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
9 Kneedler.

10 Five minutes, Mr. Clement.

11 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

12 ON BEHALF OF THE PETITIONERS

13 MR. CLEMENT: Thank you, Mr. Chief  
14 Justice, and may it please the Court:

15 I'd like to just start off with  
16 Justice Kagan's point that the government takes  
17 the payment in obligation with the exact same  
18 language to be absolutely mandatory.

19 And I assure you, if one of my clients  
20 when presented with a bill said, well, we have a  
21 bunch of internal rules at our company and I  
22 actually can't disburse the funds until I get  
23 approval from the treasury division at our  
24 company, I don't think the government would be  
25 impressed by that and they certainly wouldn't

1 say that the mandatory obligation just somehow  
2 disappeared because the rule said we didn't have  
3 the funds to pay it at that particular moment.

4 I'd also like to talk about the  
5 subject to appropriations language because  
6 that's not just a feature of many other  
7 provisions of the Affordable Care Act. I asked  
8 one of my associates to look at how many times  
9 that appears in the U.S. Code. When he gave me  
10 200, I told him he could stop.

11 This is a recurring provision in the  
12 U.S. Code and they would wipe out 200 references  
13 to subject of appropriations, they would mean  
14 absolutely nothing.

15 Text matters here. Obviously, they  
16 don't want to talk about the text of the  
17 appropriations riders, because the text doesn't  
18 have language that says repeal, it doesn't limit  
19 payments out to payments in. It doesn't even  
20 have the "this or any other act" language that  
21 was at issue in Will or Dickerson.

22 And to be clear, that's not because  
23 Congress forgot how to use that phrase. The  
24 same 2015 Appropriations Act had multiple  
25 provisions that failed to appropriate funds and



1 said no funds available under this or any other  
2 act.

3           There were also provisions in that  
4 same 2015 appropriations bill that expressly  
5 repealed substantive provisions. So Congress  
6 knows how to repeal. It knows how to  
7 emphatically limit funds. It didn't do that  
8 here.

9           Another point that I want to make  
10 clear here is just my friend has used the term  
11 "subsidy" a lot in describing this program.  
12 This really doesn't feel like a subsidy because  
13 nobody -- none of my clients get paid a penny  
14 unless they suffer actual losses.

15           So this is not a great subsidy  
16 program, if the only way you can get paid a  
17 penny is if you lose lots of money by losing  
18 money by providing your products on the  
19 exchanges, so what I would describe this program  
20 as is essentially more like an insurance  
21 program.

22           The government says we very much want  
23 you to do this, and if you do it and lose money  
24 in the process, we shall pay a percentage of  
25 your losses. That's why this retroactivity here

1 is so pernicious, because what could be worse  
2 than getting an insurance policy and at the  
3 point that you actually suffer a loss and try to  
4 make a claim, they say: Oh, I'm sorry, we -- we  
5 just decided we weren't going to fund that  
6 policy, even though you performed, even though  
7 you suffered actual losses. So I really  
8 wouldn't describe this as a subsidy program.

9 My friend on the other side suggested  
10 that there's no case law one way or another on  
11 this. I just respectfully disagree.

12 I think White Mountain Apache, I think  
13 Mitchell, the 1983 Mitchell decision, sometimes  
14 referred to as Mitchell II, are cases where this  
15 Court said there's money mandating directly from  
16 a statute. And those were Indian trust cases  
17 where the direction was much less specific than  
18 this.

19 You shall administer this property in  
20 a trust. And the Court found an action there.  
21 There you really had to do some inferring and  
22 some implying to get to the cause of action, not  
23 so with respect to this kind of direct "shall  
24 pay" obligation.

25 My friend also relied a lot on the

1 Amtrak case. I think it's worth taking a closer  
2 look at that case, because the kind of contract  
3 at issue there was the kind of contract that  
4 would essentially bind the federal government in  
5 perpetuity and prevent them even from taking  
6 action prospectively.

7           So there it was basically about  
8 whether the employees of the railroads that got  
9 consolidated into Amtrak were going to get  
10 essentially a free pass for life. And the Court  
11 in that context said, well, we don't want to  
12 bind future Congresses forever on that.

13           But this is different. This is  
14 whether you're going to be bound to a contract  
15 where the counterparty has already performed to  
16 their detriment. And in those circumstances, I  
17 don't think there should be any special rule.

18           Again, I think the two paragraphs in  
19 the Bowen dissent are exactly right. I think  
20 this is a unilateral contract that's accepted  
21 through performance, and then the government has  
22 to pay.

23           But if for some reason you think you  
24 don't get a contract unless the statute says the  
25 word contract, then you just treat it as a

1 statutory obligation to pay.

2 My friend said that all those cases  
3 that Justice Scalia relied on are salary cases.  
4 That's not actually true. There are also  
5 pension benefit cases there for pensions that  
6 are available or special benefits that are  
7 available to law enforcement officers and  
8 firefighters.

9 So this is not some principle that's  
10 been limited strictly to the context of salary  
11 provisions.

12 And my final point is on what Congress  
13 was trying to accomplish here. There is no  
14 question that they wanted to get the insurance  
15 companies to provide these policies. But there  
16 is equally no question that they wanted the  
17 premiums to be relatively low.

18 And in thinking about the billions of  
19 dollars that this failure to uphold their  
20 obligations is going to cost the government, you  
21 shouldn't lose sight of the fact that they also  
22 saved billions of dollars in tax subsidies by  
23 reducing the premiums through this -- through  
24 this commitment.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel. The case is submitted.  
3 (Whereupon, at 11:11 a.m., the case  
4 was submitted.)

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