Affordable Care Act — Risk Corridors Program — Government Liability — Maine Community Health Options v. United States

The Patient Protection and Affordable Care Act[1] (ACA), enacted in 2010, contained a number of provisions meant to encourage health insurers to provide services to previously uninsured individuals at reasonable cost — a potentially risky business proposition.[2] One of these initiatives, the Risk Corridors program, would operate for three years and reimburse insurers that had suffered unexpected losses using money paid by profitable insurers and, potentially, federal funds.[3] Insurers' losses turned out to be higher than expected, such that payments from profitable insurers would not be enough to cover them and taxpayers might be on the hook.[4] Faced with this liability, Congress in 2015 attached a rider to an appropriations bill stipulating that none of the funds made available by the bill could be used to cover the program's deficit — and did so again for the next two years.[5] The government never paid the insurers.[6] Last Term, in *Maine Community Health Options v. United States*,[7] the Supreme Court held that insurers with losses who had participated in the Risk Corridors program were entitled to payment, and that the riders had not repealed the government's obligation to them.[8] Justice Sotomayor's opinion was able to achieve a near consensus by resolving the case through formalist reasoning grounded in precedent and statutory text. While the opinion's formalism likely attracted the votes of even the Court's staunchest textualists, the Justice alluded obliquely to the functional considerations animating the decision and was able to achieve principled agreement rather than a muddled compromise. Justice Sotomayor's reliance on modest and formalist reasoning in a case pulsing with contentious issues illustrates a way to seek consensus in the Roberts Court.[9]

Through the Risk Corridors program, Congress essentially insured the insurers: the government would compensate health insurers whose losses exceeded a certain amount, while plans with profits greater than

---

[1] Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

[2] Me. Cmty. Health Options v. United States, 140 S. Ct. 1308, 1316 (2020).

[3] *Id.*

[4] *Id.* at 1317–18.

[5] *Id.* at 1317.

[6] *Id.* at 1315.

[7] 140 S. Ct. 1308.

[8] *Id.* at 1319.

[9] *Cf.* Bostock v. Clayton County, 140 S. Ct. 1731, 1746 (2020) (holding, through a textualist mode of analysis, that Title VII bars discrimination based on gender identity or sexual orientation, in a 6–3 opinion).

a threshold figure would hand the government part of the earnings.[10] The hope, presumably, was that payments and receipts would match, with little effect on the government budget. But from 2014 to 2016, the three years in which the program was set to operate, the amount owed to unprofitable plans far exceeded compensation from profitable ones, and the gap grew to more than $12 billion.[11] Concerned with the prospect of such an outlay, Congress passed appropriations bills with riders providing that the funds disbursed to the Centers for Medicare and Medicaid Services (CMS), the agency tasked with collecting and remitting the Risk Corridors payments on behalf of the Secretary of Health and Human Services (HHS), could not be used to pay loss-making insurers.[12] Still, both CMS and HHS informed program participants that the government would fully compensate them for the shortfall.[13]

The HHS Secretary eventually paid insurers a prorated amount based on how much the Department had received from profitable insurers, rather than the full amount as calculated by the statutory formula.[14] Dozens of insurers then sued the government in the Court of Federal Claims, invoking jurisdiction under the Tucker Act[15] and seeking damages for the remaining balance as contemplated by the statute.[16] Results in the trial courts were mixed.[17]

In each appeal, a divided panel of the Court of Appeals for the Federal Circuit ruled against the insurers.[18] Writing for the majority, Chief Judge Prost[19] found that in establishing the Risk Corridors program, section 1342 of the ACA[20] "created an obligation of the government to pay participants in the health benefit exchanges the full amount indicated by the statutory formula."[21] Such an obligation remains even if Congress does not appropriate funds to cover it.[22] However, the court held that certain provisions in the appropriations bills had implicitly repealed the government's obligation to pay unprofitable insurers any

---

[10] *Me. Cmty. Health*, 140. S. Ct. at 1316.

[11] *Id.* at 1317–18.

[12] *Id.*

[13] *Id.* at 1316–17.

[14] Moda Health Plan, Inc. v. United States, 892 F.3d 1311, 1319 (Fed. Cir. 2018).

[15] 28 U.S.C. § 1491.

[16] *Moda Health Plan*, 892 F.3d at 1319–20.

[17] *Id.* at 1319 (citing Molina Healthcare of Cal., Inc. v. United States, 133 Fed. Cl. 14 (2017); Me. Cmty. Health Options v. United States, 133 Fed. Cl. 1 (2017)).

[18] *Me. Cmty. Health*, 140 S. Ct. at 1318.

[19] Chief Judge Prost was joined by Judge Moore in her opinion and each companion case. *See* Land of Lincoln Mut. Health Ins. Co. v. United States, 892 F.3d 1184, 1186 (Fed. Cir. 2018); Blue Cross & Blue Shield of N.C. v. United States, 729 F. App'x 939 (Fed. Cir. 2018) (mem.); Me. Cmty. Health Options v. United States, 729 F. App'x 939 (Fed. Cir. 2018) (mem.).

[20] 42 U.S.C. § 18062.

[21] *Moda Health Plan*, 892 F.3d at 1322.

[22] *Id.* at 1321.

amount exceeding what it received from profitable ones.[23] Judge Newman dissented, arguing that the appropriations riders fell short of the "explicit legislative statement and action" that would be required to cancel the government's obligation.[24] The Federal Circuit denied the insurers' petition for rehearing en banc.[25] The Supreme Court granted certiorari, consolidating four insurers' cases.[26]

The Supreme Court reversed and remanded.[27] Writing for the Court, Justice Sotomayor[28] found that the appropriations riders had not repealed the government's obligation to pay the insurers.[29] The majority first considered whether there was an obligation.[30] Although the typical sequence involves "authorizing appropriations" and "designating . . . funds" *before* a government agent incurs an obligation, that order is not absolute.[31] Congress can incur an obligation directly through statute without first earmarking the funds to satisfy it.[32] Interpreting the text of section 1342, the majority emphasized the statute's use of the mandatory "shall" in "shall pay," as distinguished from the discretionary "may" found in other parts of the statute.[33] The "plain terms" of the statute commanded the government to pay, and nothing in it suggested that outflows to insurers were limited to inflows from insurers.[34] Qualifying the statute in such a way in the absence of such language would "conflict with wellsettled [sic] principles of statutory interpretation," given that other provisions of the ACA were "expressly limited . . . to available appropriations."[35] If implicit in section 1342, that limitation would be superfluous in other parts of the statute.[36] Additionally, the Court found that neither the Appropriations Clause of the Constitution nor the Anti-Deficiency Act,[37] which restrict government agents' ability

---

[23] *Id.* at 1322.

[24] *Id.* at 1333 (Newman, J., dissenting).

[25] Moda Health Plan, Inc. v. United States, 908 F.3d 738, 740 (Fed. Cir. 2018). Judge Newman and Judge Wallach both dissented from the denial, emphasizing policy considerations. *See id.* at 740 (Newman, J., dissenting); *id.* at 748 (Wallach, J., dissenting).

[26] *Me. Cmty. Health*, 140 S. Ct. at 1318.

[27] *Id.* at 1331.

[28] She was joined in full by Chief Justice Roberts and Justices Ginsburg, Breyer, Kagan, and Kavanaugh, and joined in part by Justices Thomas and Gorsuch.

[29] *Me. Cmty. Health*, 140 S. Ct. at 1323.

[30] *Id.* at 1319.

[31] *Id.*

[32] *Id.* at 1320 (citing United States v. Langston, 118 U.S. 389, 394 (1886)).

[33] *Id.* at 1320–21 (citing Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1972 (2016)).

[34] *Id.* at 1322.

[35] *Id.* The Court also provided many other examples of statutes where payments are expressly conditioned on the availability of appropriations. *Id.* at 1322 n.7.

[36] *Id.* at 1323.

[37] 31 U.S.C. § 1341.

to "make or authorize payments without appropriations,"[38] was applicable when Congress itself created an obligation by statute.[39]

The Court then evaluated the effect of the appropriations riders purporting to limit funding for the Risk Corridors program.[40] They had not expressly repealed section 1342, and their language was not clear enough to accomplish a "repeal by implication," which is strongly disfavored.[41] Analogizing to century-old cases where Congress had "appropriated a lesser amount" than contemplated by prior statutory obligations, the Court found that "a mere failure to appropriate does not repeal or discharge an obligation to pay."[42] An implicit repeal would "raise serious questions," in this case, about whether the "insurers' right to payment" had been "retroactively impaired."[43] Also significant was the relevant agencies' view that the riders had not eliminated the government's obligation to the insurers.[44] The Court proceeded to analyze two situations where an implied repeal had previously been found.[45] First were cases where an appropriations bill had prospectively suspended the obligation or restricted funding from *any* act, and had done so before the government had incurred the obligation.[46] In this case, by contrast, the riders shut off a particular source of funding, but not all others, and did so after an obligation had already accrued.[47] Second were cases where the statutory formula for calculating an obligation had been substantially altered,[48] which was not the case here.[49] In the one part of the opinion not joined by Justices Thomas and Gorsuch, the majority assessed two pieces of legislative history relied on by the court of appeals, a floor statement and an unpublished letter from the Government Accountability Office.[50] It determined that neither constituted enough evidence of "clear congressional intent" to repeal the obligation.[51]

Concluding that the insurers had a valid claim, the Court then addressed whether they were entitled to a suit for damages under the

---

[38] *Me. Cmty. Health*, 140 S. Ct. at 1321.

[39] *Id.*

[40] *Id.* at 1323.

[41] *Id.* at 1323–24.

[42] *Id.* at 1324 (citing United States v. Langston, 118 U.S. 389, 393–94 (1886); United States v. Vulte, 233 U.S. 509, 514–15 (1914)).

[43] *Id.*

[44] *Id.* at 1324–25 ("Had Congress 'clearly expressed' its intent to repeal, one might have expected HHS or CMS to signal the sea change." (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974))).

[45] *Id.* at 1325.

[46] *Id.* (citing United States v. Will, 449 U.S. 200 (1980); United States v. Dickerson, 310 U.S. 554 (1940)).

[47] *Id.*

[48] *Id.* at 1325–26 (citing United States v. Mitchell, 109 U.S. 146 (1883); United States v. Fisher, 109 U.S. 143 (1883)).

[49] *Id.* at 1326.

[50] *Id.* at 1326–27.

[51] *Id.*

Tucker Act in the Court of Federal Claims.[52] The Tucker Act waives sovereign immunity in certain circumstances but does not itself create "substantive rights."[53] In order to prevail, the plaintiff's claim must rest on a statute that "can fairly be interpreted as mandating compensation from the federal government."[54] Unqualified "money-mandating provisions are uncommon," but section 1342 is "one of the rare laws" that meets the hurdle.[55] Its mandatory "'shall pay' language . . . reflects congressional intent 'to create both a right and a remedy' under the Tucker Act."[56] And the statute does not contain its own "separate remedial scheme," which would take precedence over the Tucker Act's.[57] Nor was the Administrative Procedure Act the proper avenue for relief, as the insurers had not requested declaratory or injunctive relief.[58] The fact that the financial relationship between the insurers and the federal government did not involve ongoing transactions also made it more suited to resolution through the Tucker Act.[59] Justice Sotomayor ended her opinion by nodding to the importance of preserving the public credit through the government's "honor[ing] its obligations."[60]

Justice Alito dissented, taking issue with the majority's implication of a right of action and a damages remedy from the statute.[61] He criticized the majority opinion as being inconsistent with a post-*Erie* understanding of federal jurisdiction[62] and saw tension with recent cases that had refused to imply new causes of action for damages against federal officers.[63] The dissent suggested that there was little difference between the "rights-mandating language" of the provisions in those cases, which did not create a right to damages, and the "'money-mandating' language" of section 1342, which did (as the majority held).[64] Justice Alito then compared the Tucker Act with the Alien Tort Statute, both jurisdictional statutes that did not themselves grant causes of action, and submitted that the Court's money-mandating interpretation of section 1342 was "in stark tension" with the "great caution" it exercised when

---

[52] *Id.* at 1327.
[53] *Id.* (quoting United States v. Navajo Nation, 556 U.S. 287, 290 (2009)).
[54] *Id.* at 1328 (quoting United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003)).
[55] *Id.* at 1329.
[56] *Id.* (quoting Bowen v. Massachusetts, 487 U.S. 879, 906 n.42 (1988)).
[57] *Id.* at 1329–30.
[58] *Id.* at 1330.
[59] *Id.* at 1330–31.
[60] *Id.* at 1331.
[61] *Id.* at 1332 (Alito, J., dissenting).
[62] *Id.* at 1334.
[63] *Id.* at 1333–34 (citing Hernández v. Mesa, 140 S. Ct. 735, 743, 749–50 (2020)).
[64] *Id.*

considering whether to infer new common law claims in the latter context.[65] Implying a private right of action where Congress had not provided one, the majority's interpretation constituted "a massive bailout for insurance companies."[66] Justice Alito concluded by pointing to the lack of briefing on the relationship between "inferring rights of action in Tucker Act cases" and the Court's "broader jurisprudence."[67]

The majority accused the dissent of expecting "magic words" when Congress wants to create a cause of action.[68] Forgoing spells, the Court accepted an obvious inference from the money-mandating statute,[69] even as it shut its eye to the practical import of the appropriations riders, demanding that the text be explicit.[70] The Court justified these differing standards by reference to precedent.[71] But beneath the formalism of this nearly unanimous opinion, a number of considerations — the lawmaking process, the issue of deference to agencies, and the role of purposivism — likely played an unacknowledged role. By alluding to these functional considerations but not explicitly relying on them in her reasoning, Justice Sotomayor created a narrow and formalist middle ground that managed to attract broad agreement and still achieve functionalist ends. Her opinion provides a model for incorporating purposivist and pragmatic concerns into the Roberts Court's statutory interpretation jurisprudence.

Among the unacknowledged functional considerations driving the majority's decision, there may have been a concern with appropriations riders' serving as vehicles for substantive policymaking. There are significant differences between the process used to enact legislation that authorizes agencies to implement congressional policy (the authorization process) and the process used to pass laws that fund those agencies (the appropriations process).[72] Usually, Congress assigns authorization bills to specialized congressional committees with the relevant subject matter expertise.[73] Those committees study the bill and hold public hearings on it where experts can testify.[74] Members of Congress and citizens who are interested in the bill have "many opportunities" to scrutinize it and

---

[65] *Id.* at 1334–35 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 728 (2004)).

[66] *Id.* at 1332.

[67] *Id.* at 1335.

[68] *Id.* at 1328 n.12 (majority opinion).

[69] *See id.* at 1328–29.

[70] *See id.* at 1323. *Contra* Moda Health Plan, Inc. v. United States, 892 F.3d 1311, 1329 (Fed. Cir. 2018) ("We simply hold that the appropriations riders carried the clear implication of Congress's intent to prevent the use of taxpayer funds to support the risk corridors program.").

[71] *See, e.g.*, *Me. Cmty. Health*, 140 S. Ct. at 1324–25.

[72] *See* Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 633, 653–55 (2006) (describing the procedural differences).

[73] *See id.* at 653–55; Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENV'T L. REV. 457, 501 (1997).

[74] *See* Lazarus, *supra* note 72, at 657.

express their opinions.[75] With appropriations bills, by contrast, the committee with subject matter expertise does not normally weigh in;[76] instead, an appropriations committee takes charge of the bill.[77] Unlike authorization committees, appropriations committees are not usually subject to the procedural safeguards meant to encourage "deliberation and transparency" in substantive lawmaking.[78] Indeed, typical appropriations hearings focus on financial considerations rather than "the substantive merits of a proposal."[79]

Policy riders can therefore ride their way to enactment with little notice. As such, the practice of attaching riders with policy implications to appropriations bills has been condemned by commentators.[80] While some have proposed reform of Congress's rules and procedures as a solution to this problem,[81] the Court could also address it through a rule of statutory interpretation mandating that appropriations riders with significant policy implications be "narrowly construed."[82] But this rule would probably face opposition from textualist Justices, because "honest textualist[s]," according to Justice Scalia, ought to resist rules of narrow construction as "unpredictabl[e]" and "arbitrar[y]" departures from the text.[83] Forgoing the debate, the *Maine Community Health* Court did not announce such a rule, nor did it take special note of the fact that a major policy change had been hitched to the appropriations wagon. The Court simply remarked, without further elaboration, that its "aversion to implied repeals is 'especially' strong 'in the appropriations context'"[84] — leaving unsaid any doubts it may have had about the quality of the legislative process in those instances. But an awareness of Congress's short-circuited procedure for appropriations bills may have raised the already high implied-repeals bar even higher.

The fact that the two agencies charged with implementing the Risk Corridors program had consistently agreed with the insurers' position[85]

---

75 Zellmer, *supra* note 73, at 500.

76 *See* Lazarus, *supra* note 72, at 653.

77 *See id.* at 653, 655.

78 William Alan Nelson, *Unfaithful Execution of the Law: Congressional Interference with Agency Decision-Making*, 42 SETON HALL LEGIS. J. 95, 120 (2017); *see id.* at 119–20.

79 Lazarus, *supra* note 72, at 655.

80 *See, e.g.*, *id.* at 632; Zellmer, *supra* note 73, at 503–04.

81 *See* Lazarus, *supra* note 72, at 678–80.

82 Geoffrey Christopher Rapp, Case Note, *Low Riding*, 110 YALE L.J. 1089, 1090 (2001).

83 Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 28 (Amy Gutmann ed., 1997). Indeed, this Term, Justice Gorsuch rejected a narrow construction of Title VII as being inconsistent with the expansive reach of the text. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1740–41 (2020).

84 *Me. Cmty. Health*, 140 S. Ct. at 1323 (quoting Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 440 (1992)).

85 *See id.* at 1316–17, 1324–25.

may have also influenced the Court's interpretation, although this consideration was not squarely addressed either. Agencies are often charged with implementing and so interpreting legislative schemes, such that they, rather than courts, are the "first" or even "primary" interpreters of many statutes.[86] Therefore, some commentators have called for courts to attend to agencies' views when interpreting statutes.[87] But outside the context of *Chevron*,[88] which applies to an agency's interpretation of a statute "it administers,"[89] it is unclear what degree of deference, if any, courts should give to agencies' interpretations of statutes *generally*. On the one hand, unlike a substantive statute whose implementation is entrusted to an agency, the appropriations rider at issue cannot reasonably be seen as an implicit delegation to the agencies to fill in its gaps (the justification for *Chevron* deference[90]). Rather than delegate discretion, the rider simply imposes a condition on the agencies' finances.[91] On the other hand, the agencies' subject matter expertise may lend credibility to their interpretation of the rider, and *Chevron* and its progeny emphasize expertise as a reason to defer to agencies.[92]

A petitioner's brief called for the Court to defer, based on *Chevron*, to the agencies' interpretation if it found the rider to be ambiguous,[93] but the Court did not address the argument. The issue is highly contentious, and Justices Thomas and Gorsuch, who joined the majority, have expressed skepticism of the *Chevron* doctrine.[94] Justice Sotomayor did not explicitly give the agencies' view any weight or suggest that it was persuasive, but she presented it as a circumstantial piece of evidence confirming her textual and precedent-bound analysis: if Congress had clearly meant to repeal the obligation, the relevant agencies would have understood and conveyed this intention.[95] This interpretive move operates similarly to the so-called "dog that did not bark" canon, according to which "Congress's failure to comment, in the legislative record, on a substantial change effected by a law" suggests that such a change was

---

[86] *See* ROBERT A. KATZMANN, JUDGING STATUTES 23 (2014).

[87] *See, e.g.*, *id.* at 27.

[88] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[89] *Id.* at 842.

[90] *See id.* at 843–44.

[91] *See Me. Cmty. Health*, 140 S. Ct. at 1317.

[92] *See Chevron*, 467 U.S. at 865; *see also* Kisor v. Wilkie, 139 S. Ct. 2400, 2417 (2019).

[93] Brief for Petitioner Land of Lincoln at 26–27, *Me. Cmty. Health*, 140 S. Ct. 1308 (Nos. 18-1023, 18-1028, 18-1038).

[94] *See, e.g.*, Baldwin v. United States, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting from denial of certiorari) (noting that *Chevron* "is in serious tension with the Constitution, the APA, and over 100 years of judicial decisions"); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) ("*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty.").

[95] *See Me. Cmty. Health*, 140 S. Ct. at 1324–25.

not intended.[96] The Court did not expressly invoke the canon, the use of which is controversial,[97] but its inference worked alike. And, in practice, it served to extend deference to the agencies' view, albeit implicitly. Significantly, Justices who are skeptical of deference to agencies signed on to the majority opinion.[98]

Some Justices may have also taken heed of the purpose of the Risk Corridors program in the operation of the ACA. Justice Sotomayor noted the risks involved in insuring a previously uninsured group of people, and the program's role as one of "several risk-mitigation programs" meant to induce private insurers to participate in the ACA's exchanges.[99] At the end, she emphasized that the government should keep its word if it wants to be "trusted," and quoted Alexander Hamilton's First Report on the Public Credit.[100] In the report, the Framer also stated that if the public credit is "in any degree questionable," the country would have to pay an "extravagant premium, in one shape or another," in its financial dealings.[101] At oral argument, counsel for the petitioners began and ended with the mirror image of this point: because insurers trusted the public credit, the government had been able to save money.[102] By mitigating insurers' risk and inducing them to charge lower premiums, the government ultimately paid out less money in tax subsidies to buyers of insurance.[103] The Court's opinion did not explicitly address this point, but its suggestion in quoting Hamilton was clear: the government benefited from the insurers' trust, and future cooperation, on favorable terms, between the government and the private sector requires solicitude for the public credit.

The majority's reasoning did not overtly embrace such purposivism, relying instead on a careful analysis of precedent (much of it more than a century old) and, especially, the text.[104] But while guided by those formal constraints, the Court's interpretations of the Risk Corridors

---

96 Anita S. Krishnakumar, *The Sherlock Holmes Canon*, 84 GEO. WASH. L. REV. 1, 2 (2016).

97 *See, e.g.*, Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 73–74 (2004) (Scalia, J., dissenting) (criticizing the "Canon of Canine Silence" invoked by the majority, particularly when used to contradict the clear text of the statute).

98 While Justices Thomas and Gorsuch took care not to join the part of the opinion discussing legislative history, they joined the rest of the opinion. *See Me. Cmty. Health*, 140 S. Ct. at 1314, 1326–27.

99 *Id.* at 1315–16.

100 *Id.* at 1331 (quoting 6 ALEXANDER HAMILTON, *Report Relative to a Provision for the Support of Public Credit* (1790), *reprinted in* THE PAPERS OF ALEXANDER HAMILTON 61, 68 (Harold C. Syrett & Jacob E. Cooke eds., 1962)).

101 HAMILTON, *supra* note 100, at 67.

102 *See* Transcript of Oral Argument at 5–6, 67, *Me. Cmty. Health*, 140 S. Ct. 1308 (Nos. 18-1023, 18-1028, 18-1038).

103 *Id.*

104 *See Me. Cmty. Health*, 140 S. Ct. at 1321–24.

statute and the appropriations riders were consistent with its characterization of the program as a way to mitigate risk for insurers. Accordingly, whereas the bar for textual clarity was set low for the money-mandating provision's immunity waiver, it was set high for the riders' repeal of the government's obligation. Professor Richard Re has argued that the Roberts Court takes "purposive and pragmatic considerations" into account when determining the "degree of textual support demanded."[105] Dean John Manning has similarly noted a "new, textually constrained purposivism" in the Court's opinions.[106] The majority opinion justified on the basis of precedent its "set[ting] the bar for textual clarity"[107] differently in the money-mandating versus the implied-repeal context,[108] without explicitly providing reasons for why they should differ.[109] But purposivist considerations may have played a role, in an instance of the new purposivism that commentators have identified.

As Justice Alito highlighted in his dissent, the Court's decision has the effect of awarding billions of taxpayer dollars to the petitioners even though Congress had refused to appropriate the money.[110] In spite of the magnitude of the issue, the Court stood almost united as it ordered the government to open the public purse, with no concurrences qualifying its reasoning and only one dissent (which did not so much question the Court's analysis as call for a reevaluation of the doctrine in the field[111]). Justice Sotomayor's opinion was able to attract a near consensus by grounding its reasoning in formal constraints. Although unresolved debates about the validity of policy riders, the issue of deference to agency interpretations, and the role of statutory purpose may have roiled beneath the surface of the decision, the Court did not commit itself to a position on those issues, but only gestured toward them, *sotto voce*. The case shows the continued relevance of the passive virtues, and the possibility of achieving consensus by resting on the narrow grounds of agreement rather than the gulfs that separate the Justices.

---

105 Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407, 417 (2015); *see also id.* at 421 ("[W]hen a statute's central objective is at risk or an otherwise plausible reading leads to alarming results, believers in the New Holy Trinity hold the text to a higher-than-normal standard.").

106 John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 148; *see id.* at 116–17, 141–42, 146–47.

107 Re, *supra* note 105, at 417.

108 *See Me. Cmty. Health*, 140 S. Ct. at 1323, 1328.

109 The dissent noted that the cases relied on by the majority had articulated the money-mandating standard without "provid[ing] a reasoned explanation" for it. *Id.* at 1333 (Alito, J., dissenting).

110 *Id.*

111 *See id.* at 1332–33, 1335.