APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2022-1377

INDIANA MUNICIPAL POWER AGENCY, Missouri Joint Municipal Electric Utility Commission, Northern Illinois Municipal Power Agency, American Municipal Power, Inc., Illinois Municipal Electric Agency, Kentucky Municipal Power Agency,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

[Decided: February 17, 2023]

Before Prost, Reyna, and Hughes, Circuit Judges.

Opinion

Hughes, Circuit Judge.

On appeal is the Court of Federal Claims' judgment that sequestration applies to reduce government payments for Build America Bonds and that Appellants do not have a contractual right to these payments. We affirm and adopt the trial court's reasoning.

I

Congress passed the American Recovery and Reinvestment Act of 2009 (ARRA) to stabilize the U.S. economy in the wake of the 2008 financial crisis.

Pub. L. No. 111-5, 123 Stat. 115 (2009). Section 1531 of the ARRA created two types of government-subsidized bonds called Build America Bonds (BABs). § 1531, 123 Stat. at 358-360.

The type of bonds at issue, "Direct Payment BABs," entitled bond issuers to a tax refund from the U.S. Department of the Treasury ("Treasury") equal to 35 percent of the interest paid on their BABs. Treasury annually pays issuers of BABs upon receiving a timely Form 8038-CP filed by the issuers. I.R.S. Notice 2009-26, § 3.1. The payments are funded by the permanent, indefinite appropriation for refunds of internal revenue collections. 31 U.S.C. § 1324 (providing for the appropriation of "[n]ecessary amounts . . . for refunding internal revenue collections").

Appellants are a group of local power agencies that collectively issued over four billion dollars in qualifying Direct Payment BABs before January 1, 2011. From January 2010 through the end of 2012, Treasury paid the full 35 percent of the bonds' interest payments.

In 2011 and 2013, Congress passed legislation reviving sequestration: "[T]he cancellation of budgetary resources provided by discretionary appropriations or direct spending law." 2 U.S.C. §§ 900(c)(2), 901(a); *see* Budget Control Act, Pub. L. No. 112-25, 125 Stat. 240 (2011); American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (2013). Pursuant to this sequestration legislation, Treasury stopped making payments to Appellants at the rate of 35 percent. Instead, since 2013, Appellants have been paid the reduced rates as determined by the Office of Management and Budget's sequestration calculations. For example, 2013 payments were

reduced from 35 percent to 8.7 percent in accordance with the 2013 sequestration rate.

On December 30, 2020, Appellants filed a complaint with the Court of Federal Claims, which was later amended. The amended complaint seeks the full 35 percent of interest payments for 2013-2030[1] under two theories: (1) a statutory theory that the Government violates § 1531 of the ARRA by not making the full 35 percent payments, and (2) a contractual theory that the Government has breached a contract that arises out of § 1531. The Government moved to dismiss for failure to state a claim, and the Court of Federal Claims agreed that (1) no statutory claim existed because sequestration applied to these payments, and (2) no contractual claim existed because the ARRA did not create a contract between the government and Appellants.

Appellants filed a motion for reconsideration, which was denied. They now appeal the order granting the Government's motion to dismiss and the order denying reconsideration. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

II

We review the Court of Federal Claims' dismissal for failure to state a claim and issues of statutory interpretation de novo. *Turping v. United States*, 913 F.3d 1060, 1064 (Fed. Cir. 2019); *Genentech, Inc. v. Immunex R.I. Corp.*, 964 F.3d 1109, 1111 (Fed. Cir. 2020). We review the Court of Federal Claims' denial for reconsideration for abuse of discretion. *Entergy Nuclear FitzPatrick, LLC v. United States*, 711 F.3d 1382, 1386 (Fed. Cir. 2013).

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[1] Plaintiffs' amended complaint seeks payments through 2030 because sequestration has been extended through that date. J.A. 4-5.

III

Having considered all of Appellants' arguments, we find no basis to overturn the decision of the trial court and agree with the trial court's well-reasoned analysis. As for Appellants' statutory claim, we agree that sequestration applies to Direct Payment BABs because these payments are issued from the permanent, indefinite appropriation provided by 31 U.S.C. § 1324, which constitutes direct spending. As for Appellants' contractual claim, we agree that Appellants did not plead the elements of a contract because they rely solely on a statutory provision that does not create a government contract.

We therefore affirm the trial court's judgment and adopt its published opinions[2] as our own.

AFFIRMED

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[2] *Ind. Mun. Power Agency v. United States*, 154 Fed. Cl. 752 (2021); *Ind. Mun. Power Agency v. United States*, 156 Fed. Cl. 744 (2021).

UNITED STATES COURT OF FEDERAL CLAIMS

No. 20-2038C

INDIANA MUNICIPAL POWER AGENCY, et al.,
Plaintiff,

v.

UNITED STATES,
Defendant.

[Filed: November 15, 2021]

MEMORANDUM OPINION AND ORDER

HERTLING, Judge

The plaintiffs have filed a timely motion under both Rule 59(a) and Rule 60(b)(1) of the Rules of the Court of Federal Claims ("RCFC") for reconsideration of the Court's judgment entered on July 23, 2021. (ECF 27.) The plaintiffs argue that the Court committed "clear legal error" resulting in "manifest injustice." (ECF 27 at 3.)

The Court finds that once again the plaintiffs have misapprehended federal law and failed to recognize that the Court already implicitly rejected the argument they advance in support of their motion. *See Ind. Mun. Power Agency v. United States*, 154 Fed. Cl. 752, 762 (2021). The plaintiffs' motion is denied.

I. BACKGROUND

The plaintiffs are public-sector power providers. They all issued Direct Payment Build America Bonds ("BABs"), authorized by section 1531 of the American

Recovery and Reinvestment Act of 2009 ("ARRA"), Pub. L. No. 111-5, 123 Stat. 115 (2009). Under the ARRA, issuers of Direct Payment BABs are entitled to a tax refund from the Internal Revenue Service ("IRS") of 35 percent of the interest payable under the BABs. The plaintiffs alleged that the defendant, the United States, acting through the Treasury Department and the IRS, stopped making payments to the plaintiffs based on the ARRA's 35-percent rate in 2013. The plaintiffs alleged that, since 2013, the defendant had been violating its statutory obligation to pay 35 percent of the interest payable under their Direct Payment BABs.[1]

The defendant moved to dismiss the complaint under RCFC 12(b)(6) for failure to state a claim upon which relief can be granted. The focus of the defendant's argument was that the Budget Control Act and the Taxpayer Relief Act implemented sequestration of direct spending, defined as "budget authority provided by law *other than appropriation Acts*." 2 U.S.C. § 900(c)(8) (emphasis added); *see also id.* § 906(k)(1). The defendant argued that the tax refunds for the plaintiffs' Direct Payment BABs were subject to that sequestration. A central issue regarding the motion to dismiss was whether 31 U.S.C. § 1324, the provision appropriating funds for the payment of tax refunds for Direct Payment BABs, was direct spending or

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[1] The plaintiffs also alleged that section 1531 of the ARRA created a contractual agreement with the defendant and that the defendant's failure to pay at the 35-percent rate breached that contract. The Court rejected that claim and granted the defendant's motion under RCFC 12(b)(6) to dismiss it. In their motion under RCFC 59 and 60, the plaintiffs do not challenge this aspect of the Court's prior ruling, and, as a result, this opinion does not address that aspect of the plaintiffs' initial claims.

spending pursuant to an "appropriation Act." *Ind. Mun. Power Agency*, 154 Fed. Cl. at 759-63. If the funds for the payment of tax refunds to the plaintiffs for their Direct Spending BABs were spent pursuant to an "appropriation Act" they would not be subject to sequestration, and the plaintiffs could state a claim.

The Court held that the tax refunds owed under the ARRA for Direct Payment BABs constituted "direct spending" and were, accordingly, subject to sequestration. *Id.* at 763. The defendant's motion to dismiss was granted. *Id.* at 769.

After entry of judgment, the plaintiffs filed a timely motion under RCFC 59(a), seeking reconsideration of the Court's ruling. (ECF 27.) The plaintiffs argue that the Court's ruling was legally incorrect and has caused "undisputable manifest injustice." (*Id.* at 7.) The plaintiffs posit that, regardless of whether 31 U.S.C. § 1324 is an "appropriation Act," the ARRA itself was an "appropriation Act," and, therefore, the tax refunds due for Direct Payment BABs constitute spending under an "appropriation Act." (*Id.*) The matter has been fully briefed, and the Court has determined that oral argument on the plaintiffs' motion is not necessary.

II. STANDARD OF REVIEW

RCFC 59(a)(1) establishes the standard for a motion for reconsideration:

> The Court may, on motion, grant a new trial or a motion for reconsideration on all or some of the issues—and to any party—as follows:
>
> (A) for any reason for which a new trial has heretofore been granted in an action at law in federal court;

> (B) for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court; or
>
> (C) upon the showing of satisfactory evidence, cumulative or otherwise, that any fraud, wrong, or injustice has been done to the United States.

RCFC 59(a)(1).[2]

"Under [RCFC] 59(a)(1), a court, in its discretion, may grant a motion for reconsideration when there has been an intervening change in the controlling law, newly discovered evidence, or a need to correct clear factual or legal error or prevent manifest injustice." *Biery v. United States*, 818 F.3d 704, 711 (Fed. Cir. 2016) (internal quotation and citation omitted).

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[2] The plaintiffs also purport to file their motion under RCFC 60(b)(1). (ECF 27 at 6.) RCFC 59 and RCFC 60 are similar in purpose, both allowing a party to seek reconsideration of a court's decision. Under RCFC 59, a motion for reconsideration must be brought within 28 days of the decision for which reconsideration is sought. RCFC 59(b). Under RCFC 60(b), the window for seeking reconsideration is longer.

The standards under which a court evaluates a motion under either RCFC 59 or RCFC 60 are similar, and courts in some instances consider both rules in analyzing a litigant's claim. *See*, *e.g.*, *Cyios Corp. v. United States*, 124 Fed. Cl. 107, 114 (2015) (considering a motion brought pursuant to both RCFC 59 and 60 under both rules); *Webster v. United States*, 93 Fed. Cl. 676, 680 (2010) (same). While the shorter deadline of RCFC 59 at times constrains a court to consider a motion only under RCFC 60, the filing in this case of a timely motion under RCFC 59 presents no such limitation. *See Bowling v. United States*, 93 Fed. Cl. 551, 561 n.1 (2010) (noting that because the plaintiff's motion was "timely filed under RCFC 59" the court would address the motion under RCFC 59 rather than RCFC 60). Accordingly, as in *Devine v. United States*, No. 18-871, 155 Fed.Cl. 193, 200 n.2 (Fed. Cl. Aug. 3, 2021), the Court will treat the motion as one under RCFC 59 and merge the RCFC 60(b)(1) motion into the RCFC 59 motion.

"Reconsideration of a judgment is not intended to permit a party to [reargue] its case when it previously was afforded a full and fair opportunity to do so." *Peretz v. United States*, 151 Fed. Cl. 465, 468 (2020), *appeal pending*, No. 21-1831 (Fed. Cir.). Rule 59 does not provide an opportunity to "relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008) (internal quotation and citation omitted); *see also Peretz*, 151 Fed. Cl. at 468; *Ammex, Inc. v. United States*, 52 Fed. Cl. 555, 557 (2002); *Principal Mut. Life Ins. Co. v. United States*, 29 Fed. Cl. 157, 164 (1993).

Given its limited purpose, a "[m]otion[] for reconsideration must be supported by a showing of extraordinary circumstances which justify relief." *Caldwell v. United States*, 391 F.3d 1226, 1235 (Fed. Cir. 2004) (internal quotation and citation omitted). In the case of a party seeking reconsideration on the ground of manifest injustice, that party must demonstrate that such injustice is "apparent to the point of being almost indisputable." *Pac. Gas & Elec. Co. v. United States*, 74 Fed. Cl. 779, 785 (2006), *aff'd in part and rev'd on other grounds*, 536 F.3d 1282 (Fed. Cir. 2008); *accord Biloxi Marsh Lands Corp. v. United States*, No. 12-382, 156 Fed.Cl. 301, 308 (Fed. Cl. Oct. 27, 2021).

III. DISCUSSION

As the plaintiffs note, the briefs and oral arguments made during consideration of the defendant's motion to dismiss focused primarily on whether 31 U.S.C. § 1324 was an "appropriation Act." This issue was most salient because 31 U.S.C. § 1324

provides the permanent appropriation of funds for tax refunds, including tax refunds for Direct Payment BABs. Accordingly, if § 1324 were an "appropriation Act," payments made under its authority would have been exempted from sequestration. If § 1324 were not an "appropriation Act," as the Court found, refunds for the bonds at issue would be subject to sequestration. Given the central importance of the issue to the resolution of the motion, much of the parties' arguments and the Court's earlier decision focused on § 1324.

The plaintiffs now argue that the defendant's focus on § 1324 caused the Court (and the plaintiffs themselves) to overlook a more important issue: whether the ARRA itself was an "appropriation Act" whose provisions would be exempt from sequestration. The plaintiffs posit that the ARRA, which both established the Direct Payment BABs program and amended 31 U.S.C. § 1324 to enable refund payments to issuers of the BABs, is an "appropriation Act." (ECF 27 at 7.) The plaintiffs argue that, "as the [defendant] has conceded and th[e] Court has found, programs funded through an appropriation act are not direct spending and are thus exempt from sequestration." (*Id.*) Completing the syllogism, the plaintiffs contend that the "Court's holding that the [defendant's] BABs payment obligations are direct spending subject to sequestration is . . . obvious legal error and/or mistake which has worked undisputable manifest injustice . . . ." (*Id.*) The plaintiffs did not raise this argument during briefing or oral argument on the defendant's motion to dismiss; that was when the argument would have been timely.

Although the plaintiffs' argument is untimely, the Court will consider it. The issue now before the Court

is the same as it was when the defendant's motion to dismiss was considered: whether the tax refunds owed to issuers of Direct Payment BABs are direct spending subject to sequestration. The answer to that question again depends on whether the budget authority for payments to issuers of Direct Payment BABs is "direct spending" or whether that budget authority is provided by an "appropriation Act."

A. Budget Authority

The plaintiffs ignore the fact that the ARRA did not appropriate money for the Direct Payment BABs program. Instead, the ARRA amended 31 U.S.C. § 1324 to provide funding for tax refunds due to issuers under the Direct Payment BABs program. ARRA, Pub. L. No. 111-5, 123 Stat. 115, 360. Section 1324 of Title 31 provides for "[n]ecessary amounts" to be appropriated "for refunding internal revenue collections as provided by law." 31 U.S.C. § 1324(a). As the plaintiffs concede, the refunds to issuers of Direct Payment BABs come from the permanent appropriation of 31 U.S.C. § 1324. (ECF 31 at 3 n.5.)

Because the budget authority for the tax refunds is provided in 31 U.S.C. § 1324, the Court correctly focused its analysis in its Memorandum Opinion on that provision. *See Ind. Mun. Power Agency*, 154 Fed. Cl. at 759-63. The Court found that § 1324 is not an "appropriation Act" but, instead, authorizes direct spending. *Id.* at 763. Without an explicit exemption by Congress, that direct spending is subject to sequestration.[3] *Id.* In their motion for reconsideration, the plaintiffs do not take issue with

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[3] Congress exempted from sequestration refundable tax credits paid to individuals. 2 U.S.C. § 905(d). Congress did not provide an exemption for refundable tax credits paid to entities, such as the plaintiffs.

that holding. Because that issue is dispositive of the plaintiffs' claim, the plaintiffs have no argument that the prior ruling was in error.

B. Structure of the ARRA

Instead of challenging the Court's holding with respect to 31 U.S.C. § 1324, the plaintiffs now argue that the relevant inquiry should have focused on the ARRA itself. Even if this argument were determinative, and it is not, the plaintiffs' motion fails. In pursuing their argument that the ARRA itself is an "appropriation Act," the plaintiffs fail to consider the structure of the ARRA.

The plaintiffs premise their argument on 1 U.S.C. § 105. Because a related provision in Title 2 of the U.S. Code defines "appropriation Act" by cross-referencing 1 U.S.C. § 105, the Court had considered the provision in determining that 31 U.S.C. § 1324 was not an "appropriation Act." *Ind. Mun. Power Agency*, 154 Fed. Cl. at 760. Section 105 provides: "The style and title of all Acts making appropriations for the support of Government shall be as follows: 'An Act making appropriations (here insert the object) for the year ending September 30 (here insert the calendar year).'" 1 U.S.C. § 105. As the plaintiffs note, the title of H.R. 1, the legislation that became the ARRA upon enactment, was "[a]n Act Making supplemental appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization, for the fiscal year ending September 30, 2009, and for other purposes." ARRA, Pub. L. No. 111-5, 123 Stat. 115.

The plaintiffs argue that "the title of the ARRA conforms with the requirements of 1 U.S.C. § 105,

thus the ARRA which created the BABs program is an appropriation act." (ECF 27 at 7.)

The plaintiffs correctly note that the title of the ARRA conforms with 1 U.S.C. § 105 and that the ARRA contains, as one portion of that legislation, an "appropriation Act." They err, however, in concluding that the budget authority for the Direct Payment BABs established by § 1531 of the ARRA arises pursuant to an "appropriation Act." The ARRA contains both provisions making appropriations and provisions authorizing direct spending. An example of the latter is the ARRA's provision providing payments to issuers of Direct Payment BABs to be funded through 31 U.S.C. § 1324.

On its own terms, the ARRA does not support the plaintiffs' argument, which rests solely on the style and title of the legislation enacted. While the Court did rely in part on 1 U.S.C. § 105 in helping to determine whether a bill enacts an "appropriation Act," that style and title are not sufficient to resolve the issue. Rather, the answer must be derived by reviewing not simply the style and title of the legislation, but also its structure. The plaintiffs would promote form over function; although form is important, it was not dispositive in the earlier ruling and is not dispositive here. The Court rejects the plaintiffs' argument.

The ARRA is a "lengthy and complex act amounting to just over 400 pages" enacted to address the 2008 to 2009 recession. Cong. Rsch. Serv. ("CRS"), R40537, *American Recovery and Reinvestment Act of 2009 (P.L. 111-5): Summary and Legislative History*

ii (2009) ("CRS Report").[4] The ARRA contains "two major divisions": Division A – Appropriations Provisions and Division B – Tax, Unemployment, Health, State Fiscal Relief, and Other Provisions. CRS Report at ii; *see also* ARRA, Pub. L. No. 111-5, 123 Stat. 115. Title I of Division B has its own short title, "American Recovery and Reinvestment Tax Act of 2009." ARRA, Pub. L. No. 111-5, § 1000(a), 123 Stat. 115. The Titles and Sections are not consecutively numbered between Division A and Division B, and some of the same section numbers are used in both divisions. For example, there are two sections 1521, two sections 1522, and two sections 1541.

Section 1531, which established the Direct Payment BABs program and amended 31 U.S.C. § 1324 to fund the program as a tax refund, is under Division B's Title I, which, as noted, is itself separately designated as the American Recovery and Reinvestment Tax Act of 2009.

The Court's finding that the tax refunds for Direct Payment BABs are direct spending is consistent with the way legislative entities interpreted the ARRA. In reviewing the ARRA, the Congressional Budget

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[4] Courts may take judicial notice of certain government documents, such as CRS Reports, because they "are capable of being 'accurately and readily determined from sources whose accuracy cannot reasonably be questioned.'" *Mobility Workx, LLC v. Unified Pats., LLC*, 15 F.4th 1146, 1151-52 (Fed. Cir. 2021) (quoting Fed. R. Evid. 201(b)(2)) (granting a party's motion for judicial notice of various government documents). The Court does not rely on these legislative documents as dispositive to the legal issue; instead, the Court notes that its determination is consistent with the description of the ARRA and its provisions in those documents. The CRS Report is publicly available at https://crsreports.congress.gov/product/pdf/R/R40537.

Office ("CBO") determined that the provisions of the ARRA under Division A constituted "appropriations," and that the provisions under Division B were "direct spending." *See* Letter of Douglas W. Elmendorf, Director, CBO to the Hon. Nancy Pelosi (Feb. 13, 2009).[5] Similarly, the CRS noted that "Division A includes the discretionary spending [*i.e.*, appropriation] provisions, but some significant substantive provisions as well; Division B includes the mandatory spending [*i.e.*, direct spending] and revenue provisions, with some exceptions."[6] CRS Report at ii. Multiple congressional committees, not only the committees with jurisdiction over appropriations, reviewed the ARRA. *Id.*; *see also* 155 Cong. Rec. H525-02 (2009).

The ARRA did not provide the budget authority for the Direct Payment BABs program through discretionary spending in Division A's "Appropriation Provisions." ARRA, Pub. L. No. 111-5, 123 Stat. 115. Instead, in Division B, the ARRA designated the budget authority to be the permanent appropriation under 31 U.S.C. § 1324. *Id.* at 360.

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[5] Congress created the CBO in 1974. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974). The primary duty and function of the CBO is "to provide to the Committees on the Budget of both Houses information which will assist such committees in the discharge of all matters within their jurisdictions, including . . . information with respect to the budget, appropriation bills, and other bills authorizing or providing new budget authority or tax expenditures . . . ." 2 U.S.C. § 602(a). The letter is publicly available at https://www.cbo.gov/sites/default/files/111-th-congress-2009-2010/costestimate/hr1conference0.pdf.

[6] Congress established the nonpartisan CRS, among other functions, to aid congressional committees in the analysis of legislative proposals and to prepare and provide reference materials to members and committees of Congress. 2 U.S.C. § 166(d).

IV. CONCLUSION

Although the ARRA established the Direct Payment BABs program, it provided that the program was funded through 31 U.S.C. § 1324. The Court has found § 1324 to be subject to sequestration as direct spending, and in their motion the plaintiffs do not contest that holding. Consistent with the Court's conclusion, the defendant's payment obligations under the ARRA arose under Division B, which on its face constitutes direct spending. Multiple legislative entities have similarly identified the provisions of Division B of the ARRA, including the provision creating the Direct Payment BABs program, as direct spending. The Court did not err in dismissing the plaintiffs' claims, and the plaintiffs have failed to demonstrate that "extraordinary circumstances" justify relief in this case and that injustice is "apparent to the point of being almost indisputable." *See Caldwell*, 391 F.3d at 1235; *Pac. Gas & Elec. Co.*, 74 Fed. Cl. at 785.

Accordingly, the plaintiffs' motion for reconsideration (ECF 27) is **DENIED**.

UNITED STATES COURT OF FEDERAL CLAIMS

No. 20-2038C

INDIANA MUNICIPAL POWER AGENCY, et al.,
Plaintiff,

v.

UNITED STATES,
Defendant.

[Filed: July 23, 2021]

MEMORANDUM OPINION

HERTLING, Judge

The plaintiffs are public-sector power providers. The plaintiffs all issued Direct Payment Build America Bonds ("BABs"), authorized by section 1531 of the American Recovery and Reinvestment Act of 2009 ("ARRA"), Pub. L. No. 111-5, 123 Stat. 115 (2009). Under the ARRA, issuers of Direct Payment BABs are entitled to a refund from the Internal Revenue Service ("IRS") of 35 percent of the interest payable under the BABs.

The defendant, the United States acting through the Treasury Department and the IRS, stopped making payments to the plaintiffs based on the ARRA's 35-percent rate in 2013. The plaintiffs argue that, since 2013, the defendant has been violating its statutory obligation to pay 35 percent of the interest payable under their Direct Payment BABs. The plaintiffs also allege that section 1531 created a

contractual agreement with the defendant, and the defendant's failure to pay at the 35-percent rate has breached that contract.

The defendant has moved to dismiss the complaint for failure to state a claim under Rule 12(b)(6) of the Rules of the Court of Federal Claims ("RCFC").

Legislation enacted by Congress after the issuance of the Direct Payment BABs under the ARRA required sequestration of direct spending. "Direct spending" does not include budget authority provided by "appropriation Acts." *See* 2 U.S.C. § 900(c)(8)(A). If the tax refunds for Direct Payment BABs are direct spending, sequestration has the effect of reducing the amount payable by the IRS to bond issuers. The plaintiffs' statutory claims turn on whether interest payments for Direct Payment BABs are direct spending or reflect spending under an "appropriation Act."

The Court finds that the payments are direct spending. The subsequent legislation, therefore, modified the defendant's payment obligations, reducing the amount that the defendant is statutorily required to pay the plaintiffs.

The plaintiffs' contract claims also fail. The presumption is that a statute does not create contract rights. For a statute to obligate the government contractually, the statute must speak in contractual terms. Section 1531 of the ARRA does not include any such language. Thus, the plaintiffs have not pleaded facts sufficient to establish the defendant's intent to contract through the statute.

The plaintiffs therefore cannot recover on either their statutory or contract claims. Their complaint fails to state a claim upon which relief can be granted. The Court grants the defendant's motion to dismiss.

I. BACKGROUND[1]

A. Build America Bonds

1. Statutory Authority

Following the 2008 financial crisis, the ARRA sought to promote economic recovery through, among other means, investment in infrastructure and stabilization of state and local government budgets. ARRA § 3(a), 123 Stat. 115, 115-16 (listing the purposes of the ARRA). Section 1531 authorized refundable credit or tax credits to state and local governments that issue BABs, which were subsidized to lower the cost of borrowing for state and local governments. *Id.* § 1531, 123 Stat. 115, 358-60.[2] The BABs at issue here, Direct Payment BABs, were to be used for capital expenditures. *Id.*

The provisions relevant to BABs were codified at 26 U.S.C. §§ 54AA and 6431. Although those sections were removed from the Code in 2017, Congress limited the amendment removing the provisions to "apply [only] to bonds issued after December 31, 2017."[3] Budget Fiscal Year 2018, Pub. L. No. 115-97,

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[1] In considering the defendant's motion to dismiss, the Court assumes the facts alleged in the plaintiffs' amended complaint to be true. (ECF 13.) This summary of the facts does not constitute findings of fact but is simply a recitation of the plaintiffs' allegations.

[2] A "tax credit" is "[a]n amount that offsets or reduces tax liability." Government Accountability Office, *A Glossary of Terms Used in the Federal Budget Process* 94 (Sept. 2005) ("GAO Glossary"), *available at* https://www.gao.gov/assets/gao-05-734sp.pdf. A tax credit is considered refundable "[w]hen the allowable tax credit amount exceeds the tax liability and the difference is paid to the taxpayer . . . ." *Id.*

[3] For the bonds to qualify for the program, the bonds had to be issued before January 1, 2011. *See* 26 U.S.C. §§ 54AA(d)(1)(B), 6431(a). As a result, any bonds issued after

§ 13404(a), (b) & (d), 131 Stat. 2054, 2138 (2017). The citations that follow are to those provisions as they appeared prior to their repeal.

Section 54AA(g) of Title 26 authorized issuers of Direct Payment BABs to receive a refundable credit in lieu of tax credits under section 6431 of the same title. 26 U.S.C. § 54AA(g). Section 6431 provided the payment scheme: "In the case of a qualified bond issued before January 1, 2011, the issuer of such bond shall be allowed a credit with respect to each interest payment under such bond which shall be payable by the Secretary," who "shall pay (contemporaneously with each interest payment date under such bond) to the issuer of such bond (or to any person who makes such interest payments on behalf of the issuer) 35 percent of the interest payable under such bond on such date." *Id.* § 6431(a)-(b).

The Treasury Department pays issuers of BABs annually upon receiving a timely Form 8038-CP (Return for Credit Payments to Issuers of Qualified Bonds) filed by the issuers. IRS Notice 2009-26, § 3.1. The "payments are treated as overpayments of tax." *Id.* § 3.3. As a refundable tax credit, the payments for the Direct Payment BABs are funded by the permanent, indefinite appropriation for refund of internal revenue collections. *See* 31 U.S.C. § 1324 (providing for the appropriation of "[n]ecessary amounts . . . for refunding internal revenue collections," including refunds due under 26 U.S.C. § 6431).

December 31, 2017, would not qualify for the program, regardless of the 2017 amendments. The discrepancy between these dates makes no difference to the resolution of this case.

2. Plaintiffs' Bonds

The plaintiffs are the following public power entities: Indiana Municipal Power Agency; Missouri Joint Municipal Electric Utility Commission; Northern Illinois Municipal Power Agency; American Municipal Power, Inc.; Illinois Municipal Electric Agency; and Kentucky Municipal Power Agency. (ECF 13, ¶¶ 3-8.) All the plaintiffs issued Direct Payment BABs to fund capital investments in projects that provide electric power to more than 300 municipalities in nine states. (*Id.* ¶ 31.)

The plaintiffs collectively issued $4,097,680,000 in Direct Payment BABs before January 1, 2011—within the timeframe for bonds to qualify under 26 U.S.C. § 6431 and before the 2017 cutoff created by Congress when it repealed § 6431. (*Id.* ¶¶ 30, 32.) The plaintiffs allege that their Direct Payment BABs comply with the requirements established by section 1531 of the ARRA. (*Id.* ¶¶ 32-34.) Indeed, the defendant paid the full 35 percent of the bonds' interest payments from January 2010 through the end of 2012. (*Id.* ¶ 36.)

B. Sequestration

Congress reinstated and amended the Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (1985) (codified at 2 U.S.C. § 900 et seq.), through the Budget Control Act of 2011 ("Budget Control Act"), Pub. L. No. 112-25, 125 Stat. 240 (2011). The Budget Control Act requires automatic reductions of certain government spending through sequestration, which "refer[s] to or mean[s] the cancellation of budgetary resources provided by discretionary appropriations or direct spending law." 2 U.S.C. §§ 900(c)(2), 901a.

The term "budgetary resources" refers to "new budget authority, unobligated balances, direct spending authority, and obligation limitations." *Id.* § 900(c)(6). "Direct spending," in turn, refers to "budget authority provided by law other than appropriation Acts"; "entitlement authority"; and "the Supplemental Nutrition Assistance Program." *Id.* § 900(c)(8). Except for one exception not relevant here, sequestered budgetary resources are permanently cancelled. *Id.* § 906(k)(1).

The Budget Control Act requires reductions in discretionary appropriations and direct spending accounts in accordance with 2 U.S.C. § 901a, which directs the Office of Management and Budget ("OMB") to determine the amount of funds to be sequestered and the President to order sequestration. *Id.* § 901a. The only programs exempt from sequestration are listed in 2 U.S.C. § 905. Although "[p]ayments to individuals made pursuant to provisions of Title 26 establishing refundable tax credits" are exempt from reduction, payments to entities, such as the plaintiffs, are not exempt. *Id.* § 905(d). The lists of programs that are exempted likewise do not include the Direct Payment BABs payment program. *See id.* § 905.

At the beginning of 2013, the American Taxpayer Relief Act of 2012 ("Taxpayer Relief Act"), Pub. L. No. 112-240, 126 Stat. 2313 (2013), amended the statutes created by the Balanced Budget and Emergency Deficit Control Act of 1985. The Taxpayer Relief Act provided that "[n]otwithstanding any other provision of law, the fiscal year 2013 spending reductions required by . . . the Balanced Budget and Emergency Deficit Control Act of 1985 shall be evaluated and implemented on March 27, 2013." Taxpayer Relief Act § 901(b), 126 Stat. 2313, 2370.

Under the sequestration required by the Taxpayer Relief Act, in 2013 the defendant stopped making payments to issuers of Direct Payment BABs at the rate of 35 percent of the bonds' interest as provided under the ARRA. (*See* ECF 13, ¶ 37.) Although the BABs program remains in effect for bonds issued before January 1, 2018, the defendant has been paying issuers of BABs at rates reduced by the amount of funds determined by OMB to be covered by sequestration. (ECF 15 at 8-9.) In 2013, for example, payments were reduced from 35 percent to 8.7 percent, the fiscal year 2013 sequestration rate.[4] Sequestration has been extended through 2030.[5]

C. Procedural History

On December 30, 2020, the plaintiffs filed their complaint (ECF 1), which was later amended (ECF 13). The amended complaint seeks damages for the defendant's failure to make direct cash payments to

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[4] The degree to which sequestration reduces the percentage of interest the government pays varies each year. The following link provides the yearly sequestration rate reductions from 2013 through the present: https://www.irs.gov/tax-exempt-bonds/effect-of-sequestration-on-state-local-government-filers-of-form-8038-cp.

[5] Sequestration was extended through fiscal year 2023 by the Bipartisan Budget Act of 2013, Pub. L. No. 113-67, § 101, 127 Stat. 1165 (2013); through fiscal year 2024 by the Extension of Direct Spending Reduction for Fiscal Year 2024, Pub. L. No. 113-82, § 1, 128 Stat. 1009 (2014); through fiscal year 2025 by the Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 101, 129 Stat. 584 (2015); through fiscal year 2027 by the Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 30101, 132 Stat. 64 (2018); through fiscal year 2029 by the Bipartisan Budget Act of 2019, Pub. L. No. 116-37, § 402, 133 Stat. 1049 (2019); and through fiscal year 2030 by the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 3709, 134 Stat. 281 (2020).

the plaintiffs equal to 35 percent of each interest payment made by the plaintiffs for their Direct Payment BABs. (*See id.*, Prayer for Relief.) Counts I, III, and V allege that the defendant has violated (and continues to violate) section 1531 of the ARRA. (*Id.* ¶¶ 41-50, 57-66, 73-82.) Counts II, IV, and VI allege that the defendant has breached its contractual obligations created by section 1531. (*Id.* ¶¶ 51-56, 67-72, 83-88.)

The defendant moved to dismiss (ECF 15), and the matter was fully briefed. The Court heard oral argument on June 22, 2021. Following oral argument, the Court allowed the plaintiffs to submit a sur-reply, which was filed on July 9, 2021.

II. JURISDICTION[6]

The Tucker Act, 28 U.S.C. § 1491(a), gives this court limited jurisdiction over claims for damages against the United States:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

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[6] The defendant argues that the Court has no jurisdiction to consider the plaintiffs' claims for damages beyond six years of filing this case. *See* 28 U.S.C. § 2501. The effect on the damages available to the plaintiffs of a dismissal based on the statute of limitations would not be known until after discovery because there is not yet a sufficient factual record to identify which damages would be barred. Dismissing the amended complaint for failure to state a claim, the Court does not consider the defendant's argument on the statute of limitations.

28 U.S.C. § 1491(a)(1). The Tucker Act itself does not "create[] a substantive right enforceable against the Government by a claim for money damages." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003). Instead, the Tucker Act limits this court's jurisdiction to causes of action based on separate money-mandating statutes and regulations. *Metz v. United States*, 466 F.3d 991, 995-98 (Fed. Cir. 2006).

The defendant does not challenge this court's jurisdiction over Counts I, III, and V of the plaintiffs' amended complaint. Because section 1531 creates a payment obligation on the government, the Court finds that section 1531 is money-mandating and, therefore, that the Court has jurisdiction over the plaintiffs' Counts I, III, and V. *See LCM Energy Sols. v. United States*, 128 Fed. Cl. 728, 729 (2016) (finding a similar provision of the ARRA to be money-mandating).

Although the defendant initially challenged this court's jurisdiction over the plaintiffs' contract claims in its opening brief (ECF 15 at 20), the defendant admitted at oral argument that the plaintiffs may have asserted nonfrivolous allegations of a contract with the United States, as required to establish jurisdiction over their contract claims (ECF 22, Oral Arg. Tr. at 23:16-24:8). As a result, the defendant conceded that its motion would be more appropriately analyzed as a motion to dismiss for failure to state a claim upon which relief can be granted.

The Court agrees. The plaintiffs have asserted a nonfrivolous claim of a contract with the United States and, accordingly, the Court has jurisdiction over the plaintiffs' contract claims in Counts II, IV, and VI. *See* 28 U.S.C. § 1491(a)(1) (providing juris-

diction over claims founded on express or implied contracts with the United States); *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1353 (Fed. Cir. 2011) ("[J]urisdiction under [28 U.S.C. § 1491(a)(1)] requires no more than a non-frivolous *allegation* of a contract with the government." (emphasis in original)).

III. STANDARD OF REVIEW

The defendant has moved to dismiss the plaintiffs' complaint for failure to state a claim under RCFC 12(b)(6). Dismissal for failure to state a claim upon which relief can be granted "is appropriate when the facts asserted by the claimant do not entitle him to a legal remedy." *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002). A court must both accept as true a complaint's well-pleaded factual allegations, *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), and draw all reasonable inferences in favor of the non-moving party. *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed. Cir. 2001). To avoid dismissal, a complaint must allege facts "plausibly suggesting (not merely consistent with)" a showing that the plaintiffs are entitled to the relief sought. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 (quoting *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955).

IV. DISCUSSION

The defendant argues that both the plaintiffs' statutory claims and their contract claims must be dismissed for failure to state a claim. First, the defendant argues that the statutory scheme to pay Direct Payment BABs is funded through direct

spending, not an "appropriation Act." As direct spending, the payment scheme was altered by subsequent legislation, which sequestered that spending. Second, the defendant argues that the plaintiffs have not pleaded the requisite elements to establish a contract with the government. Namely, the plaintiffs cannot show that the government intended to contract through the statute authorizing Direct Payment BABs. The Court considers both arguments in turn.

A. Direct Payment BABs are Direct Spending

1. Statutory Payment Obligation

The plaintiffs issued Direct Payment BABs in accordance with section 1531 of the ARRA. That section authorized issuers of qualifying Direct Payment BABs to receive refundable tax credit. ARRA § 1531, 123 Stat. 115, 358-60. The defendant does not dispute that the added provisions obligate the government to pay. (ECF 15 at 16.) Notably, section 6431(a) of Title 26, added by the ARRA, provided that "the issuer of such bond *shall be allowed* a credit with respect to each interest payment under such bond which *shall be payable* by the Secretary," and subsection (b) of the same section provided that "[t]he Secretary *shall pay* (contemporaneously with each interest payment date under such bond) to the issuer of such bond . . . 35 percent of the interest payable under such bond on such date." 26 U.S.C. § 6431(a)-(b) (emphasis added).

The ARRA also amended 31 U.S.C. § 1324 to provide funding for refunds due under 26 U.S.C. § 6431. ARRA § 1531, 123 Stat. 115, 360; *see also* 31 U.S.C. § 1324(b)(2) (providing explicitly for refunds from 26 U.S.C. § 6431). Section 1324 of Title 31 provides for "[n]ecessary amounts" to be appropriated "for refund-

ing internal revenue collections as provided by law." 31 U.S.C. § 1324(a). The parties do not dispute whether § 1324 establishes an indefinite, permanent appropriation. It does. *See* Government Accountability Office ("GAO"), *Principles of Federal Appropriations Law* 2-23 (4th ed. 2016), *available at* https://www.gao.gov/assets/2019-11/675709.pdf (listing 31 U.S.C. § 1324 as a statute that makes an appropriation); *see also id.* at 2-10 ("[A] 'permanent indefinite' appropriation is open ended as to both period of availability and amount.").

Sequestration, as implemented by the Budget Control Act and the Taxpayer Relief Act, has the effect of permanently cancelling certain budgetary resources, which includes direct spending authority. 2 U.S.C. §§ 900(c)(6), 906(k)(1). The term "direct spending," as relevant here, means "budget authority provided by law *other than appropriation Acts* . . . ." *Id.* § 900(c)(8) (emphasis added). The payment program for Direct Payment BABs is not listed as a program or activity exempted from sequestration. *See id.* § 905.

Thus, the crucial issue is whether 31 U.S.C. § 1324, the funding mechanism for paying issuers of Direct Payment BABs, authorizes direct spending, or whether it is an "appropriation Act." If the provision authorizes direct spending, it is subject to sequestration, and the plaintiffs would be unable to prevail on their statutory claims.

2. Appropriation Act

The United States Constitution commands that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ." U.S. Const. art. I, § 9, cl. 7. As the D.C. Circuit has noted, "[t]his clause is not self-defining and Congress

has plenary power to give meaning to the provision." *Harrington v. Bush*, 553 F.2d 190, 194 (D.C. Cir. 1977). Appropriating funds to operate the government is a core function of Congress, and "[t]he Congressionally chosen method of implementing the requirements of Article I, section 9, clause 7 is to be found in various statutory provisions." *Id.* at 194-95. In exercising this constitutional function, Congress uses the term "appropriation Act" in a specific, technical sense. *Principles of Federal Appropriations Law*, at 2-17 to 2-21 (explaining the legislative process for considering and enacting appropriation acts).

To govern this special type of legislation, both houses of Congress have adopted special rules for the consideration of appropriation bills distinct from the rules governing the consideration of general legislation. For example, both houses of Congress have similar rules limiting appropriations in appropriation bills to expenditures already authorized by existing law. *See* H.R. Doc. No. 116-177, House Rule XXI, 2(a)(1) (2019); S. Doc. No. 113-18, Senate Rule XVI, 1. (2013).[7] Both houses also prohibit the inclusion of general legislation in appropriation bills. *See* House Rule XXI, 2(b); Senate Rule XVI, 2. The latter limitation is a crucial one and helps to identify with specificity whether a bill is or is not appropriation legislation that, once enacted, becomes an "appropriation Act." These rules of each chamber applying special requirements to appropriations bills were also in effect in 1990 when Congress enacted the

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[7] The current House Rules are available at https://rules.house.gov/sites/democrats.rules.house.gov/files/documents/116-House-RulesClerk.pdf. The current Senate Rules are available at https://www.rules.senate.gov/download/the-rules-of-the-senate.

definition of "direct spending," which excludes budget authority provided by "appropriation Acts." *See* 2 U.S.C. § 900(c)(8); S. Doc. 101-1, Senate Rule XVI (1989); H.R. Doc. No. 100-248, House Rule XXI (1988).

The term "appropriation Act" in Title 2 of the United States Code reflects a similar technical meaning defined, as noted below, elsewhere in the federal law, and, as a result, also reflects a term of art. *See Air Wisconsin Airlines Corp. v. Hoeper*, 571 U.S. 237, 248, 134 S.Ct. 852, 187 L.Ed.2d 744 (2014) ("'[I]t is a cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it is taken.'" (quoting *F.A.A. v. Cooper*, 566 U.S. 284, 292, 132 S.Ct. 1441, 182 L.Ed.2d 497 (2012)) (modifications in original)).

The plaintiffs contend that 31 U.S.C. § 1324 is an "appropriation Act" because it permanently appropriates funds for refunding internal revenue collections. The Court disagrees. Appropriation acts are not, as the plaintiffs' argument suggests, all statutes referring to the appropriation of funds. Two sources provide relevant definitions of "appropriation Act": another statute in Title 2 and the GAO Glossary.

First, in the sections of Title 2 of the United States Code governing congressional budget and fiscal operations, Congress has defined the term "appropriation Act" to mean "an Act referred to in section 105 of Title 1." 2 U.S.C. § 622(5). Section 105 of Title 1 of the U.S. Code, cross-referenced in 2 U.S.C. § 622(5), provides the following: "The style and title of all Acts making appropriations for the support of Govern-

ment shall be as follows: 'An Act making appropriations (here insert the object) for the year ending September 30 (here insert the calendar year).'" 1 U.S.C. § 105. The term "appropriation Act" from the definition of "direct spending" in 2 U.S.C. § 900(c)(8) should be read *in pari materia* and given the same meaning as it has in § 622(5) of the same Title. *See United States v. Davis*, —— U.S. ——, 139 S. Ct. 2319, 2329, 204 L.Ed.2d 757 (2019) ("[Courts] normally presume that the same language in related statutes carries a consistent meaning.").

Second, the GAO Glossary defines the term "Appropriation Act" as "[a] statute, under the jurisdiction of the House and Senate Committees on Appropriations, that generally provides legal authority for federal agencies to incur obligations and to make payments out of the Treasury for specified purposes." GAO Glossary 13. The GAO's definition carries persuasive weight in the budget context because the GAO has a statutory mandate to "establish, maintain, and publish standard terms and classifications for fiscal, budget, and program information" in cooperation with the Secretary of the Treasury, the Director of the OMB, and the Director of the Congressional Budget Office ("CBO"). *See* 31 U.S.C. § 1112(c)(1). The Supreme Court has relied on the GAO Glossary in interpreting federal law. *See Maine Cmty. Health Options v. United States*, —— U.S. ——, 140 S. Ct. 1308, 1319, 1322, 206 L.Ed.2d 764 (2020).

Section 1324 is not an "appropriation Act" under either definition. Section 1324 of Title 31 does not fall within the definition of "appropriation Act" found in Title 2. The Act in which Congress enacted section 1324 did not use the style and title specified in

1 U.S.C. § 105 and did not make appropriations for a specific calendar year. *See* Pub. L. No. 97-258, 96 Stat. 877 (1982) (creating section 1324 as part of "[a]n Act to revise, codify, and enact without substantive change certain general and permanent laws, related to money and finance, as title 31, United States Code, 'Money and Finance'").

At oral argument, the plaintiffs argued that section 1324 is an "appropriation Act," and the special title required by 1 U.S.C. § 105 "applies only to 'appropriations for the support of Government.'" (ECF 22, Oral Arg. Tr. at 27:1-22 (quoting 1 U.S.C. § 105).) They argued that "the payments at issue here are not appropriations for the support of government, they are the Government's promised share of the interest payments that are due for the life of the BABs bonds . . . ." (*Id.* at 27:12-15.) This "support of Government" language, however, is itself a term of art. The same phrase is mirrored in the Senate Rule XXV(b) summarizing the legislative jurisdiction of the Senate Appropriations Committee. *See* Senate Rule XXV(b). As a term of art, the phrase "for the support of Government" is not restricted to the appropriation of funds for the operations of government agencies; if it were so limited, the word "agencies" would follow "government" in the phrase. Instead, the phrase reflects that it applies to all bills appropriating any money "in support of Government" *policies*, which is necessary under the Constitution if any federal funds are to be expended from the Treasury. That phrase, therefore, does not limit the application of § 105 to appropriations for the operation of federal agencies.

The Act creating section 1324 also did not fall under the legislative jurisdiction of the House or Senate Committees on Appropriations, as provided in

the GAO Glossary definition, but rather was referred to the Judiciary Committees of both houses of Congress. The Act was not considered under the rules of either chamber governing floor consideration of appropriation bills. *See* 128 Cong. Rec. H19932-H20003 (Aug. 9, 1982) (House floor consideration), S22597 (Aug. 20, 1982) (Senate passage without amendment by unanimous consent). Accordingly, although the Act contains multiple authorizing provisions and provides for the appropriation of funds to pay tax refunds, it is not an "appropriation Act" in the technical sense.

If section 1324 is not an appropriation Act, what is it? It does provide on its face for spending to cover permanent expenditures for the payment of tax refunds, but that feature, standing alone, does not convert the provision into an appropriation Act. By authorizing such permanent spending, section 1324 is most naturally seen as providing for direct spending. As "budget authority provided by law other than appropriation Acts," section 1324 is direct spending for the purposes of sequestration. *See* 2 U.S.C. § 900(c)(8).

This conclusion is consistent with the GAO Glossary's definition of "direct spending." The GAO explains that "[d]irect spending may be temporary or permanent, definite or indefinite (as to amount) but *it is an appropriation* or other budget authority *made available to agencies in an act other than an appropriation act*." *See* GAO Glossary 45 (emphasis added); *see also id.* at 21 ("An appropriation act is the most common means of providing appropriations, however, authorizing and other legislation itself may provide appropriations."). Accordingly, and contrary to the plaintiffs' argument, a statute may provide permanent,

indefinite appropriation authority, as does section 1324, without being an "appropriation Act."[8]

To emphasize the point that a statute can provide an appropriation without being an appropriation act, the GAO provides an example from a law enacted to settle land claims by the Coushatta Tribe against the United States:

> The Secretary of the Treasury is authorized and directed to pay to the Secretary of the Interior . . . for the benefit of the Coushatta Tribe of Louisiana . . . out of any money in the Treasury not otherwise appropriated, the sum of $1,300,000.

Principles of Federal Appropriations Law, at 2-56 (quoting Pub. L. No. 100-411, § 1(a)(1), 102 Stat. 1097 (1988)) (modifications added by the GAO). The GAO explains that "it is certainly an appropriation—it contains a specific direction to pay and designates the funds to be used—but, in a technical sense, it is not an appropriation act." *Id.* The GAO also notes that the cited provision "contains its own authorization" but does not fit the description of an authorization act. *Id.* As a result, the GAO concludes that "we have an authorization and an appropriation combined in a statute that is neither an authorization act . . . nor an appropriation act." *Id.*

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[8] In their sur-reply, the plaintiffs allege that "[t]he Judgment Fund is similarly funded by a permanent appropriations act." (ECF 23 at 6 n.15.) They are correct that the Judgment Fund, like 31 U.S.C. § 1324, is an indefinite, permanent appropriation. Unlike tax refunds to entities under § 1324, however, the category of "Claims, Judgments, and Relief Acts" is expressly exempted from sequestration. *See* 2 U.S.C. § 905(g)(1)(A). Congress would have no reason to enact that exemption if the Judgment Fund were already exempt from sequestration as an "appropriation Act." The plaintiffs' citation to the Judgment Fund undercuts rather than supports their argument.

As the GAO Glossary explains, "direct spending" is also referred to as "mandatory spending," a term matching the permanent appropriation at issue here: "By defining eligibility and setting the benefit or payment rules, Congress controls spending for these programs indirectly rather than directly through appropriations acts." *See id.* at 66. The statutory definitions in 2 U.S.C. § 900 likewise draw the distinction between "discretionary appropriations" and "direct spending." "Discretionary appropriations" is defined as "budgetary resources (except to fund direct-spending programs) provided in appropriation Acts." 2 U.S.C. § 900(c)(7). The CBO's cost estimate for the conference agreement for the ARRA also distinguishes between discretionary spending and direct spending. *See* Letter of Douglas W. Elmendorf, Director, CBO to the Hon. Nancy Pelosi (Feb. 13, 2009).[9] The ARRA's tax-provisions section, which created the BABs program, is listed by the CBO as direct spending.[10] *Id.* at tbl. 1.

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[9] Congress created the CBO in 1974. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat 297 (1974). The primary duty and function of the CBO is "to provide to the Committees on the Budget of both Houses information which will assist such committees in the discharge of all matters within their jurisdictions, including . . . information with respect to the budget, appropriation bills, and other bills authorizing or providing new budget authority or tax expenditures . . . ." 2 U.S.C. § 602(a).

[10] As part of the ARRA, the BABs program was created under Division B (Tax, Unemployment, Health, State Fiscal Relief, and Other Provisions), Title I (Tax Provisions), Subtitle F (Infrastructure Financing Tools), Part IV (Build America Bonds). The CBO lists all of Division B as direct spending, explicitly listing refundable tax credits in that category. The CBO's letter is available at https://www.cbo.gov/sites/default/files/111th-congress-2009-2010/costestimate/hr1conference0.pdf.

The GAO's *Principles of Federal Appropriations Law* distinguishes between appropriation acts and appropriation-authorization legislation. *See Principles of Federal Appropriations Law*, at 2-54 to 2-82. "Appropriation authorization legislation . . . is legislation that authorizes the appropriation of funds to implement the organic legislation," which is the legislation that "creates an agency, establishes a program, or prescribes a function." *Id.* at 2-54. The authorization may be indefinite, "authorizing 'such sums as may be necessary to carry out the provisions of this act.'" *Id.* 2-56. Section 1324 provides similar language, authorizing an indefinite appropriation: "Necessary amounts are appropriated to the Secretary of the Treasury for refunding internal revenue collections as provided by law . . . ." 31 U.S.C. § 1324(a).

Refundable income tax credits paid to individuals under 31 U.S.C. § 1324 are exempt from sequestration, further indicating that Congress understood that, absent an exemption, the section is subject to sequestration. *See* 2 U.S.C. § 905(d). Because that funding comes from appropriations authorized under section 1324, as does funding for Direct Payment BABs, the exemption undercuts the plaintiffs' argument. If section 1324 were not subject to sequestration as an appropriation act, Congress would have had no need to exempt from sequestration payments of refundable tax credits to individuals. Congress did not provide the same exemption for refundable income tax credits to entities other than individuals, like the plaintiffs. *See id.* In fact, accepting the plaintiffs' arguments would have the effect of adding Direct Payment BABs to the list of programs exempted from sequestration, even though Congress itself

had not done so. Rewriting the law as the plaintiffs propose is a task for Congress, not the courts.

The Court finds that 31 U.S.C. § 1324, the statute providing funding for tax refunds to pay the issuers of Direct Payment BABs, is not an "appropriation Act." Instead, the statute authorizes direct spending and, therefore, is subject to sequestration unless Congress exempted the program, which it did not.

3. Overpayment of Taxes or Obligated Funds

The plaintiffs cannot preserve the full 35-percent payment rate for Direct Payment BABs from sequestration by characterizing the payments as an overpayment of taxes or as obligated funds.

The plaintiffs rely on 26 U.S.C. §§ 6401(b)(1) and 6402(a), arguing that these provisions mandate payment to issuers of Direct Payment BABs as an overpayment of tax. (ECF 16 at 10.) Section 6401 is the tax code's general provision defining which amounts are treated as overpayments, and section 6402 provides the IRS the authority to apply an overpayment "against any liability in respect of an internal revenue tax on the part of the person who made the overpayment." 26 U.S.C. §§ 6401(b)(1), 6402(a). Because section 6402 provides the IRS authority not to pay a taxpayer, it is irrelevant here. Neither provision defeats sequestration. As discussed, payments to the bond issuers are funded through 31 U.S.C. § 1324, which, at least regarding tax refunds to entities like the plaintiffs, is subject to sequestration.

The plaintiffs also argue that the payments for Direct Payment BABs were exempt from sequestration as obligated funds, citing section 256(*l*) of the Balanced Budget and Emergency Deficit Control Act of 1985. (ECF 16 at 10-11.) That section provides an exemption from sequestration for "those contracts

the reduction of which would violate the legal obligations of the Government." Pub. L. No. 99-177, § 256(*l*)(2)(B). This obligated-funds argument relies on the plaintiffs' claim that they had contracts with the government, an argument the Court rejects below, IV.B. Even worse for the plaintiffs, the section applies only to "contracts in major functional category 050," which relates to national defense spending. *Id.* § 256(*l*)(2); *see also* House Committee on Budget, *Budget Functions*, *available at* https://budget.house.gov/budgets/budget-functions (listing the major budget functions with function number and category). The plaintiffs do not allege to have contracts related to national defense spending, rendering section 256(*l*) irrelevant to their claims.

Apparently uncertain of which concept applies, the plaintiffs in their sur-reply argue that the defendant's "obligation to pay [them] the full 35% of the interest payments for the life of the BABs at issue here easily falls within [the GAO Glossary's] definitions of obligation, obligated balance and unobligated balance." (ECF 23 at 7.) The GAO Glossary provides the following definition of "obligation":

> A definite commitment that creates a legal liability of the government for the payment of goods and services ordered or received, or a legal duty on the part of the United States that could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States.

GAO Glossary 70. An "obligated balance" is "[t]he amount of obligations already incurred for which payment has not yet been made." *Id.* at 71.

As the defendant notes, the government did not obligate funds for the life of the bonds. (*See* ECF 19

at 14 n.3.) Instead, the defendant argues that its obligation arising from the Direct Payment BABs arises not when the bonds are issued, but only after the IRS receives from the bond issuers and processes a timely Form 8038-CP. The government's payment obligation, therefore, does not extend beyond the year processed.

The Court agrees with the defendant. As the GAO explains, under permanent appropriations, such as 31 U.S.C. § 1324, "the money is *available for obligation or expenditure* without further action by Congress." *Principles of Federal Appropriations Law*, at 2-24 (emphasis added). In other words, section 1324 does not obligate the funds for tax refunds but, instead, makes the funds available to be obligated. The ARRA directed the government to pay issuers of Direct Payment BABs "*contemporaneously with each interest payment due under such bond* . . . 35 percent of the interest payable under such bond *on such date*." 26 U.S.C. § 6431(b) (emphasis added). In the budgetary sense in which the GAO definition applies, the funds are not "obligated" until a bond issuer applies for the refund and the IRS determines how much is due to the bond issuer for the given tax year. As the Court elaborates below, the IRS can no longer authorize payment or obligate funds at the original payment rate due to sequestration. *See* 31 U.S.C. § 1341(a)(1)(C) ("Except as specified in this subchapter or any other provision of law, an officer or employee of the United States Government . . . may not . . . make or authorize an expenditure or obligation of funds required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 . . . .").

At oral argument and in their sur-reply, the plaintiffs argue that payments for Direct Payment BABs are exempted from sequestration as "[n]on-defense unobligated balances" under 2 U.S.C. § 905(e). (ECF 23 at 6.) They urge that this exemption is the "current iteration" of § 256 of the Balanced Budget and Emergency Deficit Control Act of 1985. (*Id.*) They again point to the GAO Glossary, which defines "unobligated balance" as "[t]he portion of obligational authority that has not yet been obligated." GAO Glossary 72.

The GAO Glossary entry on "unobligated balance" explains the source of unobligated balances as being from fixed-period appropriations or no-year accounts. *Id.* For fixed-period appropriations, the unobligated balance remains available for five additional fiscal years. *Id.* For no-year accounts, the unobligated balance carries forward indefinitely until either "specifically rescinded by law" or "the head of the agency concerned or the President determines that the purposes for which the appropriation was made have been carried out and disbursements have not been made from the appropriation for 2 consecutive years." *Id.*

As a permanent appropriation, 31 U.S.C. § 1324 is neither a fixed-period appropriation nor a no-year account. First, section 1324 provides a permanent appropriation, so it is not established for a fixed period. Second, although the GAO notes the concepts are similar, it distinguishes between permanent appropriations and no-year appropriations: "In actual usage, the term 'permanent appropriation' tends to be used more in reference to appropriations contained in permanent legislation, such as legislation establishing a revolving fund, while 'no-year appropri-

ation' is used more to describe appropriations found in appropriation acts." *See Principles of Federal Appropriations Law*, at 2-10 n.9. Since section 1324 did not create an obligation that carried over into subsequent fiscal years through a fixed-period or no-year appropriation, the payments to issuers of Direct Payment BABs are not exempt from sequestration as an "unobligated balance." *See* 2 U.S.C. § 905(e) (exempting from sequestration "[u]nobligated balances of budget authority carried over from prior fiscal years").

In sum, the plaintiffs' characterizations of the payments—as overpayment of taxes, obligated funds, or unobligated funds—do not provide a way around the conclusion that payments for Direct Payment BABs are funded through direct spending, subject to sequestration.[11]

4. Payment for Direct Payment BABs Sequestered

Having found that 31 U.S.C. § 1324 is subject to sequestration, the Court next considers what effect

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[11] In paragraph 25 of their amended complaint, the plaintiffs note that section 5 of the ARRA provided that "'[a]ll applicable provisions of this Act are designated as an emergency for purposes of pay-as-you-go principles.'" (ECF 13, ¶ 25 (quoting ARRA § 5(b), 123 Stat. 115, 116).) Pay-as-you-go refers to another type of budgeting enforcement mechanism, not at issue here. *See* H.R. Res. 5, 111th Cong. (2009); *see also* House Committee on Budget, *FAQs on Sequester: An Update for 2020*, *available at* https://budget.house.gov/publications/report/FAQs-on-Sequester-An-Update-for-2020 (explaining the difference between pay-as-you-go, under which sequestration has never occurred, and sequestration under the Budget Control Act). Section 5 of the ARRA has no implication for this case and does not exempt the provision authorizing the issuance of BABs from sequestration required by the Budget Control Act and the Taxpayer Relief Act.

sequestration has on payments to issuers of Direct Payment BABs. Generally, Congress is not bound by earlier legislation; it remains free to modify earlier statutes. *Dorsey v. United States*, 567 U.S. 260, 274, 132 S.Ct. 2321, 183 L.Ed.2d 250 (2012) ("[S]tatutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified."). Congress can modify an earlier statute expressly or by implication as it chooses. *Id.*

Here, the Taxpayer Relief Act, enacted after the ARRA, altered the payment formula for paying issuers of Direct Payment BABs, reducing the government's payment obligation. The Taxpayer Relief Act provided that "[*n*]*otwithstanding any other provision of law*, the fiscal year 2013 spending reductions required by . . . the Balanced Budget and Emergency Deficit Control Act of 1985 *shall be evaluated and implemented* on March 27, 2013." Taxpayer Relief Act § 901(b), 126 Stat. 2313, 2370 (emphasis added). The Federal Circuit has held that "[t]he introductory phrase '[n]otwithstanding any other provision of law' connotes a legislative intent to displace any other provision of law that is contrary to the Act [containing that phrase] . . . ." *Shoshone Indian Tribe of Wind River Rsrv. v. United States*, 364 F.3d 1339, 1347 (Fed. Cir. 2004) *reh'g and reh'g en banc denied*, *cert. denied*, 544 U.S. 973, 125 S.Ct. 1824, 161 L.Ed.2d 723 (2005). As implemented by the Taxpayer Relief Act—notwithstanding any other provision of law—the "[b]udgetary resources sequestered from any account shall be permanently cancelled . . . ." 2 U.S.C. § 906(k)(1). These later expressions of Congress

control. The government was statutorily required to reduce its payment obligations.

This court has considered the effect of sequestration on the government's payment obligations in a similar situation involving the Payment in Lieu of Taxes Act ("PILT Act"). *See Kane Cnty. v. United States*, 127 Fed. Cl. 696 (2016). The PILT Act was enacted "to compensate local governments such as counties for the loss of tax revenue stemming from their inability to tax federal lands located within their jurisdictions." *Id.* at 697. In 2008, an amendment made payments mandatory, providing "that local government units '*shall* be entitled to payment,' and that appropriated 'sums *shall* be made . . . for obligation or expenditure.'" *Id.* (quoting 31 U.S.C. § 6906) (emphasis in original). When Congress later passed the Budget Control Act and the Taxpayer Relief Act, it did not include PILT Act payments in the list of programs exempt from sequestration. *Id.*

In *Kane County*, this court held that Congress, by enacting the Taxpayer Relief Act, "diminished funds available to PILT and other spending programs, and altered their funding authority as well." *Id.* at 699. As a judge of this court explained, "by providing that the Budget Control Act 'shall' be implemented 'notwithstanding any other provision of law,' Congress required reductions to the non-exempt PILT program, notwithstanding the 2008 amendments to PILT." *Id.* at 698. The court also noted that sequestered budgetary resources are permanently cancelled under 2 U.S.C. § 906(k)(1). *Id.* The Taxpayer Relief Act controlled, and it altered PILT's funding payout regime in 2013, despite the mandatory language in PILT's amendments. *Id.*

As in *Kane County*, this case presents a conflict between an earlier payment obligation and later sequestration under the Taxpayer Relief Act and the Budget Control Act. The same reasoning that led the court in *Kane County* to uphold the application of sequestration to the PILT program applies here to the ARRA and produces the same result.

The Taxpayer Relief Act mandated sequestration be implemented "[n]otwithstanding any other provision of law." Taxpayer Relief Act § 901(b), 126 Stat. 2313, 2370. As a result of this explicit language, sequestration applies "notwithstanding" the mandatory language in section 1531 of the ARRA. Those sequestered funds are "permanently cancelled." 2 U.S.C. § 906(k)(1).

The plaintiffs attempt to distinguish *Kane County* by arguing that it did not involve an overpayment of taxes under a statute providing a permanent appropriation. (ECF 16 at 11-12.) As already noted, however, because 31 U.S.C. § 1324 is not an "appropriation Act," sequestration applies to refund payments by the IRS for Direct Payment BABs as direct spending. The factual distinction the plaintiffs advance is without any legal significance. The later-enacted Taxpayer Relief Act and the Budget Control Act altered the Direct Payment BABs payment program.

The plaintiffs' reliance on cases involving implied repeals is likewise misplaced. They cite *Maine Community Health* and *Molina Healthcare of California, Inc. v. United States*, 133 Fed. Cl. 14 (2017), both of which were brought under the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010). The plaintiffs argue that these cases support their argument that Congress did not impliedly repeal or rescind the government's obliga-

tion to pay the plaintiffs 35 percent of the interest on the bonds. The Supreme Court's opinion in *Maine Community Health* is controlling and provides the authoritative expression of the law on implied repeals, not the earlier decisions in *Molina Healthcare* and other ACA cases from this court. *See Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436 (2017), *rev'd*, 892 F.3d 1311 (Fed. Cir. 2018), *rev'd and remanded sub nom. Maine Cmty. Health Options*, 140 S. Ct. 1308.

Maine Community Health presented a very different legal situation from this case. *Maine Community Health* involved an alleged implied repeal of the ACA Risk Corridors program. When Congress appropriated funds for the Centers for Medicare and Medicaid Services, it included a rider prohibiting the use of those funds to make Risk Corridor payments to health insurers. *Maine Cmty. Health*, 140 S. Ct. at 1317. In resolving whether a rider on an appropriation act impliedly repealed the statutory payment obligation, the Supreme Court held that it did not because, in part, "a mere failure to appropriate does not repeal or discharge an obligation to pay." *Id.* at 1324 (citing *United States v. Vulte*, 233 U.S. 509, 34 S.Ct. 664, 58 L.Ed. 1071 (1914)).

Relevant to the case at hand, the Supreme Court distinguished *Maine Community Health* from a "strand of precedent [that] turned on provisions that reformed statutory payment formulas in ways 'irreconcilable' with the original methods." *Id.* at 1325-26 (citing *United States v. Mitchell*, 109 U.S. 146, 3 S.Ct. 151, 27 L.Ed. 887 (1883) and *United States v. Fisher*, 109 U.S. 143, 3 S.Ct. 154, 27 L.Ed. 885 (1883)). In those cases, subsequent legislation was found to have altered the government's payment obligation.

This case does not implicate an implied-repeal theory or a failure to appropriate funds. The defendant does not (and does not need to) rely on an implied repeal of section 1531 of the ARRA. (*See* ECF 19 at 8-9.) The Taxpayer Relief Act expressly modifies the government's existing payment obligations, and it does so in a way that directly conflicts with the earlier payment program created by section 1531 of the ARRA.

The spending cuts implemented by the Taxpayer Relief Act and the Budget Control Act are irreconcilable with section 1531's 35-percent payment rate. As a result, the Taxpayer Relief Act altered the Direct Payment BABs program, reducing the government's payment obligation. When sequestration was implemented in 2013, the defendant was required by law to pay issuers of BABs a reduced rate. This change was consistent with the basic principle that Congress is free to amend pre-existing laws. *See Dorsey v. United States*, 567 U.S. at 274, 132 S.Ct. 2321.

In sum, the defendant's payments to the issuers of Direct Payment BABs were funded through direct spending, which was later sequestered. The sequestration rates expressly altered the payment program, reducing the amount the defendant is obligated to pay. For as long as the funding is sequestered, as it has been since 2013, the defendant does not owe the plaintiffs the 35 percent of the interest originally payable under the bonds. Accordingly, the Court must dismiss the plaintiffs' statutory claim for failure to state a claim upon which relief can be granted.

B. Contractual Payment Obligation

The plaintiffs conceded at oral argument that if their statutory claims failed then so would their contract claims because, if the Court found that subsequent legislation altered the defendant's obliga-

tions, then there can be no contractual obligation. (ECF 22, Oral Arg. Tr. at 50:9-51:5.) Even if subsequent legislation had not altered the defendant's obligations, the Court nonetheless finds that the plaintiffs have not pleaded a plausible statutory contractual obligation on the government.

To establish a contract with the United States, the plaintiffs must show "(1) mutuality of intent to contract, (2) consideration, (3) lack of ambiguity in offer and acceptance, and (4) authority on the part of the government agent entering the contract." *Suess v. United States*, 535 F.3d 1348, 1359 (Fed. Cir. 2008). The plaintiffs must also overcome the presumption that statutes do not create contractual rights. *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66, 105 S.Ct. 1441, 84 L.Ed.2d 432 (1985). The Supreme Court has held that "absent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *Id.* (quoting *Dodge v. Bd. of Educ. of City of Chicago*, 302 U.S. 74, 79, 58 S.Ct. 98, 82 L.Ed. 57 (1937)). Courts "proceed cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation." *Id.* at 466, 105 S.Ct. 1441.

"To determine whether a statute gives rise to a contractual obligation, [courts] first look to the language of the statute." *Am. Bankers Ass'n v. United States*, 932 F.3d 1375, 1382 (Fed. Cir. 2019). As the Federal Circuit has noted, "evidence of an intent to contract" has been recognized "where a statute 'provide[s] for the execution of a written contract *on behalf of the United States*' or 'speak[s] of a contract'

with the United States." *Id.* at 1381 (quoting *Nat'l R.R. Passenger Corp.*, 470 U.S. at 467, 105 S.Ct. 1441 (emphasis in original) (modifications added by the Federal Circuit)).

Here, section 1531 of the ARRA does not frame the payments it authorizes as a contractual obligation. *See* ARRA § 1531, 123 Stat. 115, 358-60. The plaintiffs do not point to any language in section 1531 creating a contract with the government because they cannot. The statute neither provides for the execution of a written contract on behalf of the United States nor reflects any language that could be interpreted to establish a contract between issuers of BABs and the United States. Section 1531 merely sets forth a payment program for issuers of qualifying bonds. This authorization is not enough to establish a contractual obligation. *See Am. Bankers Ass'n*, 932 F.3d at 1383 ("[A] statute does not create contractual obligations merely by setting forth 'benefits to those who comply with its conditions.'" (quoting *Wisconsin & M. Ry. Co. v. Powers*, 191 U.S. 379, 387, 24 S.Ct. 107, 48 L.Ed. 229 (1903))).

Rather than rely on the text of the statute, the plaintiffs rely solely on *Molina Healthcare*, but that case is no help to them. Although *Molina Healthcare* found all four elements of a contract met in the statute for the ACA Risk Corridor program, *Molina Healthcare*'s conclusion on this point has been undermined by later decisions and can no longer support the burden the plaintiffs place on it.

The court in *Molina Healthcare* relied heavily on *Moda Health Plan*, which also found a contract based on the ACA Risk Corridor statute. *See Molina Healthcare*, 133 Fed. Cl. at 41-45. On appeal, and following the decision in *Molina Healthcare*, the

Federal Circuit reversed *Moda Health Plan* on this issue: "[N]o statement by the government evinced an intention to form a contract. The statute, its regulations, and [the agency's] conduct all simply worked towards crafting an incentive program." *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1330 (Fed. Cir. 2018), *rev'd on other grounds sub nom. Maine Cmty. Health Options*, 140 S. Ct. 1308. The Federal Circuit recognized "the well-established presumption" from *Nat'l R.R. Passenger Corp.* that a law is not intended to create contractual rights. *See id.* at 1329-30.

Although the Federal Circuit's opinion was in turn reversed by the Supreme Court, the Supreme Court did not reach the contract issue, leaving the Federal Circuit's reasoning intact on the issue. *See Maine Cmty. Health*, 140 S. Ct. at 1331 n.15. In 2019, the Federal Circuit in *American Bankers* adopted the same reasoning and legal basis on the statutory contract issue as it had expressed in its *Moda Health Plan* decision. *Am. Bankers Ass'n*, 932 F.3d at 1380-84. This court's reasoning in *Molina Healthcare* does not express the law of this Circuit. The Federal Circuit's decisions in *Moda Health Plan* and *American Bankers*, decided after this court's decision in *Molina Healthcare*, are the controlling law on the plaintiffs' contract claims.

Both *Moda Health Plan* and *American Bankers* recognized the presumption that statutes do not create contract rights. *Am. Bankers Ass'n*, 932 F.3d at 1381; *Moda Health Plan*, 892 F.3d at 1329. The plaintiffs have not overcome that presumption and cannot establish the requisite mutuality of intent to contract. Specifically, the plaintiffs have not pleaded facts sufficient to establish the defendant's intent to contract.

In *ARRA Energy Co. I v. United States*, 97 Fed. Cl. 12, 28 (2011), for example, this court found that the "plaintiffs [had] not demonstrated an unambiguous offer or the parties' mutual intent to enter a contract . . . ." The court could "not discern and the plaintiffs [had] not pointed to any language in section 1603 [of the ARRA] or its legislative history that would allow a reasonable inference that the government intended to enter into contracts with all persons and entities that filed applications for reimbursement grants." *Id.*; *see also LCM Energy Sols.*, 107 Fed. Cl. at 774 (recognizing that *ARRA Energy Co. I* "expressly rejected the theory that Section 1603 creates an implied-in-fact contract with qualified applicants for reimbursement").

The plaintiffs here likewise cannot point to any language in section 1531 of the ARRA reflecting a "clear indication" that Congress intended to bind the government contractually. *See Nat'l R.R. Passenger Corp.*, 470 U.S. at 465-66, 105 S.Ct. 1441; *Am. Bankers Ass'n*, 932 F.3d at 1381-82; *Moda Health Plan*, 892 F.3d at 1329 ("Absent clear indication to the contrary, legislation and regulation cannot establish the government's intent to bind itself in a contract." (citing *Nat'l R.R. Passenger Corp.*, 470 U.S. at 465-66, 105 S.Ct. 1441)). The Court does not discern any language that "'speak[s] of a contract' with the United States." *See Am. Bankers Ass'n*, 932 F.3d at 1381 (quoting *Nat'l R.R. Passenger Corp.*, 470 U.S. at 467, 105 S.Ct. 1441 (modifications added by the Federal Circuit)). As a result, the plaintiffs have not provided a basis for finding that the defendant intended to contract under the terms of section 1531. The plaintiffs have failed to plead mutuality of intent to contract—the first element of a contract.

Because the plaintiffs have not pleaded facts sufficient to establish the defendant's intent to contract and the statute itself provides no basis on which to demonstrate congressional intent to create a contract by law, the plaintiffs fail to state a plausible claim for breach of contract. The Court must dismiss the plaintiffs' contract claims for failure to state a claim upon which relief can be granted.[12]

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[12] The plaintiffs clarified in their briefing that they do not assert an implied-in-law contract claim (ECF 16 at 15 n.24), so the Court does not address the issue. The plaintiffs also do not allege a taking of their property. (ECF 22, Oral Arg. Tr. at 37:23-25.)

At oral argument, the plaintiffs' counsel disclaimed any reliance on additional documents constituting a contract, relying on the statutory provisions alone:

> Now, I know Your Honor asked the Government a question about whether or not the BABs issue – my clients, the Plaintiffs, whether or not they were required to execute a contract type document at the beginning of their efforts to issue bonds, and the Government's answer, to the best of my knowledge, is correct. No, Your Honor, they were not required to do that. What we had, instead, was we have a very specific statute which very specifically set forth the offer, if you will, the terms of the contract.

(*Id.* at 50:9-18.) In their sur-reply following oral argument, perhaps prompted by the Court's questions at oral argument (*see id.* at 18:18-22:21), the plaintiffs for the first time appear to rely on additional documents to try to establish the existence of a contract with the United States. (ECF 23 at 10-11 (citing *Columbus Reg'l Hosp. v. United States*, 990 F.3d 1330 (Fed. Cir. 2021); *Suess*, 535 F.3d 1348; *Hanlin v. United States*, 316 F.3d 1325 (Fed. Cir. 2003)).) They refer to Forms 8038-CP, CP152, and 8038-G, all of which the plaintiffs allegedly submitted to participate in the Direct Payment BABs program. (*Id.*)

The plaintiffs have waived any argument based on these additional documents. *See Casa de Cambio Comdiv S.A. de C.V. v. United States*, 291 F.3d 1356, 1366 (Fed. Cir. 2002) (declining to address the plaintiff's theory "because it was not properly

V. CONCLUSION

The plaintiffs' statutory claims and contract claims must be dismissed. The defendant's obligation to pay 35 percent of the interest payable under the plaintiffs' Direct Payment BABs has been sequestered by subsequent legislation, reducing the defendant's payment obligation. The plaintiffs also have not pleaded a plausible contractual relationship with the defendant based on the Direct Payment BABs legislation. The plaintiffs' amended complaint, therefore, fails to state a claim upon which relief can be granted.

The defendant's motion to dismiss under RCFC 12(b)(6) is granted.

The Court will issue an order in accordance with this memorandum opinion.

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raised" when "[n]o mention of this theory appears in [the plaintiff's] complaint"), *reh'g and reh'g en banc denied* (Fed. Cir. 2002), *cert. denied*, 538 U.S. 921, 123 S.Ct. 1570, 155 L.Ed.2d 311 (2003). The plaintiffs did not plead a contract based on these documents in their amended complaint, they did not raise this argument in opposition to the defendant's motion to dismiss, and they disclaimed the argument at oral argument. Nonetheless, even if not waived, the plaintiffs' argument fails. They have not shown how the forms establish that the government agreed to be bound at the 35-percent rate for the life of the bonds.

STATUTORY PROVISIONS INVOLVED

1. Section 13404 of the Act of December 22, 2017, Pub. L. No. 115-97, 131 Stat. 2054, 2138, provides:

SEC. 13404. REPEAL OF TAX CREDIT BONDS.

(a) IN GENERAL.—Part IV of subchapter A of chapter 1 is amended by striking subparts H, I, and J (and by striking the items relating to such subparts in the table of subparts for such part).

(b) PAYMENTS TO ISSUERS.—Subchapter B of chapter 65 is amended by striking section 6431 (and by striking the item relating to such section in the table of sections for such subchapter).

(c) CONFORMING AMENDMENTS.—

(1) Part IV of subchapter U of chapter 1 is amended by striking section 1397E (and by striking the item relating to such section in the table of sections for such part).

(2) Section 54(l)(3)(B) is amended by inserting "(as in effect before its repeal by the Tax Cuts and Jobs Act)" after "section 1397E(I)".

(3) Section 6211(b)(4)(A) is amended by striking ", and 6431" and inserting "and" before "36B".

(4) Section 6401(b)(1) is amended by striking "G, H, I, and J" and inserting "and G".

(d) EFFECTIVE DATE.—The amendments made by this section shall apply to bonds issued after December 31, 2017.

2. The American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, provides in relevant part:

An Act

Making supplemental appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization, for the fiscal year ending September 30, 2009, and for other purposes.

* * *

SEC. 3. PURPOSES AND PRINCIPLES.

(a) STATEMENT OF PURPOSES.—The purposes of this Act include the following:

(1) To preserve and create jobs and promote economic recovery.

(2) To assist those most impacted by the recession.

(3) To provide investments needed to increase economic efficiency by spurring technological advances in science and health.

(4) To invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits.

(5) To stabilize State and local government budgets, in order to minimize and avoid reductions in essential services and counterproductive state and local tax increases.

(b) GENERAL PRINCIPLES CONCERNING USE OF FUNDS.—The President and the heads of Federal departments and agencies shall manage and expend the funds made available in this Act so as to achieve the

purposes specified in subsection (a), including commencing expenditures and activities as quickly as possible consistent with prudent management.

* * *

SEC. 5. EMERGENCY DESIGNATIONS.

(a) IN GENERAL.—Each amount in this Act is designated as an emergency requirement and necessary to meet emergency needs pursuant to section 204(a) of S. Con. Res. 21 (110th Congress) and section 301(b)(2) of S. Con. Res. 70 (110th Congress), the concurrent resolutions on the budget for fiscal years 2008 and 2009.

(b) PAY-AS-YOU-GO.—All applicable provisions in this Act are designated as an emergency for purposes of pay-as-you-go principles.

* * *

PART IV—BUILD AMERICA BONDS

SEC. 1531. BUILD AMERICA BONDS.

(a) IN GENERAL.—Part IV of subchapter A of chapter 1 is amended by adding at the end the following new subpart:

"Subpart J—Build America Bonds

"Sec. 54AA. Build America bonds.

"SEC. 54AA. BUILD AMERICA BONDS.

"(a) IN GENERAL.—If a taxpayer holds a build America bond on one or more interest payment dates of the bond during any taxable year, there shall be allowed as a credit against the tax imposed by this chapter for the taxable year an amount equal to the sum of the credits determined under subsection (b) with respect to such dates.

"(b) AMOUNT OF CREDIT.—The amount of the credit determined under this subsection with respect to any interest payment date for a build America bond is 35 percent of the amount of interest payable by the issuer with respect to such date.

"(c) LIMITATION BASED ON AMOUNT OF TAX.—

"(1) IN GENERAL.—The credit allowed under subsection (a) for any taxable year shall not exceed the excess of—

"(A) the sum of the regular tax liability (as defined in section 26(b)) plus the tax imposed by section 55, over

"(B) the sum of the credits allowable under this part (other than subpart C and this subpart).

"(2) CARRYOVER OF UNUSED CREDIT.—If the credit allowable under subsection (a) exceeds the limitation imposed by paragraph (1) for such taxable year, such excess shall be carried to the succeeding taxable year and added to the credit allowable under subsection (a) for such taxable year (determined before the application of paragraph (1) for such succeeding taxable year).

"(d) BUILD AMERICA BOND.—

"(1) IN GENERAL.—For purposes of this section, the term 'build America bond' means any obligation (other than a private activity bond) if—

"(A) the interest on such obligation would (but for this section) be excludable from gross income under section 103,

"(B) such obligation is issued before January 1, 2011, and

"(C) the issuer makes an irrevocable election to have this section apply.

"(2) APPLICABLE RULES.—For purposes of applying paragraph (1)—

"(A) for purposes of section 149(b), a build America bond shall not be treated as federally guaranteed by reason of the credit allowed under subsection (a) or section 6431,

"(B) for purposes of section 148, the yield on a build America bond shall be determined without regard to the credit allowed under subsection (a), and

"(C) a bond shall not be treated as a build America bond if the issue price has more than a de minimis amount (determined under rules similar to the rules of section 1273(a)(3)) of premium over the stated principal amount of the bond.

"(e) INTEREST PAYMENT DATE.—For purposes of this section, the term 'interest payment date' means any date on which the holder of record of the build America bond is entitled to a payment of interest under such bond.

"(f) SPECIAL RULES.—

"(1) INTEREST ON BUILD AMERICA BONDS INCLUDIBLE IN GROSS INCOME FOR FEDERAL INCOME TAX PURPOSES.—For purposes of this title, interest on any build America bond shall be includible in gross income.

"(2) APPLICATION OF CERTAIN RULES.—Rules similar to the rules of subsections (f), (g), (h), and (i) of section 54A shall apply for purposes of the credit allowed under subsection (a).

"(g) SPECIAL RULE FOR QUALIFIED BONDS ISSUED BEFORE 2011.—In the case of a qualified bond issued before January 1, 2011—

"(1) ISSUER ALLOWED REFUNDABLE CREDIT.—In lieu of any credit allowed under this section with respect to such bond, the issuer of such bond shall be allowed a credit as provided in section 6431.

"(2) QUALIFIED BOND.—For purposes of this subsection, the term 'qualified bond' means any build America bond issued as part of an issue if—

"(A) 100 percent of the excess of—

"(i) the available project proceeds (as defined in section 54A) of such issue, over

"(ii) the amounts in a reasonably required reserve (within the meaning of section 150(a)(3)) with respect to such issue,

are to be used for capital expenditures, and

"(B) the issuer makes an irrevocable election to have this subsection apply.

"(h) REGULATIONS.—The Secretary may prescribe such regulations and other guidance as may be necessary or appropriate to carry out this section and section 6431.".

(b) CREDIT FOR QUALIFIED BONDS ISSUED BEFORE 2011.—Subchapter B of chapter 65 is amended by adding at the end the following new section:

"SEC. 6431. CREDIT FOR QUALIFIED BONDS ALLOWED TO ISSUER.

"(a) IN GENERAL.—In the case of a qualified bond issued before January 1, 2011, the issuer of such bond shall be allowed a credit with respect to each interest payment under such bond which shall be

payable by the Secretary as provided in subsection (b).

"(b) PAYMENT OF CREDIT.—The Secretary shall pay (contemporaneously with each interest payment date under such bond) to the issuer of such bond (or to any person who makes such interest payments on behalf of the issuer) 35 percent of the interest payable under such bond on such date.

"(c) APPLICATION OF ARBITRAGE RULES.—For purposes of section 148, the yield on a qualified bond shall be reduced by the credit allowed under this section.

"(d) INTEREST PAYMENT DATE.—For purposes of this subsection, the term 'interest payment date' means each date on which interest is payable by the issuer under the terms of the bond.

"(e) QUALIFIED BOND.—For purposes of this subsection, the term 'qualified bond' has the meaning given such term in section 54AA(g).".

(c) CONFORMING AMENDMENTS.—

(1) Section 1324(b)(2) of title 31, United States Code, is amended by striking "or 6428" and inserting "6428, or 6431,".

(2) Section 54A(c)(1)(B) is amended by striking "subpart C" and inserting "subparts C and J".

(3) Sections 54(c)(2), 1397E(c)(2), and 1400N(l)(3)(B) are each amended by striking "and I" and inserting ", I, and J".

(4) Section 6211(b)(4)(A) is amended by striking "and 6428" and inserting "6428, and 6431".

(5) Section 6401(b)(1) is amended by striking "and I" and inserting "I, and J".

(6) The table of subparts for part IV of subchapter A of chapter 1 is amended by adding at the end the following new item:

"SUBPART J. BUILD AMERICA BONDS.".

(7) The table of section for subchapter B of chapter 65 is amended by adding at the end the following new item:

"Sec. 6431. Credit for qualified bonds allowed to issuer.".

(d) TRANSITIONAL COORDINATION WITH STATE LAW.—Except as otherwise provided by a State after the date of the enactment of this Act, the interest on any build America bond (as defined in section 54AA of the Internal Revenue Code of 1986, as added by this section) and the amount of any credit determined under such section with respect to such bond shall be treated for purposes of the income tax laws of such State as being exempt from Federal income tax.

(e) EFFECTIVE DATE.—The amendments made by this section shall apply to obligations issued after the date of the enactment of this Act.

* * *

3. Section 901 of the American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313, 2370 (2013), provides:

TITLE IX—BUDGET PROVISIONS

Subtitle A—Modifications of Sequestration

SEC. 901. TREATMENT OF SEQUESTER.

(a) ADJUSTMENT.—Section 251A(3) of the Balanced Budget and Emergency Deficit Control Act of 1985 is amended—

(1) in subparagraph (C), by striking "and" after the semicolon;

(2) in subparagraph (D), by striking the period and inserting" ; and"; and

(3) by inserting at the end the following:

"(E) for fiscal year 2013, reducing the amount calculated under subparagraphs (A) through (D) by $24,000,000,000.".

(b) AFTER SESSION SEQUESTER.—Notwithstanding any other provision of law, the fiscal year 2013 spending reductions required by section 251(a)(1) of the Balanced Budget and Emergency Deficit Control Act of 1985 shall be evaluated and implemented on March 27, 2013.

(c) POSTPONEMENT OF BUDGET CONTROL ACT SEQUESTER FOR FISCAL YEAR 2013.—Section 251A of the Balanced Budget and Emergency Deficit Control Act of 1985 is amended—

(1) in paragraph (4), by striking "January 2, 2013" and inserting "March 1, 2013"; and

(2) in paragraph (7)(A), by striking "January 2, 2013" and inserting "March 1, 2013".

(d) ADDITIONAL ADJUSTMENTS.—

(1) SECTION 251.—Paragraphs (2) and (3) of section 251(c) of the Balanced Budget and Emergency Deficit Control Act of 1985 are amended to read as follows:

"(2) for fiscal year 2013—

"(A) for the security category, as defined in section 250(c)(4)(B), $684,000,000,000 in budget authority; and

"(B) for the nonsecurity category, as defined in section 250(c)(4)(A), $359,000,000,000 in budget authority;

"(3) for fiscal year 2014—

"(A) for the security category, $552,000,000,000 in budget authority; and

"(B) for the nonsecurity category, $506,000,000,000 in budget authority;".

(e) 2013 SEQUESTER.—On March 1, 2013, the President shall order a sequestration for fiscal year 2013 pursuant to section 251A of the Balanced Budget and Emergency Deficit Control Act of 1985, as amended by this section, pursuant to which, only for the purposes of the calculation in sections 251A(5)(A), 251A(6)(A), and 251A(7)(A), section 251(c)(2) shall be applied as if it read as follows:

"(2) For fiscal year 2013—

"(A) for the security category, $544,000,000,000 in budget authority; and

"(B) for the nonsecurity category, $499,000,000,000 in budget authority;".

4. Section 256(*l*) of the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, tit. II, 99 Stat. 1037, 1038, 1091, provides:

SEC. 256. EXCEPTIONS, LIMITATIONS, AND SPECIAL RULES.

* * *

(l) TREATMENT OF OBLIGATED BALANCES.—

(1) IN GENERAL.—Except as provided in paragraph (2), obligated balances shall not be subject to reduction under an order issued under section 252.

(2) EXCEPTION.—Existing contracts in major functional category 050 (other than (A) those contracts which include a specified penalty for cancellation or modification by the Government and which if so cancelled or modified would result (due to such penalty) in a net loss to the Government for the fiscal year, and (B) those contracts the reduction of which would violate the legal obligations of the Government) shall be subject to reduction, in accordance with section 251(d)(3), under an order issued under section 252.

(3) DEFINITION.—For purposes of this subsection, the term "existing contracts" shall include all military and civilian contracts in major functional category 050 which exist at the time the Order involved is issued under section 252.

5. 1 U.S.C. § 105 provides:

§ 105. Title of appropriation Acts

The style and title of all Acts making appropriations for the support of Government shall be as follows: "An Act making appropriations (here insert the object) for the year ending September 30 (here insert the calendar year)."

6. 2 U.S.C. § 900 provides:

§ 900. Statement of budget enforcement through sequestration; definitions

(a) Omitted

(b) General statement of budget enforcement through sequestration

This subchapter provides for budget enforcement as called for in House Concurrent Resolution 84 (105th Congress, 1st session).

(c) Definitions

As used in this subchapter:

(1) The terms "budget authority", "new budget authority", "outlays", and "deficit" have the meanings given to such terms in section 3 of the Congressional Budget and Impoundment Control Act of 1974 [2 U.S.C. 622] and "discretionary spending limit" shall mean the amounts specified in section 901 of this title.

(2) The terms "sequester" and "sequestration" refer to or mean the cancellation of budgetary resources provided by discretionary appropriations or direct spending law.

(3) The term "breach" means, for any fiscal year, the amount (if any) by which new budget authority or outlays for that year (within a category of discretionary appropriations) is above that category's discretionary spending limit for new budget authority or outlays for that year, as the case may be.

(4)(A) The term "nonsecurity category" means all discretionary appropriations not included in the security category defined in subparagraph (B).

(B) The term "security category" includes discretionary appropriations associated with agency budgets for the Department of Defense, the Department of Homeland Security, the Department of Veterans Affairs, the National Nuclear Security Administration, the intelligence community management account (95-0401-0-1-054), and all budget accounts in budget function 150 (international affairs).

(C) The term "discretionary category" includes all discretionary appropriations.

(D) The term "revised security category" means discretionary appropriations in budget function 050.

(E) The term "revised nonsecurity category" means discretionary appropriations other than in budget function 050.

(F) The term "category" means the subsets of discretionary appropriations in section 901(c) of this title. Discretionary appropriations in each of the categories shall be those designated in the joint explanatory statement accompanying the conference report on the Balanced Budget Act of 1997. New accounts or activities shall be categorized only after consultation with the Committees on Appropriations and the Budget of the House of Representatives and the Senate and that consultation shall, to the extent practicable, include written communication to such committees that affords such committees the opportunity to comment before official action is taken with respect to new accounts or activities.

(5) The term "baseline" means the projection (described in section 907 of this title) of current-year levels of new budget authority, outlays, receipts, and the surplus or deficit into the budget year and the outyears.

(6) The term "budgetary resources" means new budget authority, unobligated balances, direct spending authority, and obligation limitations.

(7) The term "discretionary appropriations" means budgetary resources (except to fund direct-spending programs) provided in appropriation Acts.

(8) The term "direct spending" means—

(A) budget authority provided by law other than appropriation Acts;

(B) entitlement authority; and

(C) the Supplemental Nutrition Assistance Program.

(9) The term "current" means, with respect to OMB estimates included with a budget submission under section 1105(a) of title 31, the estimates consistent with the economic and technical assumptions underlying that budget and with respect to estimates made after that budget submission that are not included with it, estimates consistent with the economic and technical assumptions underlying the most recently submitted President's budget.

(10) The term "real economic growth", with respect to any fiscal year, means the growth in the gross national product during such fiscal year, adjusted for inflation, consistent with Department of Commerce definitions.

(11) The term "account" means an item for which appropriations are made in any appropriation Act and, for items not provided for in appropriation Acts, such term means an item for which there is a designated budget account identification code number in the President's budget.

(12) The term "budget year" means, with respect to a session of Congress, the fiscal year of the Government that starts on October 1 of the calendar year in which that session begins.

(13) The term "current year" means, with respect to a budget year, the fiscal year that immediately precedes that budget year.

(14) The term "outyear" means a fiscal year one or more years after the budget year.

(15) The term "OMB" means the Director of the Office of Management and Budget.

(16) The term "CBO" means the Director of the Congressional Budget Office.

(17) As used in this subchapter, all references to entitlement authority shall include the list of mandatory appropriations included in the joint explanatory statement of managers accompanying the conference report on the Balanced Budget Act of 1997.

(18) The term "deposit insurance" refers to the expenses of the Federal deposit insurance agencies, and other Federal agencies supervising insured depository institutions, resulting from full funding of, and continuation of, the deposit insurance guarantee commitment in effect under current estimates.

(19) The term "asset sale" means the sale to the public of any asset (except for those assets covered by title V of the Congressional Budget Act of 1974 [2 U.S.C. 661 et seq.]), whether physical or financial, owned in whole or in part by the United States.

(20) The term "emergency" means a situation that—

(A) requires new budget authority and outlays (or new budget authority and the outlays flowing therefrom) for the prevention or mitigation of, or response to, loss of life or property, or a threat to national security; and

(B) is unanticipated.

(21) The term "unanticipated" means that the underlying situation is—

(A) sudden, which means quickly coming into being or not building up over time;

(B) urgent, which means a pressing and compelling need requiring immediate action;

(C) unforeseen, which means not predicted or anticipated as an emerging need; and

(D) temporary, which means not of a permanent duration.

7. 2 U.S.C. § 905 provides:

§ 905. Exempt programs and activities

(a) Social security benefits and tier I railroad retirement benefits

Benefits payable under the old-age, survivors, and disability insurance program established under title II of the Social Security Act (42 U.S.C. 401 et seq.), and benefits payable under sections 231b and 231c of title 45, shall be exempt from reduction under any order issued under this subchapter.

(b) Veterans programs

The following programs shall be exempt from reduction under any order issued under this subchapter:

All programs administered by the Department of Veterans Affairs.

Special benefits for certain World War II veterans (28-0401-0-1-701).

(c) Net interest

No reduction of payments for net interest (all of major functional category 900) shall be made under any order issued under this subchapter.

(d) Refundable income tax credits and certain elective payments

(1) Refundable income tax credits

Payments to individuals made pursuant to provisions of title 26 establishing refundable tax credits shall be exempt from reduction under any order issued under this part.

(2) Certain elective payments

Payments made to taxpayers pursuant to elections under subsection (d) of section 48D of title 26, or amounts treated as payments which are made by taxpayers under paragraph (1) of such subsection, shall be exempt from reduction under any order issued under this part.

(e) Non-defense unobligated balances

Unobligated balances of budget authority carried over from prior fiscal years, except balances in the defense category, shall be exempt from reduction under any order issued under this subchapter.

(f) Optional exemption of military personnel

(1) In general

The President may, with respect to any military personnel account, exempt that account from sequestration or provide for a lower uniform percentage reduction than would otherwise apply.

(2) Limitation

The President may not use the authority provided by paragraph (1) unless the President notifies the Congress of the manner in which such authority will be exercised on or before the date specified in section 904(a) of this title for the budget year.

(g) Other programs and activities

(1)(A) The following budget accounts and activities shall be exempt from reduction under any order issued under this subchapter:

Activities resulting from private donations, bequests, or voluntary contributions to the Government.

Activities financed by voluntary payments to the Government for goods or services to be provided for such payments.

Administration of Territories, Northern Mariana Islands Covenant grants (14-0412-0-1-808).

Advances to the Unemployment Trust Fund and Other Funds (16-0327-0-1-600).

Black Lung Disability Trust Fund Refinancing (16-0329-0-1-601).

Bonneville Power Administration Fund and borrowing authority established pursuant to section 13 of Public Law 93-454 (1974), as amended [16 U.S.C. 838k] (89-4045-0-3-271).

Claims, Judgments, and Relief Acts (20-1895-0-1-808).

Compact of Free Association (14-0415-0-1-808).

Compensation of the President (11-0209-01-1-802).

Comptroller of the Currency, Assessment Funds (20-8413-0-8-373).

Continuing Fund, Southeastern Power Administration (89-5653-0-2-271).

Continuing Fund, Southwestern Power Administration (89-5649-0-2-271).

Creating Helpful Incentives to Produce Semiconductors (CHIPS) for America Fund.

Creating Helpful Incentives to Produce Semiconductors (CHIPS) for America Defense Fund.

Creating Helpful Incentives to Produce Semiconductors (CHIPS) for America International Technology Security and Innovation Fund.

Creating Helpful Incentives to Produce Semiconductors (CHIPS) for America Workforce and Education Fund.

Dual Benefits Payments Account (60-0111-0-1-601).

Emergency Fund, Western Area Power Administration (89-5069-0-2-271).

Exchange Stabilization Fund (20-4444-0-3-155).

Farm Credit Administration Operating Expenses Fund (78-4131-0-3-351).

Farm Credit System Insurance Corporation, Farm Credit Insurance Fund (78-4171-0-3-351).

Federal Deposit Insurance Corporation, Deposit Insurance Fund (51-4596-0-4-373).

Federal Deposit Insurance Corporation, FSLIC Resolution Fund (51-4065-0-3-373).

Federal Deposit Insurance Corporation, Non-interest Bearing Transaction Account Guarantee (51-4458-0-3-373).

Federal Deposit Insurance Corporation, Senior Unsecured Debt Guarantee (51-4457-0-3-373).

Federal Home Loan Mortgage Corporation (Freddie Mac).

Federal Housing Finance Agency, Administrative Expenses (95-5532-0-2-371).

Federal National Mortgage Corporation (Fannie Mae).

Federal Payment to the District of Columbia Judicial Retirement and Survivors Annuity Fund (20-1713-0-1-752).

Federal Payment to the District of Columbia Pension Fund (20-1714-0-1-601).

Federal Payments to the Railroad Retirement Accounts (60-0113-0-1-601).

Federal Reserve Bank Reimbursement Fund (20-1884-0-1-803).

Financial Agent Services (20-1802-0-1-803).

Foreign Military Sales Trust Fund (11-8242-0-7-155).

Hazardous Waste Management, Conservation Reserve Program (12-4336-0-3-999).

Host Nation Support Fund for Relocation (97-8337-0-7-051).

Internal Revenue Collections for Puerto Rico (20-5737-0-2-806).

Intragovernmental funds, including those from which the outlays are derived primarily from resources paid in from other government accounts, except to the extent such funds are augmented by direct appropriations for the fiscal year during which an order is in effect.

Medical Facilities Guarantee and Loan Fund (75-9931-0-3-551).

National Credit Union Administration, Central Liquidity Facility (25-4470-0-3-373).

National Credit Union Administration, Corporate Credit Union Share Guarantee Program (25-4476-0-3-376).

National Credit Union Administration, Credit Union Homeowners Affordability Relief Program (25-4473-0-3-371).

National Credit Union Administration, Credit Union Share Insurance Fund (25-4468-0-3-373).

National Credit Union Administration, Credit Union System Investment Program (25-4474-0-3-376).

National Credit Union Administration, Operating fund (25-4056-0-3-373).

National Credit Union Administration, Share Insurance Fund Corporate Debt Guarantee Program (25-4469-0-3-376).

National Credit Union Administration, U.S. Central Federal Credit Union Capital Program (25-4475-0-3-376).

Office of Thrift Supervision (20-4108-0-3-373).

Panama Canal Commission Compensation Fund (16-5155-0-2-602).

Payment of Vietnam and USS Pueblo prisoner-of-war claims within the Salaries and Expenses, Foreign Claims Settlement account (15-0100-0-1-153).

Payment to Civil Service Retirement and Disability Fund (24-0200-0-1-805).

Payment to Department of Defense Medicare-Eligible Retiree Health Care Fund (97-0850-0-1-054).

Payment to Judiciary Trust Funds (10-0941-0-1-752).

Payment to Military Retirement Fund (97-0040-0-1-054).

Payment to the Foreign Service Retirement and Disability Fund (19-0540-0-1-153).

Payments to Copyright Owners (03-5175-0-2-376).

Payments to Health Care Trust Funds (75-0580-0-1-571).

Payment to Radiation Exposure Compensation Trust Fund (15-0333-0-1-054).

Payments to Social Security Trust Funds (28-0404-0-1-651).

Payments to the United States Territories, Fiscal Assistance (14-0418-0-1-806).

Payments to trust funds from excise taxes or other receipts properly creditable to such trust funds.

Payments to widows and heirs of deceased Members of Congress (00-0215-0-1-801).

Postal Service Fund (18-4020-0-3-372).

Public Wireless Supply Chain Innovation Fund.

Radiation Exposure Compensation Trust Fund (15-8116-0-1-054).

Reimbursement to Federal Reserve Banks (20-0562-0-1-803).

Salaries of Article III judges.

Soldiers and Airmen's Home, payment of claims (84-8930-0-7-705).

Tennessee Valley Authority Fund, except non-power programs and activities (64-4110-0-3-999).

Tribal and Indian trust accounts within the Department of the Interior which fund prior legal obligations of the Government or which are established pursuant to Acts of Congress regarding Federal management of tribal real property or other fiduciary responsibilities, including but not limited to Tribal Special Fund (14-5265-0-2-452), Tribal Trust Fund (14-8030-0-7-452), White Earth Settlement (14-2204-0-1-452), and Indian Water Rights and Habitat Acquisition (14-5505-0-2-303).

United Mine Workers of America 1992 Benefit Plan (95-8260-0-7-551).

United Mine Workers of America 1993 Benefit Plan (95-8535-0-7-551).

United Mine Workers of America Combined Benefit Fund (95-8295-0-7-551).

United States Enrichment Corporation Fund (95-4054-0-3-271).

Universal Service Fund (27-5183-0-2-376).

Vaccine Injury Compensation (75-0320-0-1-551).

Vaccine Injury Compensation Program Trust Fund (20-8175-0-7-551).

(B) The following Federal retirement and disability accounts and activities shall be exempt from reduction under any order issued under this subchapter:

Black Lung Disability Trust Fund (20-8144-0-7-601).

Central Intelligence Agency Retirement and Disability System Fund (56-3400-0-1-054).

Civil Service Retirement and Disability Fund (24-8135-0-7-602).

Comptrollers general retirement system (05-0107-0-1-801).

Contributions to U.S. Park Police annuity benefits, Other Permanent Appropriations (14-9924-0-2-303).

Court of Appeals for Veterans Claims Retirement Fund (95-8290-0-7-705).

Department of Defense Medicare-Eligible Retiree Health Care Fund (97-5472-0-2-551).

District of Columbia Federal Pension Fund (20-5511-0-2-601).

District of Columbia Judicial Retirement and Survivors Annuity Fund (20-8212-0-7-602).

Energy Employees Occupational Illness Compensation Fund (16-1523-0-1-053).

Foreign National Employees Separation Pay (97-8165-0-7-051).

Foreign Service National Defined Contributions Retirement Fund (19-5497-0-2-602).

Foreign Service National Separation Liability Trust Fund (19-8340-0-7-602).

Foreign Service Retirement and Disability Fund (19-8186-0-7-602).

Government Payment for Annuitants, Employees Health Benefits (24-0206-0-1-551).

Government Payment for Annuitants, Employee Life Insurance (24-0500-0-1-602).

Judicial Officers' Retirement Fund (10-8122-0-7-602).

Judicial Survivors' Annuities Fund (10-8110-0-7-602).

Military Retirement Fund (97-8097-0-7-602).

National Railroad Retirement Investment Trust (60-8118-0-7-601).

National Oceanic and Atmospheric Administration retirement (13-1450-0-1-306).

Pensions for former Presidents (47-0105-0-1-802).

Postal Service Retiree Health Benefits Fund (24-5391-0-2-551).

Public Safety Officer Benefits (15-0403-0-1-754).

Rail Industry Pension Fund (60-8011-0-7-601).

Retired Pay, Coast Guard (70-0602-0-1-403).

Retirement Pay and Medical Benefits for Commissioned Officers, Public Health Service (75-0379-0-1-551).

September 11th Victim Compensation Fund (15-0340-0-1-754).

Special Benefits for Disabled Coal Miners (16-0169-0-1-601).

Special Benefits, Federal Employees' Compensation Act (16-1521-0-1-600).

Special Workers Compensation Expenses (16-9971-0-7-601).

Tax Court Judges Survivors Annuity Fund (23-8115-0-7-602).

United States Court of Federal Claims Judges' Retirement Fund (10-8124-0-7-602).

United States Secret Service, DC Annuity (70-0400-0-1-751).

Victims Compensation Fund established under section 410 of the Air Transportation Safety and System Stabilization Act (49 U.S.C. 40101 note).

United States Victims of State Sponsored Terrorism Fund.

Voluntary Separation Incentive Fund (97-8335-0-7-051).

World Trade Center Health Program Fund (75-0946-0-1-551).

(2) Prior legal obligations of the Government in the following budget accounts and activities shall be exempt from any order issued under this subchapter:

Biomass Energy Development (20-0114-0-1-271).

Check Forgery Insurance Fund (20-4109-0-3-803).

Credit liquidating accounts.

Credit reestimates.

Employees Life Insurance Fund (24-8424-0-8-602).

Federal Aviation Insurance Revolving Fund (69-4120-0-3-402).

Federal Crop Insurance Corporation Fund (12-4085-0-3-351).

Federal Emergency Management Agency, National Flood Insurance Fund (58-4236-0-3-453).

Geothermal resources development fund (89-0206-0-1-271).

Low-Rent Public Housing-Loans and Other Expenses (86-4098-0-3-604).

Maritime Administration, War Risk Insurance Revolving Fund (69-4302-0-3-403).

Natural Resource Damage Assessment Fund (14-1618-0-1-302).

United States International Development Finance Corporation.

Pension Benefit Guaranty Corporation Fund (16-4204-0-3-601).

San Joaquin Restoration Fund (14-5537-0-2-301).

Servicemembers' Group Life Insurance Fund (36-4009-0-3-701).

Terrorism Insurance Program (20-0123-0-1-376).

(h) Low-income programs

The following programs shall be exempt from reduction under any order issued under this subchapter:

Academic Competitiveness/Smart Grant Program (91-0205-0-1-502).

Child Care Entitlement to States (75-1550-0-1-609).

Child Enrollment Contingency Fund (75-5551-0-2-551).

Child Nutrition Programs (with the exception of special milk programs) (12-3539-0-1-605).

Children's Health Insurance Fund (75-0515-0-1-551).

Commodity Supplemental Food Program (12-3507-0-1-605).

Contingency Fund (75-1522-0-1-609).

Family Support Programs (75-1501-0-1-609).

Federal Pell Grants under section 1070a of title 20.

Grants to States for Medicaid (75-0512-0-1-551).

Payments for Foster Care and Permanency (75-1545-0-1-609).

Supplemental Nutrition Assistance Program (12-3505-0-1-605).

Supplemental Security Income Program (28-0406-0-1-609).

Temporary Assistance for Needy Families (75-1552-0-1-609).

(i) Economic recovery programs

The following programs shall be exempt from reduction under any order issued under this subchapter:

GSE Preferred Stock Purchase Agreements (20-0125-0-1-371).

Office of Financial Stability (20-0128-0-1-376).

Special Inspector General for the Troubled Asset Relief Program (20-0133-0-1-376).

(j) Split treatment programs

Each of the following programs shall be exempt from any order under this subchapter to the extent that the budgetary resources of such programs are subject to obligation limitations in appropriations bills:

Federal-Aid Highways (69-8083-0-7-401).

Highway Traffic Safety Grants (69-8020-0-7-401).

Operations and Research NHTSA and National Driver Register (69-8016-0-7-401).

Motor Carrier Safety Operations and Programs (69-8159-0-7-401).

Motor Carrier Safety Grants (69-8158-0-7-401).

Formula and Bus Grants (69-8350-0-7-401).

Grants-In-Aid for Airports (69-8106-0-7-402).

(k) Identification of programs

For purposes of subsections (b), (g), and (h), each account is identified by the designated budget account identification code number set forth in the Budget of the United States Government 2010-Appendix, and an activity within an account is designated by the name of the activity and the identification code number of the account.

8. 26 U.S.C. § 6401 provides:

§ 6401. Amounts treated as overpayments

(a) Assessment and collection after limitation period

The term "overpayment" includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto.

(b) Excessive credits

(1) In general

If the amount allowable as credits under subpart C of part IV of subchapter A of chapter 1 (relating to refundable credits) exceeds the tax imposed by subtitle A (reduced by the credits allowable under subparts A, B, D, and G of such part IV), the amount of such excess shall be considered an overpayment.

(2) Special rule for credit under section 33

For purposes of paragraph (1), any credit allowed under section 33 (relating to withholding of tax on nonresident aliens and on foreign corporations) for any taxable year shall be treated as a credit allowable under subpart C of part IV of subchapter A of chapter 1 only if an election under subsection (g) or (h) of section 6013 is in effect for such taxable year. The preceding sentence shall not apply to any credit so allowed by reason of section 1446.

(c) Rule where no tax liability

An amount paid as tax shall not be considered not to constitute an overpayment solely by reason of the fact that there was no tax liability in respect of which such amount was paid.

9. 26 U.S.C. § 6402 provides:

§ 6402. Authority to make credits or refunds

(a) General rule

In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsections (c), (d), (e), and (f), refund any balance to such person.

(b) Credits against estimated tax

The Secretary is authorized to prescribe regulations providing for the crediting against the estimated income tax for any taxable year of the amount determined by the taxpayer or the Secretary to be

an overpayment of the income tax for a preceding taxable year.

(c) Offset of past-due support against overpayments

The amount of any overpayment to be refunded to the person making the overpayment shall be reduced by the amount of any past-due support (as defined in section 464(c) of the Social Security Act) owed by that person of which the Secretary has been notified by a State in accordance with section 464 of such Act. The Secretary shall remit the amount by which the overpayment is so reduced to the State collecting such support and notify the person making the overpayment that so much of the overpayment as was necessary to satisfy his obligation for past-due support has been paid to the State. The Secretary shall apply a reduction under this subsection first to an amount certified by the State as past due support under section 464 of the Social Security Act before any other reductions allowed by law. This subsection shall be applied to an overpayment prior to its being credited to a person's future liability for an internal revenue tax.

(d) Collection of debts owed to Federal agencies

(1) In general

Upon receiving notice from any Federal agency that a named person owes a past-due legally enforceable debt (other than past-due support subject to the provisions of subsection (c)) to such agency, the Secretary shall—

(A) reduce the amount of any overpayment payable to such person by the amount of such debt;

(B) pay the amount by which such overpayment is reduced under subparagraph (A) to such agency; and

(C) notify the person making such overpayment that such overpayment has been reduced by an amount necessary to satisfy such debt.

(2) Priorities for offset

Any overpayment by a person shall be reduced pursuant to this subsection after such overpayment is reduced pursuant to subsection (c) with respect to past-due support collected pursuant to an assignment under section 408(a)(3) of the Social Security Act (42 U.S.C. 608(a)(3)) and before such overpayment is reduced pursuant to subsections (e) and (f) and before such overpayment is credited to the future liability for tax of such person pursuant to subsection (b). If the Secretary receives notice from a Federal agency or agencies of more than one debt subject to paragraph (1) that is owed by a person to such agency or agencies, any overpayment by such person shall be applied against such debts in the order in which such debts accrued.

(3) Treatment of OASDI overpayments

(A) Requirements

Paragraph (1) shall apply with respect to an OASDI overpayment only if the requirements of paragraphs (1) and (2) of section 3720A(f) of title 31, United States Code, are met with respect to such overpayment.

(B) Notice; protection of other persons filing joint return

(i) Notice

In the case of a debt consisting of an OASDI overpayment, if the Secretary determines upon

receipt of the notice referred to in paragraph (1) that the refund from which the reduction described in paragraph (1)(A) would be made is based upon a joint return, the Secretary shall—

(I) notify each taxpayer filing such joint return that the reduction is being made from a refund based upon such return, and

(II) include in such notification a description of the procedures to be followed, in the case of a joint return, to protect the share of the refund which may be payable to another person.

(ii) Adjustments based on protections given to other taxpayers on joint return

If the other person filing a joint return with the person owing the OASDI overpayment takes appropriate action to secure his or her proper share of the refund subject to reduction under this subsection, the Secretary shall pay such share to such other person. The Secretary shall deduct the amount of such payment from amounts which are derived from subsequent reductions in refunds under this subsection and are payable to a trust fund referred to in subparagraph (C).

(C) Deposit of amount of reduction into appropriate trust fund

In lieu of payment, pursuant to paragraph (1)(B), of the amount of any reduction under this subsection to the Commissioner of Social Security, the Secretary shall deposit such amount in the Federal Old-Age and Survivors Insurance Trust Fund or the Federal Disability Insurance Trust Fund, whichever is certified to the Secretary

as appropriate by the Commissioner of Social Security.

(D) OASDI overpayment

For purposes of this paragraph, the term "OASDI overpayment" means any overpayment of benefits made to an individual under title II of the Social Security Act.

(e) Collection of past-due, legally enforceable State income tax obligations

(1) In general

Upon receiving notice from any State that a named person owes a past-due, legally enforceable State income tax obligation to such State, the Secretary shall, under such conditions as may be prescribed by the Secretary—

(A) reduce the amount of any overpayment payable to such person by the amount of such State income tax obligation;

(B) pay the amount by which such overpayment is reduced under subparagraph (A) to such State and notify such State of such person's name, taxpayer identification number, address, and the amount collected; and

(C) notify the person making such overpayment that the overpayment has been reduced by an amount necessary to satisfy a past-due, legally enforceable State income tax obligation.

If an offset is made pursuant to a joint return, the notice under subparagraph (B) shall include the names, taxpayer identification numbers, and addresses of each person filing such return.

(2) Offset permitted only against residents of State seeking offset

Paragraph (1) shall apply to an overpayment by any person for a taxable year only if the address shown on the Federal return for such taxable year of the overpayment is an address within the State seeking the offset.

(3) Priorities for offset

Any overpayment by a person shall be reduced pursuant to this subsection—

(A) after such overpayment is reduced pursuant to—

(i) subsection (a) with respect to any liability for any internal revenue tax on the part of the person who made the overpayment;

(ii) subsection (c) with respect to past-due support; and

(iii) subsection (d) with respect to any past-due, legally enforceable debt owed to a Federal agency; and

(B) before such overpayment is credited to the future liability for any Federal internal revenue tax of such person pursuant to subsection (b).

If the Secretary receives notice from one or more agencies of the State of more than one debt subject to paragraph (1) or subsection (f) that is owed by such person to such an agency, any overpayment by such person shall be applied against such debts in the order in which such debts accrued.

(4) Notice; consideration of evidence

No State may take action under this subsection until such State—

(A) notifies by certified mail with return receipt the person owing the past-due State income tax liability that the State proposes to take action pursuant to this section;

(B) gives such person at least 60 days to present evidence that all or part of such liability is not past-due or not legally enforceable;

(C) considers any evidence presented by such person and determines that an amount of such debt is past-due and legally enforceable; and

(D) satisfies such other conditions as the Secretary may prescribe to ensure that the determination made under subparagraph (C) is valid and that the State has made reasonable efforts to obtain payment of such State income tax obligation.

(5) Past-due, legally enforceable State income tax obligation

For purposes of this subsection, the term "past-due, legally enforceable State income tax obligation" means a debt—

(A)(i) which resulted from—

(I) a judgment rendered by a court of competent jurisdiction which has determined an amount of State income tax to be due; or

(II) a determination after an administrative hearing which has determined an amount of State income tax to be due; and

(ii) which is no longer subject to judicial review; or

(B) which resulted from a State income tax which has been assessed but not collected, the time for redetermination of which has expired, and

which has not been delinquent for more than 10 years.

For purposes of this paragraph, the term "State income tax" includes any local income tax administered by the chief tax administration agency of the State.

(6) Regulations

The Secretary shall issue regulations prescribing the time and manner in which States must submit notices of past-due, legally enforceable State income tax obligations and the necessary information that must be contained in or accompany such notices. The regulations shall specify the types of State income taxes and the minimum amount of debt to which the reduction procedure established by paragraph (1) may be applied. The regulations may require States to pay a fee to reimburse the Secretary for the cost of applying such procedure. Any fee paid to the Secretary pursuant to the preceding sentence shall be used to reimburse appropriations which bore all or part of the cost of applying such procedure.

(7) Erroneous payment to State

Any State receiving notice from the Secretary that an erroneous payment has been made to such State under paragraph (1) shall pay promptly to the Secretary, in accordance with such regulations as the Secretary may prescribe, an amount equal to the amount of such erroneous payment (without regard to whether any other amounts payable to such State under such paragraph have been paid to such State).

(f) Collection of unemployment compensation debts

(1) In general

Upon receiving notice from any State that a named person owes a covered unemployment compensation debt to such State, the Secretary shall, under such conditions as may be prescribed by the Secretary—

(A) reduce the amount of any overpayment payable to such person by the amount of such covered unemployment compensation debt;

(B) pay the amount by which such overpayment is reduced under subparagraph (A) to such State and notify such State of such person's name, taxpayer identification number, address, and the amount collected; and

(C) notify the person making such overpayment that the overpayment has been reduced by an amount necessary to satisfy a covered unemployment compensation debt.

If an offset is made pursuant to a joint return, the notice under subparagraph (C) shall include information related to the rights of a spouse of a person subject to such an offset.

(2) Priorities for offset

Any overpayment by a person shall be reduced pursuant to this subsection—

(A) after such overpayment is reduced pursuant to—

(i) subsection (a) with respect to any liability for any internal revenue tax on the part of the person who made the overpayment;

(ii) subsection (c) with respect to past-due support; and

(iii) subsection (d) with respect to any past-due, legally enforceable debt owed to a Federal agency; and

(B) before such overpayment is credited to the future liability for any Federal internal revenue tax of such person pursuant to subsection (b).

If the Secretary receives notice from a State or States of more than one debt subject to paragraph (1) or subsection (e) that is owed by a person to such State or States, any overpayment by such person shall be applied against such debts in the order in which such debts accrued.

(3) Notice; consideration of evidence

No State may take action under this subsection until such State—

(A) notifies the person owing the covered unemployment compensation debt that the State proposes to take action pursuant to this section;

(B) provides such person at least 60 days to present evidence that all or part of such liability is not legally enforceable or is not a covered unemployment compensation debt;

(C) considers any evidence presented by such person and determines that an amount of such debt is legally enforceable and is a covered unemployment compensation debt; and

(D) satisfies such other conditions as the Secretary may prescribe to ensure that the determination made under subparagraph (C) is valid and that the State has made reasonable efforts to obtain payment of such covered unemployment compensation debt.

(4) Covered unemployment compensation debt

For purposes of this subsection, the term "covered unemployment compensation debt" means—

(A) a past-due debt for erroneous payment of unemployment compensation due to fraud or the person's failure to report earnings which has become final under the law of a State certified by the Secretary of Labor pursuant to section 3304 and which remains uncollected;

(B) contributions due to the unemployment fund of a State for which the State has determined the person to be liable and which remain uncollected; and

(C) any penalties and interest assessed on such debt.

(5) Regulations

(A) In general

The Secretary may issue regulations prescribing the time and manner in which States must submit notices of covered unemployment compensation debt and the necessary information that must be contained in or accompany such notices. The regulations may specify the minimum amount of debt to which the reduction procedure established by paragraph (1) may be applied.

(B) Fee payable to Secretary

The regulations may require States to pay a fee to the Secretary, which may be deducted from amounts collected, to reimburse the Secretary for the cost of applying such procedure. Any fee paid to the Secretary pursuant to the preceding sentence shall be used to reimburse appropriations

which bore all or part of the cost of applying such procedure.

(C) Submission of notices through Secretary of Labor

The regulations may include a requirement that States submit notices of covered unemployment compensation debt to the Secretary via the Secretary of Labor in accordance with procedures established by the Secretary of Labor. Such procedures may require States to pay a fee to the Secretary of Labor to reimburse the Secretary of Labor for the costs of applying this subsection. Any such fee shall be established in consultation with the Secretary of the Treasury. Any fee paid to the Secretary of Labor may be deducted from amounts collected and shall be used to reimburse the appropriation account which bore all or part of the cost of applying this subsection.

(6) Erroneous payment to State

Any State receiving notice from the Secretary that an erroneous payment has been made to such State under paragraph (1) shall pay promptly to the Secretary, in accordance with such regulations as the Secretary may prescribe, an amount equal to the amount of such erroneous payment (without regard to whether any other amounts payable to such State under such paragraph have been paid to such State).

(g) Review of reductions

No court of the United States shall have jurisdiction to hear any action, whether legal or equitable, brought to restrain or review a reduction authorized by subsection (c), (d), (e), or (f). No such reduction shall be subject to review by the Secretary in an administrative proceeding. No action brought against

the United States to recover the amount of any such reduction shall be considered to be a suit for refund of tax. This subsection does not preclude any legal, equitable, or administrative action against the Federal agency or State to which the amount of such reduction was paid or any such action against the Commissioner of Social Security which is otherwise available with respect to recoveries of overpayments of benefits under section 204 of the Social Security Act.

(h) Federal agency

For purposes of this section, the term "Federal agency" means a department, agency, or instrumentality of the United States, and includes a Government corporation (as such term is defined in section 103 of title 5, United States Code).

(i) Treatment of payments to States

The Secretary may provide that, for purposes of determining interest, the payment of any amount withheld under subsection (c), (e), or (f) to a State shall be treated as a payment to the person or persons making the overpayment.

(j) Cross reference

For procedures relating to agency notification of the Secretary, see section 3721 of title 31, United States Code.

(k) Refunds to certain fiduciaries of insolvent members of affiliated groups

Notwithstanding any other provision of law, in the case of an insolvent corporation which is a member of an affiliated group of corporations filing a consolidated return for any taxable year and which is subject to a statutory or court-appointed fiduciary, the Secretary may by regulation provide that any refund for such

taxable year may be paid on behalf of such insolvent corporation to such fiduciary to the extent that the Secretary determines that the refund is attributable to losses or credits of such insolvent corporation.

(*l*) Explanation of reason for refund disallowance

In the case of a disallowance of a claim for refund, the Secretary shall provide the taxpayer with an explanation for such disallowance.

(m) Earliest date for certain refunds

No credit or refund of an overpayment for a taxable year shall be made to a taxpayer before the 15th day of the second month following the close of such taxable year if a credit is allowed to such taxpayer under section 24 (by reason of subsection (d) thereof) or 32 for such taxable year.

(n) Misdirected direct deposit refund

Not later than the date which is 6 months after the date of the enactment of the Taxpayer First Act, the Secretary shall prescribe regulations to establish procedures to allow for—

(1) taxpayers to report instances in which a refund made by the Secretary by electronic funds transfer was not transferred to the account of the taxpayer;

(2) coordination with financial institutions for the purpose of—

(A) identifying the accounts to which transfers described in paragraph (1) were made; and

(B) recovery of the amounts so transferred; and

(3) the refund to be delivered to the correct account of the taxpayer.

10. 26 U.S.C. § 6611 provides:

§ 6611. Interest on overpayments

(a) Rate.—Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under section 6621.

(b) Period.—Such interest shall be allowed and paid as follows:

(1) Credits.—In the case of a credit, from the date of the overpayment to the due date of the amount against which the credit is taken.

(2) Refunds.—In the case of a refund, from the date of the overpayment to a date (to be determined by the Secretary) preceding the date of the refund check by not more than 30 days, whether or not such refund check is accepted by the taxpayer after tender of such check to the taxpayer. The acceptance of such check shall be without prejudice to any right of the taxpayer to claim any additional overpayment and interest thereon.

(3) Late returns.—Notwithstanding paragraph (1) or (2) in the case of a return of tax which is filed after the last date prescribed for filing such return (determined with regard to extensions), no interest shall be allowed or paid for any day before the date on which the return is filed.

[**(c) Repealed.** Pub.L. 85-866, Title I, § 83(c), Sept. 2, 1958, 72 Stat. 1664]

(d) Advance payment of tax, payment of estimated tax, and credit for income tax withholding.—The provisions of section 6513 (except the provisions of subsection (c) thereof), applicable in determining the date of payment of tax for purposes of determining the period of limitation on credit or

refund, shall be applicable in determining the date of payment for purposes of subsection (a).

(e) Disallowance of interest on certain overpayments.—

(1) Refunds within 45 days after return is filed.—If any overpayment of tax imposed by this title is refunded within 45 days after the last day prescribed for filing the return of such tax (determined without regard to any extension of time for filing the return) or, in the case of a return filed after such last date, is refunded within 45 days after the date the return is filed, no interest shall be allowed under subsection (a) on such overpayment.

(2) Refunds after claim for credit or refund.—If—

(A) the taxpayer files a claim for a credit or refund for any overpayment of tax imposed by this title, and

(B) such overpayment is refunded within 45 days after such claim is filed,

no interest shall be allowed on such overpayment from the date the claim is filed until the day the refund is made.

(3) IRS initiated adjustments.—If an adjustment initiated by the Secretary, results in a refund or credit of an overpayment, interest on such overpayment shall be computed by subtracting 45 days from the number of days interest would otherwise be allowed with respect to such overpayment.

(4) Certain withholding taxes.—In the case of any overpayment resulting from tax deducted and withheld under chapter 3 or 4, paragraphs (1), (2), and (3) shall be applied by substituting "180 days" for "45 days" each place it appears.

(f) Refund of income tax caused by carryback or adjustment for certain unused deductions.—

(1) Net operating loss or capital loss carryback.—For purposes of subsection (a), if any overpayment of tax imposed by subtitle A results from a carryback of a net operating loss or net capital loss, such overpayment shall be deemed not to have been made prior to the filing date for the taxable year in which such net operating loss or net capital loss arises.

(2) Foreign tax credit carrybacks.—For purposes of subsection (a), if any overpayment of tax imposed by subtitle A results from a carryback of tax paid or accrued to foreign countries or possessions of the United States, such overpayment shall be deemed not to have been made before the filing date for the taxable year in which such taxes were in fact paid or accrued, or, with respect to any portion of such credit carryback from a taxable year attributable to a net operating loss carryback or a capital loss carryback from a subsequent taxable year, such overpayment shall be deemed not to have been made before the filing date for such subsequent taxable year.

(3) Certain credit carrybacks.—

(A) In general.—For purposes of subsection (a), if any overpayment of tax imposed by subtitle A results from a credit carryback, such overpayment shall be deemed not to have been made before the filing date for the taxable year in which such credit carryback arises, or, with respect to any portion of a credit carryback from a taxable year attributable to a net operating loss carryback, capital loss carryback, or other credit carryback from a subsequent taxable year, such overpayment

shall be deemed not to have been made before the filing date for such subsequent taxable year.

(B) Credit carryback defined.—For purposes of this paragraph, the term "credit carryback" has the meaning given such term by section 6511(d)(4)(C).

(4) Special rules for paragraphs (1), (2), and (3).—

(A) Filing date.—For purposes of this subsection, the term "filing date" means the last date prescribed for filing the return of tax imposed by subtitle A for the taxable year (determined without regard to extensions).

(B) Coordination with subsection (e).—

(i) In general.—For purposes of subsection (e)—

(I) any overpayment described in paragraph (1), (2), or (3) shall be treated as an overpayment for the loss year, and

(II) such subsection shall be applied with respect to such overpayment by treating the return for the loss year as not filed before claim for such overpayment is filed.

(ii) Loss year.—For purposes of this subparagraph, the term "loss year" means—

(I) in the case of a carryback of a net operating loss or net capital loss, the taxable year in which such loss arises,

(II) in the case of a carryback of taxes paid or accrued to foreign countries or possessions of the United States, the taxable year in which such taxes were in fact paid or accrued (or, with respect to any portion of such carry-

back from a taxable year attributable to a net operating loss carryback or a capital loss carryback from a subsequent taxable year, such subsequent taxable year), and

(III) in the case of a credit carryback (as defined in paragraph (3)(B)), the taxable year in which such credit carryback arises (or, with respect to any portion of a credit carryback from a taxable year attributable to a net operating loss carryback, a capital loss carryback, or other credit carryback from a subsequent taxable year, such subsequent taxable year).

(C) Application of subparagraph (B) where section 6411(a) claim filed.—For purposes of subparagraph (B)(i)(II), if a taxpayer—

(i) files a claim for refund of any overpayment described in paragraph (1), (2), or (3) with respect to the taxable year to which a loss or credit is carried back, and

(ii) subsequently files an application under section 6411(a) with respect to such overpayment,

then the claim for overpayment shall be treated as having been filed on the date the application under section 6411(a) was filed.

(g) No interest until return in processible form.—

(1) For purposes of subsections (b)(3) and (e), a return shall not be treated as filed until it is filed in processible form.

(2) For purposes of paragraph (1), a return is in a processible form if—

(A) such return is filed on a permitted form, and

(B) such return contains—

(i) the taxpayer's name, address, and identifying number and the required signature, and

(ii) sufficient required information (whether on the return or on required attachments) to permit the mathematical verification of tax liability shown on the return.

(h) Prohibition of administrative review.—

For prohibition of administrative review, see section 6406.

11. 31 U.S.C. § 1324 provides:

§ 1324. Refund of internal revenue collections

(a) Necessary amounts are appropriated to the Secretary of the Treasury for refunding internal revenue collections as provided by law, including payment of—

(1) claims for prior fiscal years; and

(2) accounts arising under—

(A) "Allowance or drawback (Internal Revenue)";

(B) "Redemption of stamps (Internal Revenue)";

(C) "Refunding legacy taxes, Act of March 30, 1928";

(D) "Repayment of taxes on distilled spirits destroyed by casualty"; and

(E) "Refunds and payments of processing and related taxes".

(b) Disbursements may be made from the appropriation made by this section only for—

(1) refunds to the limit of liability of an individual tax account; and

(2) refunds due from credit provisions of the Internal Revenue Code of 1986 (26 U.S.C. 1 et seq.) enacted before January 1, 1978, or enacted by the Taxpayer Relief Act of 1997, or from section 21, 24, 25A, 35, 36, 36A, 36B, 168(k)(4)(F), 53(e), 54B(h), 3131, 3132, 3134, 6428, 6428A, 6428B, 6431, or 7527A of such Code, or due under section 3081(b)(2) of the Housing Assistance Tax Act of 2008.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

SCOTT S. HARRIS
Clerk of the Court
(202) 479-3011

May 10, 2023

Mr. David C. Frederick
Kellogg, Hansen, Todd,
Figel & Frederick, P.L.L.C.
1615 M Street, NW, Suite 400
Washington, DC 20036-3209

Re: Indiana Municipal Power Agency, et al.
v. United States
Application No. 22A979

Dear Mr. Frederick:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to The Chief Justice, who on May 10, 2023, extended the time to and including July 13, 2023.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk
by /s/ CLAYTON HIGGINS
Clayton Higgins
Case Analyst

[attached notification list omitted]