

Nos. 2017-1224, -1994, -2154, -2395

In the
United States Court of Appeals
for the Federal Circuit

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

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States
Court of Federal Claims, Case No. 1:16-cv-00744-CFL.
The Honorable **Charles F. Lettow**, Judge Presiding.

**MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* HEALTH
REPUBLIC INSURANCE COMPANY AND COMMON GROUND
HEALTHCARE COOPERATIVE IN SUPPORT OF PLAINTIFF-
APPELLANT'S PETITION FOR REHEARING EN BANC**

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Land of Lincoln Mutual Health Insurance Company v. United States of America

Case No. 17-1224

CERTIFICATE OF INTEREST

Counsel for the:

(petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

Health Republic Insurance Company and Common Ground Healthcare Cooperative

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Health Republic Insurance Company	N/A	None
Common Ground Healthcare Cooperative	N/A	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

None

FORM 9. Certificate of Interest

Form 9
Rev. 10/17

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47.4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

See Attachment A.

8/13/2018

Date

/s Stephen A. Swedlow

Signature of counsel

Stephen A. Swedlow

Printed name of counsel

Please Note: All questions must be answered

cc: _____

Reset Fields

Attachment A

Federal Circuit

Blue Cross and Blue Shield of North Carolina v. United States, No. 17-2154

Maine Cmty. Health Options v. United States, No. 17-2395

Moda Health Plan, Inc. v. United States, No. 17-1994

Court of Federal Claims

Alliant Health Plans, Inc. v. United States, No. 16-1491C (Braden, J.)

BCBSM, Inc. v. United States, No. 16-1253C (Coster Williams, J.)

Blue Cross and Blue Shield of Alabama v. United States, No. 17-347C
(Campbell-Smith, J.)

Blue Cross and Blue Shield of Kanas City v. United States, No. 17-95C
(Braden, J.)

Blue Cross Blue Shield of Tennessee v. United States, No. 17-348C (Horn,
J.)

Blue Cross of Idaho Health Service, Inc. v. United States, No. 16-1384C
(Lettow, J.)

Common Ground Healthcare Cooperative v. United States, No. 17-877C
(Sweeney, J.)

EmblemHealth, Inc. v. United States, No. 17-703C (Wheeler, J.)

Farmer v. United States, No. 17-363C (Campbell-Smith, J.)

First Priority Life Ins. Co. v. United States, No. 16-587C (Wolski, J.)

Health Alliance Medical Plans, Inc. v. United States, No. 17-653C
(Campbell-Smith, J.)

Health Net, Inc. v. United States, No. 16-1722C (Wolski, J.)

Health Republic Ins. Co. v. United States, No. 16-259C (Sweeney, J.)

HPHC Ins. Co., Inc. v. United States, No. 17-87C (Griggsby, J.)

Medica Health Plans v. United States, No. 17-94C (Horn, J.)

Minuteman Health Inc. v. United States, No. 16-1418C (Griggsby, J.)

Molina Healthcare v. United States, No. 17-97C (Wheeler, J.)

Montana Health CO-OP v. United States, No. 16-1427C (Wolski, J.)

Neighborhood Health Plan, Inc. v. United States, No. 16-1659C (Smith, J.)

New Mexico Health Connections v. United States, No. 16-1199C (Bruggink, J.)

Ommen v. United States, No. 17-712C (Lettow, J.)

Sanford Health Plan v. United States, No. 17-357C (Bruggink, J.)

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

The *amici curiae*, Health Republic Insurance Company (“Health Republic”) and Common Ground Healthcare Cooperative (“Common Ground”) respectfully move this Court pursuant to Federal Rules of Appellate Procedure 29 and 35, for leave to file the brief submitted herewith, in support of Appellant Land of Lincoln Mutual Health Insurance Company.

According to Federal Rule of Appellate Procedure 29(a)(3), an *amicus* brief is appropriate where *amici* are “interested” in the case and an *amicus* brief is “desirable” and the “matters asserted are relevant to the disposition of the case.” Fed. R. App. P. 29.

Here, the *amici curiae* are nonprofit corporations that offered health insurance on the exchanges established by the Patient Protection and Affordable Care Act in 2014, 2015, and/or 2016. Health Republic and Common Ground are each owed tens of millions of dollars in unpaid risk corridors amounts.

In February 2016, Health Republic filed the first lawsuit in the nation related to the failure of the United States of America (the “Government”) to make full payments under the risk corridors program of the ACA. Health Republic did so on behalf of both itself and a putative class of qualified health plan issuers for the 2014 and 2015 plan years (the “2014-2015 QHP Issuer Class”). The Court of Federal Claims certified the 2014-2015 QHP Issuer Class and Health Republic acts as its

representative. The 2014-2015 QHP Issuer Class consists of 149 class members, each of which affirmatively opted-in to the class.

In June 2017, Common Ground filed a lawsuit in the Court of Federal Claims on behalf of itself and a putative class of qualified health plan issuers for the 2016 plan year (the “2016 QHP Issuer Class,” and together with the 2014-2015 QHP Issuer Class the “QHP Issuer Classes”). The Court of Federal Claims certified the 2016 QHP Issuer Class and Common Ground acts as its representative. The 2016 QHP Issuer Class consists of 116 class members, each of which affirmatively opted-in to the class.

Both the *Health Republic* and the *Common Ground* class actions assert Tucker Act claims for failure to make full risk corridor payments—claims that are virtually identical to the one Land of Lincoln asserts here. Accordingly, Health Republic and Common Ground’s interests, as well as the interests of the QHP Issuer Classes they represent, may be affected by the outcome of this petition. Indeed, both class actions have been stayed pending further appellate developments in this case and the *Moda* appeal.

Plaintiff-Appellant Land of Lincoln’s petition for rehearing *en banc* thoroughly explains why the panel’s decision is contrary to existing precedent from this Court and the Supreme Court. Nevertheless, Health Republic and Common

Ground believe that certain issues from Land of Lincoln's petition bear additional discussion and explanation.

First, the panel decision's determination that the appropriations riders acted to "suspend" the Government's obligation to make payments out in an amount exceeding payments in is contrary to binding precedent requiring that "[t]he intent of Congress to effect a change in the substantive law via provision in an appropriation act must be clearly manifest." *N.Y. Airways, Inc. v. United States*, 369 F.2d 743, 749 (Ct. Cl. 1966). Congress's intent in passing the appropriations riders is far from "clear." Moreover, the Government repeatedly acknowledged that it was obligated to pay the full amounts of risk corridor payments, regardless of how much money was paid into the program.

Second, Health Republic, Common Ground, and the QHP Issuer Classes all understood that Section 1342 of the ACA and its implementing regulations would fully compensate them in accordance with the formulas set forth in the ACA for any unexpected losses. The Government's subsequent refusal to pay the full risk corridors amounts for the 2014-2016 plan years has caused enormous losses to Health Republic, Common Ground, and the QHP Issuer Classes and their enrollees.

Pursuant to Federal Circuit Rule 27(a)(5), counsel for *amici curiae* contacted counsel for the parties to ascertain whether the parties would oppose filing of their brief. Counsel for Appellant consented. Counsel for the Government stated that

“[t]he government defers to the Court as to whether to accept a second amicus brief from the same law firm that represents multiple amici.”¹

Accordingly, the *amici curiae* respectfully request that the Court grant leave to file their Brief in Support of Appellant, submitted herewith.

Dated: August 13, 2018

Respectfully submitted,

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Classes*

¹ Quinn Emanuel also submitted an *amicus* brief on behalf of seven economists in support of Land of Lincoln. The instant brief is on behalf of separate *amici curiae* Health Republic and Common Ground and addresses entirely different issues, including the harm suffered by Health Republic, Common Ground, and two certified classes (consisting of 149 and 116 class members each).

CERTIFICATE OF COMPLIANCE

This motion complies with the word count limitation of Fed. Cir. R. 27(d)(2)(A), and contains 779 words, exclusive of the portions exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 27(d).

The motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type.

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CERTIFICATE OF SERVICE

I, Rose E. Olejniczak, being duly sworn according to law and being over the age of 18, upon my oath deposes and states that:

Counsel Press was retained by Stephen A. Swedlow, Quinn Emanuel Urquhart & Sullivan, LLP, Counsel for *Amicus Curiae* Health Republic Insurance Company and Common Ground Healthcare Cooperative, to print this document. I am an employee of Counsel Press.

On August 13, 2018, Mr. Swedlow authorized me to electronically file the foregoing Motion for Leave to File Brief of *Amicus Curiae* Health Republic Insurance Company and Common Ground Healthcare Cooperative In Support of Plaintiff-Appellant's Petition for Rehearing En Banc with the Clerk of the Federal Circuit using the CM/ECF System, which will serve e-mail notice of such filing on the following:

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August 13, 2018