

No. 2017-1224

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.

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

STEPHEN A. SWEDLOW
QUINN EMANUEL URQUHART &
SULLIVAN, LLP
191 N. Wacker Drive, Suite 2700
Chicago, IL 60606
Tel: (312) 705-7400

*Counsel for Amicus Curiae
Health Republic Insurance Company and
Common Ground Healthcare Cooperative*



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.)

TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATE OF INTEREST	i
TABLE OF CONTENTS.....	v
TABLE OF AUTHORITIES	vi
INTEREST OF AMICI CURIAE.....	1
INTRODUCTION	4
ARGUMENT	5
I. Appropriations Riders Did Not Operate To Suspend The Government’s Obligation To Pay Full Amount Of Risk Corridors Payments Owed.	5
II. The Government’s Failure To Pay Full Risk Corridors Amounts Harmed Health Republic, Common Ground, And The QHP Issuer Classes.	8
CONCLUSION.....	12

TABLE OF AUTHORITIES

Page

CASES

Gibney v. United States,
114 Ct. Cl. 38 (1949)6

Moda Health Plan, Inc. v. United States,
892 F.3d 1311 (Fed. Cir. 2018) 3, 5, 6, 7

N.Y. Airways, Inc. v. United States,
369 F.2d 743 (Ct. Cl. 1966).....4

United States v. Langston,
118 U.S. 389 (1886).....6

OTHER AUTHORITIES

160 Cong. Rec. H9307-1, H9838 (Dec. 11, 2014)7, 8

78 Fed. Reg. 15,410, at 15,473 (Mar. 11, 2013).....7

79 Fed. Reg. 30,240, at 30,260 (May 27, 2014).....7, 8

Fed. R. App. P. 29.....1

INTEREST OF AMICI CURIAE¹

Health Republic Insurance Company (“Health Republic”) is a nonprofit corporation organized under the laws of the State of Oregon that began providing health insurance to thousands of people on Oregon’s state-based health exchange, established pursuant to the Patient Protection and Affordable Care Act (“ACA”), in January 2014. Health Republic provided health insurance to its insureds during the 2014 and 2015 benefit years. In October 2015, Health Republic learned that the Government would make only a fraction of the payments owed to Health Republic under what is known as the ACA’s “risk corridors program.” Due to this shortfall, Health Republic was forced to wind down its operations and did not offer any health insurance in 2016.

Common Ground Healthcare Cooperative (“Common Ground”) is a nonprofit corporation organized under the laws of the State of Wisconsin that began providing health insurance to thousands of people on Wisconsin’s state-based ACA health exchange in January 2014. Throughout 2014, 2015, and 2016 (*i.e.*, all three years that the risk corridors program was in operation), Common Ground continued to

¹ Pursuant to Fed. R. App. P. 29, counsel for *amici* Health Republic and Common Ground represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Fed. R. App. P. 29, *amici* Health Republic and Common Ground have filed a motion for leave to file this brief.

provide qualified health plans (“QHPs”) on the ACA exchange. In November 2017, CMS determined that Common Ground was owed over \$27 million in risk corridor receivables for the individual and small group markets for the 2016 plan year. However, CMS announced it would be paying Common Ground just under \$400,000, a pro rata amount that would be applied to the remaining amounts owed to Common Ground for the 2014 plan year.

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 corridor 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 interest in this case is based on the fact that their 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.

On behalf of themselves and the certified QHP Issuer Classes, Health Republic and Common Ground respectfully submit this brief in support of Plaintiff-Appellant Land of Lincoln’s Petition for Rehearing *En Banc*.

INTRODUCTION

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 subsequent implementing regulations would fully compensate them in accordance with the formulas set forth in the ACA for any unexpected losses stemming from the inability to predict what the risk pool would look like and therefore to accurately set premiums or fees in the

new ACA markets. This permitted Health Republic, Common Ground, and the QHP Issuer Classes to enter the risky new ACA exchanges and keep rates as low as possible while they learned the new markets' demographics and health status, knowing they would neither earn extreme profits nor suffer disastrous losses. It was only after Health Republic, Common Ground, and the QHP Issuer Classes had committed to entering the ACA exchange marketplace and set premiums that the Government unexpectedly announced it would not make full risk corridors payments. 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.

ARGUMENT

I. Appropriations Riders Did Not Operate To Suspend The Government's Obligation To Pay Full Amount Of Risk Corridors Payments Owed.

The majority correctly held "that the plain language of section 1342 created an obligation of the government to pay participants in the health benefit exchanges the full amount indicated by the statutory formula for payments out under the risk corridors program." *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1322 (Fed. Cir. 2018). However, the majority went on to hold that "Congress suspended the government's obligation in each year of the program through clear intent manifested in appropriations riders." *Id.* at 1331. According to the majority, the

appropriation riders were evidence of “Congress’s intent to temporarily cap payments out at the amount of payments in.” *Id.* at 1326.

As discussed in Land of Lincoln’s petition, the majority’s decision directly conflicts with Supreme Court precedent and precedent from the Federal Circuit. Moreover, the directives coming from Congress and other branches of the Government have been anything but “clear.” For example, a long line of cases have held that merely failing to appropriate sufficient funds or barring payments from a particular source (as Congress did in the appropriation riders at issue here) do not remove the Government’s underlying obligation. *See, e.g., United States v. Langston*, 118 U.S. 389, 393-94 (1886) (holding that Congress owed Haitian ambassador \$2,500 where statute mandated that he be paid \$7,500 annually and Congress only appropriated \$5,000 for that purpose); *Gibney v. United States*, 114 Ct. Cl. 38, 50-51 (1949) (requiring payment of overtime wages to government workers where such overtime was mandated by statute, but Congress forbade the employing agency from using appropriated funds for that purpose). Here, the provision in the appropriation riders mirrors language previously found to be “a mere limitation on the expenditure of a particular fund and had no other effect,” and did not “repeal[] or even suspend[] an existing statutory obligation.” *Gibney*, 114 Ct. Cl. at 50-51. Thus, it is not clear that Congress intended to repeal the underlying statutory obligation via the appropriation riders.

The majority opinion also cites an Explanatory Statement the House Committee on Appropriations appended to the 2015 Spending Bill regarding, *inter alia*, the risk corridors rider. *Moda*, 892 F.3d, at 1325. But this Explanatory Statement fails to provide the necessary clarity:

Risk Corridor Program. — In 2014, HHS issued a regulation stating that the risk corridor program will be budget neutral, meaning that the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect. The agreement includes new bill language to prevent the CMS Program Management appropriation account from being used to support risk corridors payments.

160 Cong. Rec. H9307-1, H9838 (Dec. 11, 2014). Nothing in this statement evinces an intent to repeal. The first sentence is a statement of fact of what HHS has done; it is not a statement of intent and does not even suggest such an intent. Rather, it merely reports on HHS's decision in 2014 to treat the risk corridors program as budget neutral, and then only notes that the effect of the approach would be to delay full payment during the term of the three-year period.

However, HHS has stated on multiple occasions before this Explanatory Statement that it believed it and the Government were obligated to make full risk corridor payments at the end of the “three year period risk corridors are in effect.” *See, e.g.*, 78 Fed. Reg. 15,410, at 15,473 (Mar. 11, 2013) (“Regardless of the balance of payments and receipts, HHS will remit payments as required under Section 1342 of the Affordable Care Act.”); 79 Fed. Reg. 30,240, at 30,260 (May 27, 2014) (“HHS

recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers.”). Because the House Committee on Appropriations demonstrated it was aware of HHS’s various statements, the evidence is therefore that Congress knew of their substance, and approved of them because it did not contradict the statements in either the 2015 Spending Bills or any of the subsequent acts.

The second sentence of the Explanatory Statement, also does not evince any intent to repeal. It says nothing except that Congress intended to limit access to the CMS Program Management appropriation account—*i.e.*, access to a specific fund—for risk corridor payments. 160 Cong. Rec. at H9838. But as discussed above, just limiting access to a particular fund does not provide clear legislative intent to repeal a preexisting statute.

Thus, for these reasons and those discussed in Land of Lincoln’s petition, the appropriation riders do not “clearly manifest” a Congressional intent to repeal the Government’s obligation to make full risk corridors payments.

II. The Government’s Failure To Pay Full Risk Corridors Amounts Harmed Health Republic, Common Ground, And The QHP Issuer Classes.

The ACA exchange market was a new marketplace where insurers and health plans did not have comprehensive or accurate information about the likely cost of new enrollees (many of whom had preexisting medical conditions or had been previously uninsured). To incentivize insurers and health plans to participate in the

ACA exchanges, the Government established certain programs to help protect against losses, including the risk corridors program. In reliance on promised risk corridors payments, insurers and health plans set fees and premiums on an annual basis and based their rates on the belief that they would receive full risk corridors payments annually. Normally, insurers account for an uncertain risk pool by setting premiums higher, purchasing reinsurance, or holding additional financial reserves. However, the ACA prevented insurers from setting rates for future years to recoup for past years' losses. The protection the risk corridors program provided against outsized losses allowed insurers and health plans to enter the ACA exchange market place and offer plans with more competitively priced premiums.

In reliance on the statutory and regulatory scheme established by the ACA, including the risk corridors program, Health Republic, Common Ground, and members of the QHP Issuer Classes chose to offer qualified health plans on the ACA exchanges in 2014, 2015, and/or 2016. However, due to a variety of factors, including a higher-than-expected percentage of sick individuals purchasing insurance on the exchanges, QHP Issuers suffered substantial losses in 2014-2016. Based on the Government's own official calculations, QHP Issuers are owed about \$12.3 billion dollars for the 2014-2016 plan years. In CMS's annual risk corridors payment and charge amount statements, it informed QHP Issuers that they would receive just a small fraction of the amounts they were owed under the risk corridor

program, which reflected a prorated distribution of a few hundred million dollars received from the few issuers that were required to pay the Government for the 2014-2016 plan years.

Due to the uncertainty that CMS and HHS would honor their obligation to pay the risk corridor payments in full, the National Association of Insurance Commissioners issued guidance to state insurance commissioners recommending that QHP Issuers *not* be permitted to admit risk corridor payments as balance sheet assets for purposes of meeting regulatory reserve requirements. This created an incredible burden on QHP Issuers, causing many to run afoul of their regulatory reserve requirements and decide to exit the ACA exchanges.

As it became clear QHP Issuers would only receive a tiny fraction of what they were owed under the risk corridor program, many began to fail. In October 2015, Health Republic, Common Ground, and other QHP Issuers learned that the Government would pay only a fraction of the risk corridor amounts owed to them for the 2014 plan year. Had the Government paid even 30% of the full risk corridor amount it owed Health Republic for the 2014 plan year, Health Republic would have been able to continue operations and keep offering qualified health plans to Oregon citizens for the 2016 plan year. Instead, due to the shortfall in funds, Health Republic had insufficient capital reserves to continue on and made the business decision to not offer qualified health plans on the ACA exchanges after the 2015 plan year.

Likewise, nearly every consumer operated and oriented plan (CO-OP) created under the Affordable Care Act announced they were unable to meet cash flow and/or regulatory reserve requirements and many closed their doors due to the deficit of risk corridor payments.

As a young insurer, Common Ground did not have the cash reserves to cover the degradation of the risk corridors receivable, which meant that Common Ground's Risk Based Capital was reduced to company action levels and Common Ground's publicly available financial statements showed a loss rather than a gain on its 2015 year-end financials. Because CMS's October 2015 announcement regarding its change in the risk corridors program occurred after all plans and rates for 2014, 2015, and 2016 were filed and approved, Common Ground and other members of the QHP Issuer Classes had no ability to account for this change in their budgets or build it into their pricing. As a result, Common Ground and the 2016 QHP Issuer Class suffered further losses in 2016.

A number of other insurance companies have also failed due to the Government's default on the risk corridor amounts, and many more (including several of the nation's largest health plan providers) withdrew from the ACA exchanges entirely. Even those QHP Issuers that have survived have had to compensate for this uncertainty in payment by offering health plans at higher prices than before to ensure they are protected from the unknown risk this nascent market

still embodies. This is exactly the opposite of the risk corridors program's intended result.

CONCLUSION

For all these reasons, the Court should grant Land of Lincoln's petition for rehearing *en banc*.

Dated: August 13, 2018

Respectfully submitted,

/s/ Stephen A. Swedlow

Stephen A. Swedlow

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

191 North Wacker Drive

Suite 2700

Chicago, IL 60606

(312) 705-7400

*Counsel for Amici Curiae Health Republic,
Common Ground, and the QHP Issuer
Classes*

CERTIFICATE OF COMPLIANCE

This brief complies with the word count limitation of Fed. R. App. P. 29(b)(4), and contains 2,589 words, exclusive of the portions exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b).

The brief 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 brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type.

/s/ Stephen A. Swedlow
Stephen A. Swedlow
QUINN EMANUEL URQUHART &
SULLIVAN, LLP
191 N. Wacker Drive, Suite 2700
Chicago, IL 60606
Tel: (312) 705-7400

*Counsel for Amicus Curiae
Health Republic Insurance Company and
Common Ground Healthcare Cooperative*

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 14, 2018, Mr. Swedlow authorized me to electronically file the foregoing Corrected 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:

Daniel P. Albers
BARNES & THORNBURG LLP
One N. Wacker Drive, Suite 4400
Chicago, IL 60606
312-214-8311
dalbers@btlaw.com

Jonathan Massey
MASSEY & GAIL LLP
1325 G Street NW, Suite 500
Washington, DC 20005
202-652-4511
jmassey@masseygail.com

*Counsel for Plaintiff-Appellant
Land of Lincoln Mutual Health Insurance
Company*

*Counsel for Plaintiff-Appellant
Land of Lincoln Mutual Health
Insurance Company*

Scott E. Pickens
BARNES & THORNBURG LLP
1717 Pennsylvania Ave. NW, Suite 500
Washington, DC 20006
202-371-6349
scott.pickens@btlaw.com

*Counsel for Plaintiff-Appellant
Land of Lincoln Mutual Health Insurance
Company*

Alisa B. Klein
Mark B. Stern
Carleen M. Zubrzycki
UNITED STATES DEPARTMENT
OF JUSTICE
950 Pennsylvania Ave. NW
Washington, DC 20530
202-514-2000
alisa.klein@usdoj.gov
mark.stern@usdoj.gov
carleen.m.zubrzycki@usdoj.gov

*Counsel for Defendant-Appellee
United States*

Eighteen paper copies will be filed with the Court within the time provided in
the Court's rules.

/s/ Rose E. Olejniczak
Rose E. Olejniczak

August 14, 2018