

2017-1994

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In the  
**United States Court of Appeals for the Federal Circuit**

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MODA HEALTH PLAN, INC.,  
*Plaintiff-Appellee,*

v.

UNITED STATES,  
*Defendant-Appellant.*

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**Appeal from the United States Court of Federal Claims,  
Case No. 1:16-cv-00649, Judge Thomas C. Wheeler**

**UNOPPOSED MOTION BY THE NATIONAL ASSOCIATION OF  
INSURANCE COMMISSIONERS TO FILE *AMICUS CURIAE* BRIEF IN  
SUPPORT OF PLAINTIFF-APPELLEE**

\_\_\_\_\_  
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August 14, 2018

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Pursuant to Federal Rule of Appellate Procedure 29(b) and Federal Circuit Rules 29 and 35(g), the National Association of Insurance Commissioners (“NAIC”) respectfully requests leave of the Court to file a Brief of *Amicus Curiae* in support of Moda Health Plan, Inc.’s (“Moda”) Petition for Rehearing En Banc.

### **GROUND FOR THE MOTION**

Founded in 1871, the NAIC is the U.S. standard-setting and regulatory support organization created and governed by the chief insurance regulators from the 50 states, the District of Columbia, and five U.S. territories. Through the NAIC, state insurance regulators establish standards and best practices, conduct peer review, and coordinate regulatory oversight. The NAIC represents the collective views of state regulators domestically and internationally. The NAIC members, together with the centralized resources of the NAIC, form the national system of state-based insurance regulation in the U.S.

The NAIC’s purpose is to provide its members with a national forum enabling them to work cooperatively on regulatory matters that transcend the boundaries of their own jurisdictions. This not only allows for consistency in regulating companies that do business in multiple states, but it provides a central point of communication and facilitation for joint initiatives with federal and international regulators. The NAIC also regularly assists federal regulators, federal agencies, members of Congress and the Government Accountability Office

(“GAO”) by providing information and data related to state insurance regulation, health insurance issues, terrorism insurance, annuities, insurance fraud and many other topics. Collectively, the state Insurance Commissioners work to develop model legislation, rules, regulations, handbooks, white papers and actuarial guidelines that promote and establish uniform regulatory policy. Their overriding objectives are to protect consumers, promote competitive markets, and maintain the financial solvency of insurance companies and the financial stability of the insurance industry as a whole.

Hundreds of state and federal laws, including the Patient Protection and Affordable Care Act (“ACA” or “PPACA”), Pub. L. No. 111-148, 124 Stat. 199 (2010), assign duties to the NAIC and incorporate NAIC standards, models and other publications. NAIC model laws, regulations and other standards, as implemented by the states, are a critical part of the robust regulatory structure in place to monitor the financial solvency of insurers.

The NAIC provided technical guidance and input to Congress as it drafted and debated the ACA. State Insurance Commissioners generally, and the NAIC specifically, are mentioned over 15 times in the Affordable Care Act. The NAIC was asked to develop standards for or provide expert advice to the Secretary of the Department of Health and Human Services (“HHS”) on the Medical Loss Ratio, the Summary of Benefits and Coverage, Exchanges, age bands, the temporary

reinsurance program, external review standards, and more. The NAIC has also developed model laws and regulations to assist states in the implementation of the ACA and provided comments on federal regulations.

The interest of the NAIC in this case arises out of the adverse effect of unpaid risk corridor amounts on state Insurance Commissioners' ability to protect consumers. The essential functions through which insurance commissioners promote financial solvency and the fair treatment of policyholders have been impaired. Enormous risk corridor payments have been withheld, undermining competition and unduly burdening the insurers willing to market health plans to an unknown population with vast possible health needs. Just as the insurers who participated in the health marketplaces relied on the federal Government to "turn square corners"<sup>1</sup> and act as a "fair partner"<sup>2</sup> so did the state regulators charged both with protecting health care consumers and the solvency of insurance companies operating in their states.

### **STATEMENT OF CONSENT**

Plaintiff-Appellee Moda and Defendant-Appellant United States of America consent to this filing.

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<sup>1</sup> United States v. Winstar Corp., 518 U.S. 839, 886 n. 31 (1996).

<sup>2</sup> Moda Health Plan, Inc. v. U.S., 892 F.3d 1311, 1340 (Fed. Cl. 2018).

## RELIEF SOUGHT

For the foregoing reasons, the NAIC respectfully moves the Court to enter and consider the attached Brief of *Amicus Curiae* supporting Moda's Petition for Rehearing En Banc.

Dated: August 14, 2018

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## CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, counsel for *amicus curiae* the National Association of Insurance Commissioners certifies the following:

1. The full name of every party or *amicus* represented by one or more of the undersigned is:

- The National Association of Insurance Commissioners

2. The name of the real party in interest (if the party in the caption is not the real party in interest) represented by one or more of the undersigned counsel is:

- None

3. All parent corporations and publicly held companies that own 10% or more of stock in the party:

- 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:

- Douglas J. Schmidt and Kirsten A. Byrd, Husch Blackwell LLP

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:

Federal Circuit

*Land of Lincoln Mutual Health Insurance Co. v. United States*, No. 17-1224

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

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

Court of Federal Claims

*Affinity Health Plan, Inc. v. United States*, No. 18-110C (Kaplan, J.)

*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 Kansas City v. United States*, No. 17-95C  
(Braden, J.)

*BlueCross BlueShield of Tennessee, Inc. 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.)

*Community Health Choice, Inc. v. United States*, No. 18-5C (Sweeney, J.)

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

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

*First Priority Life Ins. Co., Inc., et al. 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.)

*MDWise Marketplace, Inc. v. United States*, No. 17-1958C (Coster Williams, J.)

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

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

*Molina Healthcare of Cal., et al. 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, et al. v. United States*, No. 17-712C (Lettow, J.)

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

*Sendero Health Plans, Inc. v. United States*, No. 17-2048C (Griggsby, J.)

Dated: August 14, 2018

/s/ Steven A. Neeley  
Steven A. Neeley



**CERTIFICATE OF SERVICE**

I certify that on August 14, 2018, I filed the foregoing document by the U.S. Court of Appeals for the Federal Circuit's CM/ECF System.

/s/ Steven A. Neeley  
Steven A. Neeley