

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

LAND OF LINCOLN MUTUAL HEALTH  
INSURANCE COMPANY,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

No. 17-1224

**RESPONSE IN OPPOSITION TO NASHCO'S MOTION FOR LEAVE TO  
FILE UNTIMELY AMICUS BRIEF**

For the following reasons, the Court should deny the motion of the National Alliance of State Health Co-Ops (NASHCO) for leave to file an untimely amicus brief in support of plaintiff's request to delay oral argument in this case.

1. This case is the lead appeal of twenty-four cases in which health insurance companies contend that they are legally entitled to payment of additional amounts under the risk-corridors program created by Section 1342 of the Patient Protection and Affordable Care Act (ACA).<sup>1</sup> This appeal is fully briefed. This Court previously ordered that this appeal "will be placed on the next available oral argument calendar

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<sup>1</sup> Our prior filings referred to a total of twenty-three risk corridors cases, but a new case was recently filed so the total is now twenty-four. *See Health Alliance Medical Plans, Inc. v. United States*, No. 17-653C (Campbell-Smith, J.).

after briefing is complete.” Doc. 13 at 2. Accordingly, oral argument in this case should be heard during one of the Court’s summer sessions.

2. Briefing has not yet begun in any other risk-corridors appeal. As discussed in our prior filings, an appeal from a second risk-corridors case was recently docketed,<sup>2</sup> and, in a third case, the notice of appeal is due June 16.<sup>3</sup> Three other cases have been fully briefed and argued in trial court.<sup>4</sup> In three more cases, merits briefing recently closed or is due to close soon.<sup>5</sup> Two additional cases are in earlier stages of briefing.<sup>6</sup> Any and all of these risk-corridors cases may produce new appeals while this appeal is pending.

3. NASHCO has moved for leave to file an amicus brief in support of Lincoln’s request to delay oral argument in this case until after the second of the risk-corridors appeals (*Moda*) is fully briefed. NASHCO’s submission is untimely because

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<sup>2</sup> See *Moda Health Plan, Inc. v. United States*, No. 17-1994 (Fed. Cir.).

<sup>3</sup> See *Blue Cross and Blue Shield of North Carolina v. United States*, No. 16-651C (Griggsby, J.).

<sup>4</sup> See *First Priority Life Ins. Co. v. United States*, No. 16-587C (Wolski, J.); *Maine Cmty. Health Options v. United States*, No. 16-967C (Bruggink, J.); *Montana Health CO-OP v. United States*, No. 16-1427C (Wolski, J.).

<sup>5</sup> See *HPHC Insurance Co., Inc. v. United States*, No. 17-87C (Griggsby, J.) (briefing closed May 15); *Health Republic Ins. Co. v. United States*, No. 16-259C (Sweeney, J.) (briefing due to close June 1); *Molina Healthcare v. United States*, No. 17-97C (Wheeler, J.) (briefing due to close June 16).

<sup>6</sup> See *Blue Cross and Blue Shield of Kansas City v. United States*, No. 17-95C (Braden, J.) (motion to dismiss due May 23); *Health Net, Inc. v. United States*, No. 16-1722C (Wolski, J.) (motion to dismiss due May 31).

briefing on Lincoln's procedural motion is complete. In any event, NASHCO's proposed amicus brief confirms that Lincoln's procedural motion should be denied.

Our prior filings explained that all of the risk-corridors cases present common issues of law that do not depend on the factual circumstances of a particular health insurer or the posture in which a case was decided. NASHCO makes no contrary argument. Nor does NASCHO dispute that appellate briefing in follow-on risk-corridors appeals would duplicate the voluminous briefing already filed in this appeal. Indeed, NASCHO itself filed an amicus brief on the merits in this case, with the government's consent. *See* Doc. 30. The government likewise gave consent for six other amicus briefs that were filed on Lincoln's side by health insurers and their trade associations. *See* Docs. 63, 67, 69, 77, 79, 86. Thus, when this Court hears oral argument, it will have before it more than 250 pages of briefing on Lincoln's side.

NASHCO notes (at 3) that two of its members with stayed cases would not object to a delay of this appeal. But as we previously explained, a delay of this appeal would be contrary to this Court's practice, which is to consider joint argument when multiple cases have been briefed, not when one case is nearly ready for submission to a panel and a newly filed case is months away from briefing. NASHCO provides no reason to depart from this Court's practice. Such a departure would be particularly unwarranted here because this Court ordered that this case be placed on the next available oral argument calendar after the close of briefing, Doc. 13 at 2, and the case is now ready for submission.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that on May 22, 2017, I electronically filed the foregoing document with the Clerk of the Court by using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

*/s/ Alisa B. Klein*  
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Alisa B. Klein