

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

COMMUNITY HEALTH CHOICE, INC.,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

No. 2019-1633

MAINE COMMUNITY HEALTH  
OPTIONS,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

No. 2019-2102

**UNOPPOSED MOTION FOR LEAVE TO FILE AN AMICUS CURIAE  
BRIEF ON ORDER REQUESTING SUPPLEMENTAL BRIEFING**

On January 10, 2020, this Court ordered supplemental briefing in the above-captioned appeals. *See* Dkt. 44. Common Ground Healthcare Cooperative (“Common Ground”), on behalf of itself and a certified opt-in class, are Plaintiffs-Appellees in *Common Ground Healthcare Cooperative v. United States*, No. 20-1286 (Fed. Cir.), an appeal raising nearly identical issues to those in the instant appeals, including the issue to be addressed in the supplemental briefing. Common Ground (with the consent of Defendant-Appellant the United States) requested that its appeal be treated as a companion case to the instant appeals; this Court denied that request without prejudice to Common Ground filing a motion for leave to file

an amicus brief on the subject of the supplemental briefing. *See Common Ground Healthcare Cooperative*, No. 20-1286, Dkt. 12. Accordingly, Common Ground now brings this motion for leave to file an amicus brief, which the United States and Plaintiffs-Appellees do not oppose.

### **FACTUAL BACKGROUND**

Common Ground filed the first case in the nation alleging that, pursuant to the Tucker Act, the United States owes qualified health plan (“QHP”) issuers back payments under the cost-sharing reduction (“CSR”) program established by section 1402 of the Patient Protection and Affordable Care Act (“ACA”). *See First Amended Class Action Complaint, Common Ground Healthcare Cooperative v. United States*, No. 1:17-cv-00877-MMS (Fed. Cl. Nov. 22, 2017), Dkt. 10. On April 17, 2018, the Court of Federal Claims granted Common Ground’s motion to certify a class of QHP issuers who were owed CSR payments for the 2017 and/or 2018 benefit years. *Common Ground Healthcare Cooperative v. United States*, 137 Fed. Cl. 630 (2018). Ultimately, 101 plaintiffs affirmatively chose to opt-in to the *Common Ground* CSR class action, making this the largest CSR-related Tucker Act case in the nation, both in terms of the number of plaintiffs and the amounts at issue. *See Common Ground Healthcare Cooperative v. United States*, No. 1:17-cv-00877-MMS (Fed. Cl.), Dkt. Nos. 38, 60, 67, 69 (class list and orders to include additional class members).

On February 15, 2019, the Court of Federal Claims granted Common Ground’s motion for summary judgment. *Common Ground Healthcare Cooperative v. United States*, 142 Fed. Cl. 38, 53 (2019). The court held that Section 1402 was “a money-mandating statute for Tucker Act purposes,” “an insurer that establishes that the government failed to make the cost-sharing reduction payments to which the insurer was entitled can recover the amount due in [the Court of Federal Claims],” and “the lack of a specific appropriation for cost-sharing reduction payments does not preclude such a recovery.” *Id.* at 51 (citations omitted). The court also rejected the United States’ argument that the class claims were barred because the class would receive a “double recovery,” noting that it was “not convinced” by the United States’ argument that “the plaintiff’s ability to increase the premiums for its silver-level qualified health plans to obtain greater premium tax credit payments precludes recovery under the Act’s cost-sharing reduction provision.” *Id.* at 52. Following a claims reconciliation process to determine damages, the court entered judgment in favor of Common Ground and the CSR class pursuant to Rule 54(b) of the Rules of the United States Court of Federal Claims. *See Order, Common Ground Healthcare Cooperative v. United States*, No. 1:17-cv-00877-MMS (Fed. Cl. Oct. 22, 2019), Dkt. 71.

On December 23, 2019, the United States appealed to this Court. *See Common Ground Healthcare Cooperative v. United States*, No. 2020-1286 (Fed.

Cir.), Dkt. 1. On December 29, 2019, the United States moved to hold Common Ground's appeal in abeyance pending this Court's disposition of the related, above-captioned appeals, *id.* at Dkt. 3, and Common Ground opposed this request, *id.* at Dkt. 8. Before this Court could rule on that motion, however, the parties conferred and Common Ground filed an unopposed request to have the *Common Ground* appeal treated as a companion case to the above-captioned appeals and participate in the already-scheduled supplemental briefing. *Id.* at Dkt. 10. On January 28, 2020, this Court denied Common Ground's request to designate that appeal as a companion case, but noted that such denial was "without prejudice to Common Ground filing a motion in Appeal Nos. 2019-1633 and 2019-2102 for leave to file an amicus brief on the subject of the supplemental briefing ordered in those cases." *Id.* at Dkt. 12.

In a companion case to the instant appeals, Common Ground (with the consent of the parties) filed an amicus brief, but did not directly address the question that this Court later posed in its supplemental briefing order. *See Sanford Health Plan et al. v. United States*, Nos. 2019-1290, -1302 (Fed. Cir.), Dkt. 31. At oral argument in the instant appeals, the United States recognized that the issues at stake for Common Ground were virtually identical to those here. *See Oral Arg.* at 4:50-5:14, *available at* <http://www.cafc.uscourts.gov/oral-argument-recordings> ("The three cases that Chief Judge Sweeney decided, there was a joint oral argument, and essentially identical opinions, and we understood the opinions to have exactly the same effect,

which was to resolve as a merits matter both the question of liability and the question of whether the damages should take into account the increased tax credits.”). The United States at oral argument also referred to Common Ground’s amicus brief several times. *See id.* at 24:55-25:38, 25:50-26:15, 27:57-28:13, 1:19:57-1:20:49.

### **ARGUMENT**

Under Federal Circuit Rule 29(c), a motion for leave to file an amicus brief is not required when the amicus has the consent of all parties. However, given that this rule does not expressly refer to supplemental briefing, and in an abundance of caution, Common Ground submits this motion for leave notwithstanding that all parties have stated that they do not oppose Common Ground’s filing of an amicus brief. Even if Rule 29(c) does not govern here, it still supports the simple point that there is no reason to prevent the filing of an amicus brief that may provide valuable information to the Court when no party objects.<sup>1</sup>

That is especially true here given Common Ground’s unquestionably strong interest in the correct resolution of the issue to be addressed on supplemental

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<sup>1</sup> Under Rule 29(a)(6) of the Federal Rules of Appellate Procedure, the amicus brief itself would normally be filed with the motion for leave, but this section of the rules applies only to “amicus filings during a court’s initial consideration of a case on the merits,” Fed. R. App. P. 29(a)(1), not to supplemental briefing. In any event, Common Ground could not file an amicus brief simultaneously with this motion because the due date and page or word limit for such an amicus brief on supplemental briefing is not provided for in the Federal Rules of Appellate Procedure.

briefing. As explained above, the issue on supplemental briefing is equally applicable to Common Ground—and the 101 plaintiffs it represents—as it is to the individual plaintiffs in the instant appeals. The decision on whether damages should be reduced will effectively decide the same issue for Common Ground’s class of 101 opt-in plaintiffs, even though Common Ground filed first in the Court of Federal Claims and represents a much larger number of QHP issuers with a much greater amount of money at stake. Given the class’s paramount interest in the resolution of the question, Common Ground should have the right to file a brief addressing this Court’s question on supplemental briefing.

Furthermore, an amicus brief would very likely aid the Court in resolving the question. The very fact that the Court ordered supplemental briefing *sua sponte* shows the need for further analysis of the damages issue. Moreover, the argument of the United States for a reduction in damages based on increases in premiums and tax credits implicates substantial legal issues with regard to the interpretation of the ACA, and has broader implications for the potential reduction of damages for the government’s violation of other statutes. The importance of the question therefore warrants an amicus brief addressed solely to this issue.

Finally, Common Ground respectfully requests that the amicus brief be due seven days after the filing of Plaintiffs-Appellees’ brief, which is consistent with the usual timing for amicus briefs. *See* Fed. R. App. P. 29(a)(6). In addition, Common

Ground respectfully requests that the amicus brief be given a 30-page limit, which is the limit provided for the parties' supplemental briefs in this Court's order. This page limit is appropriate given that the issue on supplemental briefing is equally applicable to Common Ground and the class it represents as it is to Plaintiffs-Appellees. The United States and Plaintiffs-Appellees stated that they did not oppose having the amicus brief due seven days after the filing of Plaintiffs-Appellees' brief and a 30-page limit for the brief.

### **CONCLUSION**

This Court should grant leave for Common Ground to file an amicus brief with respect to the question at issue in this Court's order on supplemental briefing, with the brief not to exceed 30 pages double-spaced, to be filed no later than seven days after Plaintiffs-Appellees file their supplemental brief.

Dated: January 31, 2020

Respectfully Submitted,

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**CERTIFICATE OF COMPLIANCE**

I certify that this document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 1,506 words.

/s/ Stephen A. Swedlow  
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**CERTIFICATE OF SERVICE**

I hereby certify that on January 31, 2020, I electronically filed the foregoing with the Clerk of the Court by using the appellate EM/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/ Stephen A. Swedlow  
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