

NO. 19-5212

*In the United States Court of Appeals
For the District of Columbia Circuit*

ASSOCIATION FOR COMMUNITY AFFILIATED PLANS, ET AL.,

Appellants,

V.

UNITED STATES DEPARTMENT OF THE TREASURY, ET AL.

Appellees.

**ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CASE NO. 18-2133 (LEON, J.)**

**MOTION OF THE PENNSYLVANIA INSURANCE DEPARTMENT,
JOINED BY THE WISCONSIN OFFICE OF THE COMMISSIONER OF
INSURANCE, FOR INVITATION TO FILE BRIEF AS *AMICI CURIAE* IN
SUPPORT OF PETITION FOR REHEARING *EN BANC***

The Pennsylvania Insurance Department (the Department), joined by the Wisconsin Office of the Commissioner of Insurance (the Office), respectfully move for an invitation from this Court, under Circuit Rule 35(f) and Federal Rule of Appellate Procedure 29(b)(2), to submit a brief as *amici curiae* in support of the petition of Association for Community Affiliated Plans, et al., for a rehearing *en banc*. See, e.g., *PHH Corp. v. Consumer Fin. Prot. Bureau*, No. 15-1177 (D.C.

Cir. Feb. 16, 2017) (granting similar request for invitation to file amicus brief in support of en banc petition); *Nat'l Ass'n of Mfrs. v. Sec. & Exch. Comm'n*, No. 13-5252 (D.C. Cir. Nov. 9, 2015) (same); *Elec. Power Supply Ass'n v. FERC*, No. 11-1486 (D.C. Cir. Sept. 17, 2014) (same).

The proposed brief complies with Federal Rule of Appellate Procedure 29(b), which contemplates the filing of amicus briefs in support of petitions for rehearing with leave and which limits such briefs to 2,600 words. This motion and brief are being timely filed within seven days of the petition.

I. Interest of the *Amici Curiae*

Amici are charged with administering the laws regulating the business of insurance in Pennsylvania and Wisconsin, respectively. As the primary regulators of commercial health insurance policies sold in their states, *amici* are tasked with protecting consumers by ensuring that when they shop for health insurance coverage, they are not subject to misrepresentations or misleading or deceptive marketing, that any limitations are clear, and that, if a consumer chooses to purchase a policy, the policy is administered and claims are adjudicated properly.

The Pennsylvania Department has drawn on its experience as the primary regulator of commercial health insurance policies in Pennsylvania to file an *amicus curiae* brief in a case related to the Affordable Care Act and federal regulation of

the commercial health insurance marketplace. The Department filed an *amicus* brief supporting Highmark in the risk corridor litigation between Highmark and the United States, which was ultimately resolved in favor of Highmark (*see First Priority Life Insurance Co., Inc. et al., v. U.S.*, Case No. 16-587 (Fed. Cl. filed Oct. 14, 2016)). In that brief, the Department offered its unique perspective based on its role as the primary regulator of commercial health insurance in Pennsylvania. The Department anticipates that its unique perspective, shared by its sister regulatory agency from Wisconsin, will be equally useful here.

II. Usefulness of Briefing by *Amici Curiae* in this Case

If leave is granted, *amici's* proposed brief in support of rehearing *en banc* will make a unique contribution. *Amici's* experience with short-term limited duration insurance (STLDI) will provide valuable insight to the Court because they interact with both consumers who purchase STLDI and companies that offer and administer STLDI. Having both of these perspectives allows the Department and the Office to consider the full impact of STLDI on the health insurance market in Pennsylvania and Wisconsin, respectively.

Drawing on *amici's* unique experience as regulators, *amici* seek to file this brief because they believe that the panel's decision to affirm the district court's ruling in favor of appellees will harm their ability to protect their states' health insurance consumers and to foster a stable and predictable commercial health

insurance market. The Short-Term Limited Duration Final Rule, 83 Fed. Reg. 38212 (Aug. 3, 2018) (2018 Rule) will blur the distinction between comprehensive major medical policies and STLDI, which offers limited benefits with higher consumer cost-sharing, and with coverage that typically excludes pre-existing conditions. By making STLDI look like comprehensive coverage, the 2018 Rule will draw healthier consumers into STLDI plans that offer comparably less coverage, putting those consumers at risk for high medical costs, while simultaneously pressuring prices for comprehensive Affordable Care Act compliant plans to go up. This market segmentation will both harm consumers and the individual health insurance markets in both Pennsylvania and Wisconsin.

In sum, *amici* believe that this Court will benefit from their unique experience as the primary regulators of commercial health insurance in Pennsylvania and Wisconsin. It will offer a perspective that includes the effect of the 2018 Rule on both consumers as well as on companies, which is central to the issues in this appeal.

CONCLUSION

For the foregoing reasons, the Pennsylvania Insurance Department, joined by the Wisconsin Office of the Commissioner of Insurance, respectfully request that the Court invite them to file the accompanying brief as *amici curiae*.

Respectfully submitted,

By: /s/ Robert A. Reiley

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Date: September 8, 2020

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2020, I caused a true and correct copy of the foregoing to be served on all counsel of record through the Court's CM/ECF system.

/s/ Robert A. Reiley
Name

Dated: September 8, 2020