

2017-1224

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.

**Appeal from the United States Court of Federal Claims,
Case No. 16-744C, Judge Charles F. Lettow**

**MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*
ON BEHALF OF
THE UNITED STATES HOUSE OF REPRESENTATIVES**

Thomas G. Hungar, *General Counsel
Counsel of Record*

Todd B. Tatelman, *Associate General Counsel*
Kimberly Hamm, *Assistant General Counsel*

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700
Thomas.Hungar@mail.house.gov

*Counsel for Amicus Curiae
United States House of Representatives*

May 1, 2017

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* ON BEHALF OF THE UNITED STATES HOUSE OF REPRESENTATIVES

The United States House of Representatives (“House”)¹ respectfully moves this Court for leave to file the attached brief as *amicus curiae* in support of affirmance of the lower court’s order.

The Department of Justice consents to the motion. Counsel for Appellant Land of Lincoln does not consent to the motion, and intends to object to the motion. Fifteen *amici*, all on consent of the parties, have filed briefs in support of Land of Lincoln in this case.

STATEMENT OF INTEREST

The House has repeatedly passed legislation making clear that the risk corridors program of the Patient Protection and Affordable Care Act (“ACA”) must be implemented in a budget-neutral and self-funding manner. The ACA itself did not appropriate any funds for risk corridors payments, and Congress has

¹ The Bipartisan Legal Advisory Group (“BLAG”) of the United States House of Representatives has authorized the filing of this amicus brief on behalf of the House. The BLAG is comprised of the Honorable Paul Ryan, Speaker of the House, the Honorable Kevin McCarthy, Majority Leader, the Honorable Steve Scalise, Majority Whip, the Honorable Nancy Pelosi, Democratic Leader, and the Honorable Steny H. Hoyer, Democratic Whip, and “speaks for, and articulates the institutional position of, the House in all litigation matters.” Rule II.8(b), Rules of the United States House of Representatives, *available at* <https://rules.house.gov/sites/republicans.rules.house.gov/files/115/PDF/House-Rules-115.pdf>. The Democratic Leader and Democratic Whip decline to support the Group’s position in this case.

repeatedly legislated to *prohibit* the expenditure of any additional funds beyond user fees collected under the program. This unambiguous statutory record precludes the recognition of any judicially enforceable obligation to make risk corridors payments in excess of receipts. No appropriated funds are—or ever have been—available for that purpose.

Despite this congressional mandate, several insurers, including Land of Lincoln, have filed suit seeking billions of dollars in excess program payments—payments that Congress has explicitly barred. Yet “the assent of the House of Representatives is required before *any* public monies are spent.” *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 76 (D.D.C. 2015) (emphasis retained). “Disregard for that reservation [of Congressional control over Treasury funds] works a grievous harm on the House, which is deprived of its rightful and necessary place under our Constitution.” *Id.* at 77. Accordingly, the House has a strong interest in affirmance of the judgment below, which is necessary to vindicate one of Congress’s core constitutional powers—the power of the purse.

DESIRABILITY OF AMICUS BRIEF

The House regularly appears as *amicus curiae* in cases in which its institutional powers are implicated, including cases in which the House agrees with

the positions advanced by the Executive Branch as well as cases in which the House disagrees with the Executive Branch.²

Foremost among Congress's core constitutional powers is its exclusive control over public funds. This power of the purse was vested in Congress "as the most comple[te] and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." The Federalist No. 58, at 394 (James Madison) (Jacob E. Cooke ed., 1961).

A fundamental constitutional basis for Congress's power of the purse is the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7, which not only vests Congress with exclusive authority to permit (or decline to permit) government spending, but also affirmatively limits the power of the Executive and the Judiciary by expressly

² See, e.g., Br. of *Amicus Curiae* in Supp. of Respondents, *United States v. State of Texas*, No. 15-674 (U.S. Apr. 4, 2016); Br. as *Amicus Curiae*, *United States v. Renzi*, No. 13-10588 (9th Cir. Apr. 15, 2014); Br. of *Amicus Curiae* in Supp. of Appellant, *United States v. Rainey*, No. 13-30770 (5th Cir. Dec. 9, 2013); Br. as *Amicus Curiae* Supporting Affirmance, *Cause of Action v. Nat'l Archives & Records Admin.*, No. 13-5127 (D.C. Cir. Nov. 25, 2013); Br. as *Amicus Curiae* Supporting Affirmance, *United States v. Verrusio*, No. 11-3080 (D.C. Cir. Feb. 5, 2013); *In re Search of The Rayburn House Office Bldg. Room No. 2113*, 432 F. Supp. 2d 100, 105 (D.D.C. 2006), *rev'd sub nom.*, *United States v. Rayburn House Office Bldg.*, 497 F.3d 654 (D.C. Cir. 2007); *United States v. Rose*, 790 F. Supp. 340, 340 (D.D.C. 1992); *United States v. Eichman*, 731 F. Supp. 1123, 1127 n.6 (D.D.C. 1990); see also *Atkins v. United States*, 556 F.2d 1028, 240-41 (Ct. Cl. 1977) (noting participation of Speaker of the House as *amicus curiae* at the invitation of the court, after Department of Justice conceded the unconstitutionality of the statute at issue).

barring the expenditure of any public funds absent enactment of a law appropriating such funds.

The House, through the filing of this proposed *amicus curiae* brief, seeks to apprise the Court of its views on the controlling constitutionally-based appropriations law principles regarding the funding of government benefits programs, the legislative intent underlying the authorization for the risk corridors program and the relevant appropriations acts, and the important separation of powers concerns implicated by Appellant's attempt to obtain unappropriated payments through the Judgment Fund. As one of the two chambers composing the Legislative Branch of the federal government, the House's perspective on these issues, which go to the heart of its legislative powers, is distinct from that of the Executive Branch and worthy of judicial consideration.

CONCLUSION

For the foregoing reasons, the House's motion for leave to file the attached brief as *amicus curiae* should be granted.

Respectfully submitted,

/s/ Thomas G. Hungar
THOMAS G. HUNGAR
General Counsel
Counsel of Record
TODD B. TATELMAN
Associate General Counsel
KIMBERLY HAMM
Assistant General Counsel

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700 (telephone)
(202) 226-1360 (facsimile)
Thomas.Hungar@mail.house.gov

*Counsel for the United States House of
Representatives*

May 1, 2017

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, counsel for *amicus curiae* the United States House of Representatives certifies the following:

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

The United States House of Representatives

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:

None

/s/ Thomas G. Hungar
Thomas G. Hungar

CERTIFICATE OF SERVICE

I certify that on May 1, 2017, I filed the foregoing document by the U.S. Court of Appeals for the Federal Circuit's CM/ECF system.

/s/ Thomas G. Hungar

Thomas G. Hungar