

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.

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

**APPELLANT'S OPPOSITION TO
THE U.S. HOUSE OF REPRESENTATIVES' MOTION
FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

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CERTIFICATE OF INTEREST

1. The full name of every party represented by me is:

LAND OF LINCOLN MUTUAL HEALTH INSURANCE COMPANY

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

JENNIFER HAMMER, ACTING DIRECTOR OF THE ILLINOIS DEPARTMENT OF INSURANCE, AS STATUTORY LIQUIDATOR OF LAND OF LINCOLN MUTUAL HEALTH INSURANCE COMPANY

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party represented by me are:

NONE

4. The names of all law firms and the principals or associates that appeared for the party now represented by me in the trial court or are expected to appear in this Court are:

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**LAND OF LINCOLN MUTUAL HEALTH INSURANCE COMPANY'S
OPPOSITION TO THE U.S. HOUSE OF REPRESENTATIVES' MOTION
FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF**

Appellant Land of Lincoln Mutual Health Insurance Company (Lincoln) respectfully requests that the Court deny the motion of the U.S. House of Representatives for leave to file a brief as *amicus curiae* for the reasons explained below.

I. PRELIMINARY STATEMENT

The current majority party of the U.S. House of Representatives (House) seeks leave to file an *amicus* brief in the name of the House¹ in support of the United States Government which is already a party to this action, and which is ably represented by the U.S. Department of Justice (DOJ) -- the statutorily mandated legal representative for the Government. The majority party's brief seeks, as a political matter, to reinterpret -- in 2017 -- the actions of Congress as a whole embodied in legislation passed by both the House and the Senate in 2010 under a

¹ Although the *amicus* brief is proffered "on behalf" of the House of Representatives, the Office of General Counsel which tendered the brief, functions "pursuant to the direction of the Speaker, who shall consult with the Bipartisan Legal Advisory Group." House Rule II.8(a) (see Attachment 1) *available at* <https://rules.house.gov/sites/republicans.rules.house.gov/files/115/PDF/House-Rules-115.pdf> at page 3. In this case, the House's Motion shows that the minority leadership members (Democratic Leader Pelosi and Democratic Whip Hoyer) did not support submission of the House's motion for leave to file an *amicus* brief. *See* House Motion for Leave to File Brief As *Amicus Curiae* (House Motion) at note 1. The House Motion is therefore solely the effort of the House's majority party.

different majority party. The House’s current partisan political agenda is not a sufficient justification for *amicus* participation where all parties have not consented to *amicus* status, and, in the absence of such consent, the House has not proffered information demonstrating that its *amicus* participation is appropriate, helpful and relevant to the disposition of this case. Instead, the House’s participation simply attempts to reinforce the same assertions now made by the Government in this appeal, but such repetition does not demonstrate that the House’s participation as an *amicus* will be useful to the Court. Because the House’s proposed *amicus* brief is repetitive and cumulative, and represents the post hoc views of only the current majority party in one house of Congress, leave to file it should be denied.

The House’s previous effort to participate as an *amicus* in the pending risk corridors litigation was rejected by the U.S. Court of Federal Claims in *Health Republic Ins. Co. v. United States*, 129 Fed. Cl. 115 (2016), on the basis that the House’s political “interest” did not trump the DOJ’s litigation decisions in that case. *See* Opinion and Order dated November 7, 2016 (Attachment 2). However, DOJ in its response brief in this case has now altered its litigation position previously asserted before the Court of Federal Claims to conform to the House’s political position, so the House’s brief adds nothing to resolution of this action.

II. THE STANDARD FOR DECISION ON THE HOUSE'S MOTION

The guidelines in Fed. R. App. P. 29 show that a motion for leave to file an *amicus* brief without all parties' consent (as here) must show why the *amicus* brief is desirable, and why the matters are relevant to the disposition of the case.² Fed. R. App. P. 29(a)(3)(B). The decision whether to allow a filing of an *amicus* brief is a matter of "judicial grace." *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003). Where the proposed *amicus* brief does not add anything to a party's brief, the court should deny permission to file it. *Voices for Choices*, 339 F.3d 542, 544. That plainly is the case here. The House's brief simply parrots the arguments, theories, and assertions already found in the Government's response brief filed April 24, 2017. The House provides no substantial additional relevant information to assist the Court. *Amicus* briefs that are mostly repetitive to a party's arguments need not be accepted for filing. *Ryan v. Commodity Future Trading Comm'n*, 125 F.3d 1062, 1063-64 (7th Cir. 1997) (limiting *amicus* participation because *amicus* briefs were mostly repetitive).

² The House seeks leave pursuant to the second sentence of Federal Rule of Appellate Procedure 29(a)(2), which requires leave of court or consent of the parties. The House may not proceed under the first sentence of Federal Rule of Appellate Procedure 29(a)(2) because the United States is already a party to this action and participation of the House as a representative of the United States would not be warranted.

III. ARGUMENT

A. The United States Is Already Represented In This Action By The Department Of Justice Which Has Already Made The Arguments The House Seeks To Assert.

The DOJ is fully protecting the Government's interests in this appeal. Because the House's brief is merely repetitive of the Government's response brief, *amicus* status should be denied. Additionally, the House majority party has no standing or ability to raise new arguments or to otherwise direct the Government's conduct of this appeal. To the extent it attempts to assert new positions, *amicus* status should again be denied.

Amicus status for the House in this appeal should be denied for the same reasons that the Court of Federal Claims denied *amicus* status to the House in *Health Republic Ins. Co. v. United States*, 129 Fed. Cl. 115 (2016), one of the other pending risk corridor payment cases. There, in accepting the plaintiff's arguments that the relevant factors weighed against the House's participation as an *amicus*, including the fact that the position of the United States was already being protected by the DOJ, the Court explained:

Plaintiff's arguments are persuasive. As previously noted by the United States Court of Claims, "there can be no dispute that, unless otherwise provided by law, the Attorney General is charged by statute with exclusive and plenary power to supervise and conduct all litigation to which the U.S. is a party." *Hughes Aircraft Co. v. United States*, 534 F.2d 889, 901 (Ct. Cl. 1976) (citing 28 U.S.C. § 516-520 (1970)) In exercise of this

authority, the DOJ moved to dismiss plaintiff’s claims for lack of jurisdiction pursuant to RCFC 12(b)(1), and not for failure to state a claim upon which relief could be granted pursuant to RCFC 12(b)(6). The DOJ has “exclusive and plenary” control over the United States’ defense of this litigation, foreclosing the ability of another government entity from acting on the United States’ behalf. Thus, the House cannot separately assert a ground for dismissing plaintiff’s complaint that was not raised by the DOJ, especially under the auspices of an *amicus curiae* brief. . . .

Health Republic Insurance Co. v. United States, 129 Fed. Cl. 115, 117-18 (2016) (citations omitted). DOJ routinely defends statutes enacted by Congress. The House does not explain how or why the DOJ representation is not adequate or how the House offers special assistance to the Court that DOJ cannot provide.

To the extent that the House attempts to raise purportedly “important separation of powers concerns implicated by Appellant’s attempt to obtain unappropriated payments through the Judgment Fund” (House Motion at 4), it is raising issues that are not before the Court in this appeal and is asserting a position that is at odds with DOJ in this action, which supports denial of *amicus* status for the reasons as stated above in *Health Republic*. Cf. *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1378 (Fed. Cir. 2000) (“But an appellant and an amicus may not split up the issues and expect the court to consider that they have all been raised on appeal. It is the appellant’s case, not a joint appeal by the appellant and amicus. Appellant must raise in its opening brief all the issues it wishes the court to

address.”) The Government’s Response Brief filed by DOJ on April 24 (page 36) acknowledges that the availability of the Judgment Fund “has no bearing on the threshold question of liability.”

B. The House Majority’s Efforts To Repudiate A Prior Congressional Act And Vindicate A Partisan Political Position Do Not Support Amicus Status.

The House majority tendering the proposed *amicus* brief does not represent Congress as a whole, or even the House of Representatives as a whole. Indeed, in other cases where the House has sought to participate as an *amicus*, that participation has been justified on the basis of a Resolution presented to and passed by the entire House. *See e.g.*, <https://www.congress.gov/114/bills/hres639/BILLS-114hres639ih.pdf> and <http://clerk.house.gov/evs/2016/roll128.xml>. The House Motion does not indicate that this procedure was followed for the *amicus* brief here or for the request for *amicus* status in *Health Republic*.

Instead, here, the *amicus* request is tendered solely by the current House majority and it is apparent that the majority’s *amicus* request is motivated by partisan interests. But courts “frown on participation which simply allows the *amicus* to litigate its own views’ or present ‘its version of the facts.’” *Fluor Corp. v. United States*, 35 Fed. Cl. 284, 286 (1996) (citing *Am. Satellite Co. v. United States*, 22 Cl. Ct. 547, 549 (1991)); *see also New England Patriots Football Club, Inc. v. Univ. of Colorado*, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979) (an *amicus*

should not be partisan). Although “an adversary role of *amicus curiae* has become accepted . . . there are, or at least there should be, limits.” *Ryan v. Commodity Future Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997).

Here, the House majority “make[s] no pretense at impartiality,”³ which weighs against permitting it to file an *amicus* brief. *Fluor Corp. v. United States*, 35 Fed. Cl. 284, 286 (1996). On page 1 (note 1) of its motion, the House majority admits that only the three Republican members of the five-member Bipartisan Legal Advisory Group (BLAG) authorized its filing over the opposition of the Democratic members of that same group. Although the motion purports to speak for the entire House of Representatives and makes arguments regarding contemporaneous Congressional intent with respect to the statutes at issue in this case, the current partisan makeup of the House is not the same as it was at the time Congress passed the Affordable Care Act in 2010. *Compare* 124 Stat. 119 (ACA) (Mar. 23, 2010); *with* Paul Kane, *Resurgent Republicans take back control of the House*, WASH. POST, (Nov. 3, 2010), *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/03/AR2010110308842.html>. The House’s motion and *amicus* brief plainly

³ For example, the House’s motion makes reference to the purportedly “excess program payments” sought by Lincoln and other insurers that the House claims “Congress has explicitly barred.” House Motion at 2.

represent the views of a partisan subset of the House advancing arguments about the interpretation of a statute passed when that political party was in the minority. The potential injection of party politics into the Government's fully briefed defense of this action is unnecessary and weighs against permitting the proposed *amicus* brief.

C. The House's Effort To Justify *Amicus* Status Here Based On *Amicus* Participation In Other Cases Is Unwarranted.

The House argues that its participation as an *amicus* here is "desirable" because it regularly appears as *amicus curiae* in cases in which its institutional powers are implicated, citing nine cases. *See* House Motion at note 2. The House makes no showing that any of the cited cases have any relevance whatsoever to its effort to appear as *amicus* here or the specific issues presented in this appeal. To the contrary, in *every* case the House cites, one or more of the following is true: (1) the parties consented to the House's filing; (2) the House filed the brief under Federal Rule of Appellate Procedure 29(a)(2) (first sentence), or D.C.D.C. LCvR 7(o)(1), both of which state that the United States may file an *amicus curiae* brief without consent or permission; and (3) the House was invited by the court to file an *amicus*. *See* House Motion at 3 note 2 (listing cases). None of those circumstances apply here and the filing of *amicus* briefs in other unrelated litigation provides no support for the proffered filing here.

IV. RELIEF REQUESTED

For the foregoing reasons, Lincoln respectfully requests that the Court issue an Order denying the House leave to file an *amicus* brief.

Dated: May 8, 2017

Respectfully submitted,

s/ Daniel P. Albers

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ATTACHMENT 1

RULES

of the

HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTEENTH CONGRESS



PREPARED BY

Karen L. Haas

Clerk of the House of Representatives

JANUARY 5, 2017

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RULES OF THE HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTEENTH CONGRESS

RULE I THE SPEAKER

Approval of the Journal

1. The Speaker shall take the Chair on every legislative day precisely at the hour to which the House last adjourned and immediately call the House to order. Having examined and approved the Journal of the last day's proceedings, the Speaker shall announce to the House approval thereof. The Speaker's approval of the Journal shall be deemed agreed to unless a Member, Delegate, or Resident Commissioner demands a vote thereon. If such a vote is decided in the affirmative, it shall not be subject to a motion to reconsider. If such a vote is decided in the negative, then one motion that the Journal be read shall be privileged, shall be decided without debate, and shall not be subject to a motion to reconsider.

Preservation of order

2. The Speaker shall preserve order and decorum and, in case of disturbance or disorderly conduct in the galleries or in the lobby, may cause the same to be cleared.

Control of Capitol facilities

3. Except as otherwise provided by rule or law, the Speaker shall have general control of the Hall of the House, the corridors and passages in the part of the Capitol assigned to the use of the House, and the disposal of unappropriated rooms in that part of the Capitol.

Signature of documents

4. The Speaker shall sign all acts and joint resolutions passed by the two Houses and all writs, warrants, and subpoenas of, or issued by order of, the House. The Speaker may sign enrolled bills and joint resolutions whether or not the House is in session.

Questions of order

5. The Speaker shall decide all questions of order, subject to appeal by a Member, Delegate, or Resident Commissioner. On such an appeal a Member, Delegate, or Resident Commissioner may not speak more than once without permission of the House.

Form of a question

6. The Speaker shall put a question in this form: "Those in favor (of the question), say 'Aye.'"; and after the affirmative voice is expressed, "Those opposed, say 'No.'". After a vote by voice under this clause, the Speaker

may use such voting procedures as may be invoked under rule XX.

Discretion to vote

7. The Speaker is not required to vote in ordinary legislative proceedings, except when such vote would be decisive or when the House is engaged in voting by ballot.

Speaker pro tempore

8. (a) The Speaker may appoint a Member to perform the duties of the Chair. Except as specified in paragraph (b), such an appointment may not extend beyond three legislative days.

(b)(1) In the case of illness, the Speaker may appoint a Member to perform the duties of the Chair for a period not exceeding 10 days, subject to the approval of the House. If the Speaker is absent and has omitted to make such an appointment, then the House shall elect a Speaker pro tempore to act during the absence of the Speaker.

(2) With the approval of the House, the Speaker may appoint a Member to act as Speaker pro tempore only to sign enrolled bills and joint resolutions for a specified period of time.

(3)(A) In the case of a vacancy in the Office of Speaker, the next Member on the list described in subdivision (B) shall act as Speaker pro tempore until the election of a Speaker or a Speaker pro tempore. Pending such election the Member acting as Speaker pro tempore may exercise such authorities of the Office of Speaker as may be necessary and appropriate to that end.

(B) As soon as practicable after the election of the Speaker and whenever appropriate thereafter, the Speaker shall deliver to the Clerk a list of Members in the order in which each shall act as Speaker pro tempore under subdivision (A).

(C) For purposes of subdivision (A), a vacancy in the Office of Speaker may exist by reason of the physical inability of the Speaker to discharge the duties of the office.

Other responsibilities

9. The Speaker, in consultation with the Minority Leader, shall develop through an appropriate entity of the House a system for drug testing in the House. The system may provide for the testing of a Member, Delegate, Resident Commissioner, officer, or employee of the House, and otherwise shall be comparable in scope to the system for drug testing in the executive branch pursuant to Executive Order 12564 (Sept. 15, 1986). The expenses of

the system may be paid from applicable accounts of the House for official expenses.

Designation of travel

10. The Speaker may designate a Member, Delegate, Resident Commissioner, officer, or employee of the House to travel on the business of the House within or without the United States, whether the House is meeting, has recessed, or has adjourned. Expenses for such travel may be paid from applicable accounts of the House described in clause 1(k)(1) of rule X on vouchers approved and signed solely by the Speaker.

Committee appointment

11. The Speaker shall appoint all select, joint, and conference committees ordered by the House. At any time after an original appointment, the Speaker may remove Members, Delegates, or the Resident Commissioner from, or appoint additional Members, Delegates, or the Resident Commissioner to, a select or conference committee. In appointing Members, Delegates, or the Resident Commissioner to conference committees, the Speaker shall appoint no less than a majority who generally supported the House position as determined by the Speaker, shall name those who are primarily responsible for the legislation, and shall, to the fullest extent feasible, include the principal proponents of the major provisions of the bill or resolution passed or adopted by the House.

Recess and convening authorities

12. (a) To suspend the business of the House for a short time when no question is pending before the House, the Speaker may declare a recess subject to the call of the Chair.

(b)(1) To suspend the business of the House when notified of an imminent threat to its safety, the Speaker may declare an emergency recess subject to the call of the Chair.

(2) To suspend the business of the Committee of the Whole House on the state of the Union when notified of an imminent threat to its safety, the chair of the Committee of the Whole may declare an emergency recess subject to the call of the Chair.

(c) During any recess or adjournment of not more than three days, if the Speaker is notified by the Sergeant-at-Arms of an imminent impairment of the place of reconvening at the time previously appointed, then the Speaker may, in consultation with the Minority Leader—

Rule II, clause 3

(1) postpone the time for reconvening within the limits of clause 4, section 5, article I of the Constitution and notify Members accordingly; or

(2) reconvene the House before the time previously appointed solely to declare the House in recess within the limits of clause 4, section 5, article I of the Constitution and notify Members accordingly.

(d) The Speaker may convene the House in a place at the seat of government other than the Hall of the House if, in the opinion of the Speaker, the public interest shall warrant it.

(e) During any recess or adjournment of not more than three days, if in the opinion of the Speaker the public interest so warrants, then the Speaker, after consultation with the Minority Leader, may reconvene the House at a time other than that previously appointed, within the limits of clause 4, section 5, article I of the Constitution, and notify Members accordingly.

(f) The Speaker may name a designee for purposes of paragraphs (c), (d), and (e).

RULE II**OTHER OFFICERS AND OFFICIALS*****Elections***

1. There shall be elected at the commencement of each Congress, to continue in office until their successors are chosen and qualified, a Clerk, a Sergeant-at-Arms, a Chief Administrative Officer, and a Chaplain. Each of these officers shall take an oath to support the Constitution of the United States, and for the true and faithful exercise of the duties of the office to the best of the knowledge and ability of the officer, and to keep the secrets of the House. Each of these officers shall appoint all of the employees of the department concerned provided for by law. The Clerk, Sergeant-at-Arms, and Chief Administrative Officer may be removed by the House or by the Speaker.

Clerk

2. (a) At the commencement of the first session of each Congress, the Clerk shall call the Members, Delegates, and Resident Commissioner to order and proceed to record their presence by States in alphabetical order, either by call of the roll or by use of the electronic voting system. Pending the election of a Speaker or Speaker pro tempore, and in the absence of a Member acting as Speaker pro tempore pursuant to clause 8(b)(3)(A) of rule I, the Clerk shall preserve order and decorum and decide all questions of order, subject to appeal by a Member, Delegate, or Resident Commissioner.

(b) At the commencement of every regular session of Congress, the Clerk shall make and cause to be delivered to each Member, Delegate, and the Resident Commissioner a list of the reports that any officer or Department is required to make to Congress, citing the law or resolution in which the require-

RULES OF THE**Rule II, clause 3**

ment may be contained and placing under the name of each officer the list of reports required to be made by such officer.

(c) The Clerk shall—

(1) note all questions of order, with the decisions thereon, the record of which shall be appended to the Journal of each session;

(2) enter on the Journal the hour at which the House adjourns;

(3) complete the distribution of the Journal to Members, Delegates, and the Resident Commissioner, together with an accurate and complete index, as soon as possible after the close of a session; and

(4) send a copy of the Journal to the executive of and to each branch of the legislature of every State as may be requested by such State officials.

(d) (1) The Clerk shall attest and affix the seal of the House to all writs, warrants, and subpoenas issued by order of the House and certify the passage of all bills and joint resolutions.

(2) The Clerk shall examine all bills, amendments, and joint resolutions after passage by the House and, in cooperation with the Senate, examine all bills and joint resolutions that have passed both Houses to see that they are correctly enrolled and forthwith present those bills and joint resolutions that originated in the House to the President in person after their signature by the Speaker and the President of the Senate, and report to the House the fact and date of their presentation.

(e) The Clerk shall cause the calendars of the House to be distributed each legislative day.

(f) The Clerk shall—

(1) retain in the library at the Office of the Clerk for the use of the Members, Delegates, Resident Commissioner, and officers of the House, and not to be withdrawn therefrom, two copies of all the books and printed documents deposited there; and

(2) deliver to any Member, Delegate, or the Resident Commissioner an extra copy of each document requested by that Member, Delegate, or Resident Commissioner that has been printed by order of either House of Congress in any Congress in which the Member, Delegate, or Resident Commissioner served.

(g) The Clerk shall provide for the temporary absence or disability of the Clerk by designating an official in the Office of the Clerk to sign all papers that may require the official signature of the Clerk and to perform all other official acts that the Clerk may be required to perform under the rules and practices of the House, except such official acts as are provided for by statute. Official acts performed by the designated official shall be under the name of the Clerk. The designation shall be in writing and shall be laid before the House and entered on the Journal.

(h) The Clerk may receive messages from the President and from the Senate at any time when the House is in recess or adjournment.

(1) (1) The Clerk shall supervise the staff and manage the office of a Member, Delegate, or Resident Commissioner who has died, resigned, or been expelled until a successor is elected. The Clerk shall perform similar duties in the event that a vacancy is declared by the House in any congressional district because of the incapacity of the person representing such district or other reason. When acting as a supervisory authority over such staff, the Clerk shall have authority to terminate employees and, with the approval of the Committee on House Administration, may appoint such staff as is required to operate the office until a successor is elected.

(2) For 60 days following the death of a former Speaker, the Clerk shall maintain on the House payroll, and shall supervise in the same manner, staff appointed under House Resolution 1238, Ninety-first Congress (as enacted into permanent law by chapter VIII of the Supplemental Appropriations Act, 1971) (2 U.S.C. 5128).

(j) In addition to any other reports required by the Speaker or the Committee on House Administration, the Clerk shall report to the Committee on House Administration not later than 45 days following the close of each semi-annual period ending on June 30 or on December 31 on the financial and operational status of each function under the jurisdiction of the Clerk. Each report shall include financial statements and a description or explanation of current operations, the implementation of new policies and procedures, and future plans for each function.

(k) The Clerk shall fully cooperate with the appropriate offices and persons in the performance of reviews and audits of financial records and administrative operations.

Sergeant-at-Arms

3. (a) The Sergeant-at-Arms shall attend the House during its sittings and maintain order under the direction of the Speaker or other presiding officer. The Sergeant-at-Arms shall execute the commands of the House, and all processes issued by authority thereof, directed to the Sergeant-at-Arms by the Speaker.

(b) The symbol of the Office of the Sergeant-at-Arms shall be the mace, which shall be borne by the Sergeant-at-Arms while enforcing order on the floor.

(c) The Sergeant-at-Arms shall enforce strictly the rules relating to the privileges of the Hall of the House and be responsible to the House for the official conduct of employees of the Office of the Sergeant-at-Arms.

(d) The Sergeant-at-Arms may not allow a person to enter the room over the Hall of the House during its sittings and, from 15 minutes before the hour of the meeting of the House

HOUSE OF REPRESENTATIVES

Rule III, clause 2

each day until 10 minutes after adjournment, shall see that the floor is cleared of all persons except those privileged to remain.

(e) In addition to any other reports required by the Speaker or the Committee on House Administration, the Sergeant-at-Arms shall report to the Committee on House Administration not later than 45 days following the close of each semiannual period ending on June 30 or on December 31 on the financial and operational status of each function under the jurisdiction of the Sergeant-at-Arms. Each report shall include financial statements and a description or explanation of current operations, the implementation of new policies and procedures, and future plans for each function.

(f) The Sergeant-at-Arms shall fully cooperate with the appropriate offices and persons in the performance of reviews and audits of financial records and administrative operations.

(g)(1) The Sergeant-at-Arms is authorized and directed to impose a fine against a Member, Delegate, or the Resident Commissioner for the use of an electronic device for still photography or for audio or visual recording or broadcasting in contravention of clause 5 of rule XVII and any applicable Speaker's announced policy on electronic devices.

(2) A fine imposed pursuant to this paragraph shall be \$500 for a first offense and \$2,500 for any subsequent offense.

(3)(A) The Sergeant-at-Arms shall promptly notify the Member, Delegate, or the Resident Commissioner, the Speaker, the Chief Administrative Officer, and the Committee on Ethics of any such fine.

(B) Such Member, Delegate, or Resident Commissioner may appeal the fine in writing to the Committee on Ethics not later than 30 calendar days or five legislative days, whichever is later, after notification pursuant to subdivision (A).

(C) Upon receipt of an appeal pursuant to subdivision (B), the Committee on Ethics shall have 30 calendar days or five legislative days, whichever is later, to either dismiss the fine or allow it to proceed. Upon a determination regarding the appeal or if no appeal has been filed at the expiration of the period specified in subdivision (B), the chair of the Committee on Ethics shall promptly notify the Member, Delegate, or the Resident Commissioner, the Speaker and the Chief Administrative Officer. The Speaker shall promptly lay such notification before the House.

(4) The Sergeant-at-Arms and the Committee on Ethics are authorized to establish policies and procedures for the implementation of this paragraph.

Chief Administrative Officer

4. (a) The Chief Administrative Officer shall have operational and financial responsibility for functions as assigned by the Committee on House Ad-

ministration and shall be subject to the policy direction and oversight of the Committee on House Administration.

(b) In addition to any other reports required by the Committee on House Administration, the Chief Administrative Officer shall report to the Committee on House Administration not later than 45 days following the close of each semiannual period ending on June 30 or December 31 on the financial and operational status of each function under the jurisdiction of the Chief Administrative Officer. Each report shall include financial statements and a description or explanation of current operations, the implementation of new policies and procedures, and future plans for each function.

(c) The Chief Administrative Officer shall fully cooperate with the appropriate offices and persons in the performance of reviews and audits of financial records and administrative operations.

(d)(1) Upon notification from the chair of the Committee on Ethics pursuant to clause 3(g)(3)(C), the Chief Administrative Officer shall deduct the amount of any fine levied under clause 3(g) from the net salary otherwise due the Member, Delegate, or the Resident Commissioner.

(2) The Chief Administrative Officer is authorized to establish policies and procedures for such salary deductions.

Chaplain

5. The Chaplain shall offer a prayer at the commencement of each day's sitting of the House.

Office of Inspector General

6. (a) There is established an Office of Inspector General.

(b) The Inspector General shall be appointed for a Congress by the Speaker, the Majority Leader, and the Minority Leader, acting jointly.

(c) Subject to the policy direction and oversight of the Committee on House Administration, the Inspector General shall only—

(1) provide audit, investigative, and advisory services to the House and joint entities in a manner consistent with government-wide standards;

(2) inform the officers or other officials who are the subject of an audit of the results of that audit and suggesting appropriate curative actions;

(3) simultaneously notify the Speaker, the Majority Leader, the Minority Leader, and the chair and ranking minority member of the Committee on House Administration in the case of any financial irregularity discovered in the course of carrying out responsibilities under this clause;

(4) simultaneously submit to the Speaker, the Majority Leader, the Minority Leader, and the chair and ranking minority member of the Committee on Appropriations and the Committee on House Administration a report of each audit conducted under this clause; and

Rule III, clause 2

(5) report to the Committee on Ethics information involving possible violations by a Member, Delegate, Resident Commissioner, officer, or employee of the House of any rule of the House or of any law applicable to the performance of official duties or the discharge of official responsibilities that may require referral to the appropriate Federal or State authorities under clause 3(a)(3) of rule XI.

Office of the Historian

7. There is established an Office of the Historian of the House of Representatives. The Speaker shall appoint and set the annual rate of pay for employees of the Office of the Historian.

Office of General Counsel

8. (a) There is established an Office of General Counsel for the purpose of providing legal assistance and representation to the House. Legal assistance and representation shall be provided without regard to political affiliation. The Speaker shall appoint and set the annual rate of pay for employees of the Office of General Counsel. The Office of General Counsel shall function pursuant to the direction of the Speaker, who shall consult with the Bipartisan Legal Advisory Group.

(b) There is established a Bipartisan Legal Advisory Group composed of the Speaker and the majority and minority leaderships. Unless otherwise provided by the House, the Bipartisan Legal Advisory Group speaks for, and articulates the institutional position of, the House in all litigation matters.

(c) The House, the Speaker, a committee or the chair of a committee authorized during a prior Congress to act in a litigation matter is authorized to act as the successor in interest to the House, the Speaker, such committee or the chair of such committee of a prior Congress, respectively, with respect to such litigation matter, and to take such steps as may be appropriate to ensure continuation of such litigation matter.

RULE III

THE MEMBERS, DELEGATES, AND RESIDENT COMMISSIONER OF PUERTO RICO

Voting

1. Every Member shall be present within the Hall of the House during its sittings, unless excused or necessarily prevented, and shall vote on each question put, unless having a direct personal or pecuniary interest in the event of such question.

2. (a) A Member may not authorize any other person to cast the vote of such Member or record the presence of such Member in the House or the Committee of the Whole House on the state of the Union.

(b) No other person may cast a Member's vote or record a Member's presence in the House or the Committee of the Whole House on the state of the Union.

ATTACHMENT 2

 Positive
As of: May 5, 2017 9:33 PM Z

Health Republic Ins. Co. v. United States

United States Court of Federal Claims

November 7, 2016, Filed

No. 16-259C

Reporter

129 Fed. Cl. 115 *; 2016 U.S. Claims LEXIS 1696 **

HEALTH REPUBLIC INSURANCE COMPANY, Plaintiff,
v. THE UNITED STATES, Defendant.

Subsequent History: Dismissed by, in part *Health Republic Ins. Co. v. United States*, 129 Fed. Cl. 757, 2017 U.S. Claims LEXIS 8 (Jan. 10, 2017)

Prior History: *Land of Lincoln Mut. Health Ins. Co. v. United States*, 2016 U.S. Claims LEXIS 1523 (Fed. Cl., Oct. 7, 2016)

Core Terms

amicus curiae brief, amicus, curiae, motion to dismiss, parties, class certification

Headnotes/Syllabus

Headnotes

Motion for Leave to File an Amicus Curiae Brief by the United States House of Representatives; "Exclusive and Plenary" Authority of the United States Department of Justice to Conduct Litigation in Which the United States Is a Party

Counsel: [\[**1\]](#) Stephen Swedlow, Chicago, IL, for plaintiff.

Charles E. Canter, United States Department of Justice, Washington, DC, for defendant.

Thomas G. Hungar, United States House of Representatives, Washington, DC, for movant.

Judges: MARGARET M. SWEENEY, Judge.

Opinion by: MARGARET M. SWEENEY

Opinion

[*116] OPINION AND ORDER

SWEENEY, Judge

The United States House of Representatives ("House") moves for leave to file an amicus curiae brief in the above-captioned case. As explained below, the court denies the House's motion.

I. BACKGROUND

Plaintiff Health Republic Insurance Company filed suit in this court on February 24, 2016. In its complaint, plaintiff, for itself and on behalf of those similarly situated, alleges that the United States has not fully paid the risk corridor payments to which it and other insurers are entitled under the Patient Protection and Affordable Care Act, *Pub. L. No. 111-148*, 124 Stat. 119 (2010), and its implementing regulations. Subsequently, ten other insurers filed suit in this court to recover unpaid risk corridor payments.¹

On June 24, 2016, defendant moved to dismiss the

¹ See *First Priority Life Ins. Co. v. United States*, No. 16-587C (filed May 17, 2016); *Moda Health Plan, Inc. v. United States*, No. 16-649C (filed June 1, 2016); *Blue Cross & Blue Shield of N.C. v. United States*, No. 16-651C (filed [\[**2\]](#) June 2, 2016); *Land of Lincoln Mut. Health Ins. Co. v. United States*, No. 16-744C (filed June 23, 2016); *Me. Cnty. Health Options v. United States*, No. 16-967C (filed Aug. 9, 2016); *N.M. Health Connections v. United States*, No. 16-1199C (filed Sept. 26, 2016); *BCBSM, Inc. v. United States*, No. 16-1253C (filed Oct. 3, 2016); *Blue Cross of Idaho Health Serv., Inc. v. United States*, No. 16-1384C (filed Oct. 24, 2016); *Minuteman Health Inc. v. United States*, No. 16-1418C (filed Oct. 27, 2016); *Mont. Health Co-op v. United States*, No. 16-1427C (filed Oct. 28, 2016).

complaint in this case for lack of subject matter jurisdiction pursuant to [Rule 12\(b\)\(1\) of the Rules of the United States Court of Federal Claims](#) ("RCFC"). In its motion, defendant contends that (1) plaintiff does not have a claim for presently due money damages, (2) plaintiff's claims are not ripe, and (3) the court lacks jurisdiction to award certain relief requested by plaintiff, including consequential damages, special damages, interest, declaratory relief, and injunctive relief. Plaintiff filed its response in opposition on August 15, 2016, and defendant filed its reply on September 9, 2016.

Approximately one month later, on October 5, 2016, [**3] plaintiff filed motions for class certification and for the appointment of interim class counsel. In an October 24, 2016 joint motion, the parties indicated that defendant did not object to the appointment of interim class counsel and requested that the deadlines for briefing the class certification motion be extended such that briefing would conclude in January 2017. The following day, the court granted plaintiff's motion to appoint interim class counsel and granted the parties' request to enlarge the briefing schedule for the class certification motion.

The House filed its motion for leave to file an amicus curiae brief, with a copy of the brief attached as an exhibit, on October 13, 2016. In its motion, the House represented that plaintiff did not consent to the filing of the amicus curiae brief and that defendant took no position on its request. Plaintiff filed its response in opposition on October 17, 2016. The House did not file a reply; its motion is therefore ripe for resolution.

II. DISCUSSION

The RCFC, which largely mirror the Federal Rules of Civil Procedure, do not provide for the participation of amici curiae. Nevertheless, the court possesses the inherent authority to allow [**4] such participation, and has broad discretion to exercise that authority. [Am. Satellite Co. v. United States, 22 Cl. Ct. 547, 549 \(1991\)](#). When deciding whether to allow the participation of an amicus curiae, the court may consider a number of factors, including (1) "whether the court is persuaded that participation by the amicus will be useful to it, as contrasted with simply strengthening the assertions of one party," *id.*; (2) whether the parties consent to the participation of the amicus curiae, *id.*; (3) whether "one of the parties is not interested in or capable of fully presenting one side of [**117] the argument," *id.*; (4) whether "the court's decision would directly affect [the movant's] rights or would set a controlling precedent

regarding a claim of [the movant]," [Fluor Corp. & Affiliates v. United States, 35 Fed. Cl. 284, 285 \(1996\)](#); and (5) whether participation by an amicus curiae would unnecessarily delay the litigation, *id. at 286*. [Accord Wolfchild v. United States, 62 Fed. Cl. 521, 536 \(2004\)](#); see also [Hage v. United States, 35 Fed. Cl. 737, 742 \(1996\)](#) (allowing the participation of amici curiae who possessed "specialized knowledge" that could be "beneficial to the court in the resolution of [the] case").

The House requests leave to file an amicus curiae brief so that it can "inform this Court of clear grounds for dismissal of this action with prejudice." Mot. 1. It asserts that the United States Department of Justice ("DOJ") [**5] has moved to dismiss four of the later-filed cases for failure to state a claim upon which relief could be granted pursuant to [RCFC 12\(b\)\(6\)](#) on the ground that the plaintiffs in those cases do not have a right to receive "risk corridors payments in excess of program receipts."² *Id. at 2*. The House contends that the DOJ's arguments regarding the merits of those plaintiffs' claims are also applicable in this case, and faults the DOJ for not raising them in its motion to dismiss. Accordingly, its seeks to apprise the court of these arguments and the supporting case law, and "urges" the court to apply the arguments in this case and dismiss plaintiff's claims with prejudice. *Id. at 3*.

In addressing the factors that the court may consider when deciding whether to allow the participation of amici curiae, the House advances four arguments. First, it contends that it "has a strong institutional interest in ensuring that federal statutes are defended in a manner consistent with Congressional intent, [**6] including the exercise of Congressional appropriations power." *Id. at 6*. Second, it avers that its "brief will alert the Court to compelling arguments mandating dismissal of this case—arguments that DOJ has raised in nearly identical cases." *Id. at 7*. Third, it asserts that its motion is timely because the DOJ—at the time the House filed its motion—had not responded to plaintiff's motions for class certification and for the appointment of interim class counsel, and therefore its brief would assist "the Court in its resolution of this litigation by allowing the Court to consider arguments that would obviate the need for protracted briefing on class certification issues." *Id. at 8*. Finally, it suggests that its status as a

² Those four cases are [First Priority Life Insurance Co. v. United States, Moda Health Plan, Inc. v. United States, Blue Cross & Blue Shield of North Carolina v. United States, and Land of Lincoln Mutual Insurance Co. v. United States](#).

government entity should entitle it to file an amicus curiae brief despite plaintiff's refusal to consent to the filing, in consonance with Federal Rule of Appellate Procedure 29(a).³

In its response in opposition, plaintiff argues that the court should deny the House's motion because "the arguments the House attempts to offer in support of the Motion to Dismiss were not raised by [**7] the Government and cannot now be raised for the first time a month after the Motion to Dismiss is fully briefed." Resp. 1. Specifically, plaintiff argues that allowing the House to file its amicus curiae brief would "prejudice [plaintiff] by effectively allowing an entirely new motion into the record through an amicus brief." *Id.* at 2. Plaintiff further contends that each of the factors that the court may consider when deciding whether to allow the participation of amici curiae "weighs against granting the House's request," *id.*, including the fact that the position of the United States is already being protected by the DOJ.

Plaintiff's arguments are persuasive. As previously noted by the United States Court of Claims, "there can be no dispute that, unless otherwise provided by law, the Attorney General is charged by statute with exclusive and plenary power to supervise and conduct all litigation to which the U.S. is a party." Hughes Aircraft Co. v. United States, 534 F.2d 889, 901, 209 Ct. Cl. 446 (Ct. Cl. 1976) (citing 28 U.S.C. § 516-520 (1970)); accord 28 U.S.C. § 516 (2012) ("Except as otherwise authorized by law, the conduct of [*118] litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department [**8] of Justice, under the direction of the Attorney General."); *id.* § 518(a) ("Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue . . . suits in the United States Court of Federal Claims"); *id.* § 519 ("Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party"); Favell v. United States, 27 Fed. Cl. 724, 750 (1992) ("Courts have consistently upheld the basic principle that the Attorney General is given power over, and general supervision of, all litigation to which the United States or an agency thereof is a party."). In

exercise of this authority, the DOJ moved to dismiss plaintiff's claims for lack of jurisdiction pursuant to RCFC 12(b)(1), and not for failure to state a claim upon which relief could be granted pursuant to RCFC 12(b)(6). The DOJ has "exclusive and plenary" control over the United States' defense of this litigation, foreclosing the ability of another government entity from acting on the United States' behalf. Thus, the House cannot separately assert a ground for dismissing plaintiff's complaint that was not raised by the DOJ, especially under the auspices [**9] of an amicus curiae brief. Cf. Amoco Oil Co. v. United States, 234 F.3d 1374, 1378 (Fed. Cir. 2000) ("But an appellant and an amicus may not split up the issues and expect the court to consider that they have all been raised on appeal. It is the appellant's case, not a joint appeal by the appellant and amicus. Appellant must raise in its opening brief all the issues it wishes the court to address."); Land of Lincoln Mut. Health Ins. Co. v. United States, No. 16-744C, 2016 U.S. Claims LEXIS 1523, 2016 WL 5900196, at *1 (Fed. Cl. Oct. 7, 2016) (unpublished order) (denying a motion for leave to file an amicus curiae brief that "notably addresse[d] at some length an implied contract theory that [was not] posed by plaintiff"); Am. Satellite Co., 22 Cl. Ct. at 548 (denying a motion for leave to file an amicus curiae brief that "focus[ed] on 'legal and factual issues not now being addressed by the parties'").

III. CONCLUSION

Because the sole purpose of the House's proposed amicus curiae brief is to urge a ground for dismissing plaintiff's complaint that was not raised by the DOJ in its motion to dismiss, improperly intruding on the DOJ's "exclusive and plenary" authority to litigate the case on the United States' behalf, the court **DENIES** the House's motion for leave to file an amicus curiae brief.

IT IS SO ORDERED.

/s/ Margaret M. Sweeney

MARGARET M. SWEENEY

Judge

End of Document

³ Federal Rule of Appellate Procedure 29(a) provides: "The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court."

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 8th day of May 2017, a copy of the foregoing was filed electronically through the Court's CM/ECF system. Pursuant to Federal Circuit Rule 25, the Notice of Docketing Activity generated by that filing constitutes service on opposing counsel.

/s/ Daniel P. Albers
Daniel P. Albers