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**

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

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May 11, 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

REPLY IN SUPPORT OF 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") respectfully submits this reply in support of its motion for leave to file a brief as *amicus curiae*.

As explained in its motion, the House has a strong interest in affirmance of the judgment below. Appellant Land of Lincoln seeks to compel the Executive Branch to make additional risk corridors program payments under the Patient Protection and Affordable Care Act ("ACA") in excess of incoming program receipts. As explained in the House's proposed *amicus* brief, a ruling in favor of Land of Lincoln would nullify the intent of the 111th Congress that the risk corridors program be self-funding and budget-neutral, invalidate the actions of the 113th and 114th Congresses in passing appropriations laws that bar risk corridors payments in excess of receipts, and raise significant separation-of-powers concerns by intruding upon Congress's exclusive authority under the Appropriations Clause. Far from seeking to "repudiate" the actions of a prior Congress, as Land of Lincoln claims (Opp'n 6), the House instead seeks to ensure that prior legislative actions are given effect in accordance with congressional intent, and that this Court is fully informed regarding the unique interests and constitutional perspective of the Legislative Branch.

Land of Lincoln errs in suggesting that the House's proposed *amicus* brief merely "parrots" (Opp'n 3) the arguments advanced by the Department of Justice. To the contrary, the House's brief does not even address many of the Department's arguments (*see*, *e.g.*, Appellee Br. 40-57), while offering a distinct perspective and more detailed analysis with respect to other issues that are highly relevant to this appeal.

For example, the House's brief emphasizes (i) the central importance of the Appropriations Clause and principles of separation of powers to the proper disposition of this case (House Amicus Br. 4-7), (ii) the principles of appropriations law that provide the backdrop against which this case should be resolved (*id*. at 7-13), and (iii) the House's uniquely relevant perspective on Congress's intent in enacting the ACA and subsequent appropriations laws (*id*. at 14-21, 23-24). The House's brief also offers a more thorough explication of the reasons why Land of Lincoln's reliance on the Judgment Fund (Appellant Br. 23, 44) is misplaced (House Amicus Br. 24-29), and why this Court's decision in *Highland Falls–Fort Montgomery Central School District v. United States*, 48 F.3d 1166 (Fed. Cir. 1995), compels rejection of Land of Lincoln's claims (House Amicus Br. 12, 21-24).[1]

[1] Indeed, Land of Lincoln refutes its own "parrot[ing]" allegation by criticizing the House for advancing separation-of-powers arguments that are allegedly "at odds with" the Department's position, and bizarrely contends that the constitutional

Land of Lincoln also errs in contending that the House's interests are fully protected by the Department of Justice in this case. The interests of the Executive and Legislative Branches are seldom perfectly aligned in matters involving the Legislative Branch's Article I powers. Indeed, the Appropriations Clause was intended by the Framers to operate as a restraint on the power of the Executive and Judicial Branches (*see* House Amicus Br. 4-7), and the political branches often have sharply different views regarding the scope and import of the Clause. *See, e.g., U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165 (D.D.C. 2016). It is not surprising, therefore, that the House's proposed *amicus* brief devotes considerably more attention than does the Department's brief to matters such as the separation of powers, the importance of adhering to the dictates of the Appropriations Clause, and the unavailability of the Judgment Fund.

Finally, Land of Lincoln is equally wrong in questioning whether the proposed *amicus* brief expresses the views of the House, and in challenging the legitimacy of the process by which the brief was authorized on behalf of the House. Pursuant to House Rules, "[u]nless otherwise provided by the House, the

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principles at stake in determining whether Congress has authorized the expenditure of federal funds are "issues that are not before the Court in this appeal." Opp'n 5. It is perhaps understandable that Land of Lincoln would like this Court to ignore those constitutional principles in deciding this case, but that purely mercenary preference hardly supplies a justification for denying the request of a coordinate branch of government to express its views to the Court.

Bipartisan Legal Advisory Group [("BLAG")] 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 (115th Cong.). House Rules are adopted at the start of each Congress by vote of the full House pursuant to the Rulemaking Clause, U.S. Const. art. I, § 5, cl. 2. *See* H. Res. 5 (115th Cong.) (2017) (adopting current House Rules). Within constitutional limitations, those Rules are "absolute and beyond the challenge of any other body or tribunal." *United States v. Ballin*, 144 U.S. 1, 5 (1892). The BLAG has authorized the submission of this brief, and the House has not "otherwise provided." By operation of House Rules adopted by House Resolution, therefore, the brief "articulates the institutional position of[] the House" in this matter.[2]

CONCLUSION

The question whether the Judicial Branch may order the U.S. Treasury to disburse payments pursuant to a statutory benefits program, where the Legislative Branch (i) at the time of authorization of the program did not appropriate funds for payments, and (ii) at the time of appropriation exercised its constitutional power to explicitly bar such payments, is plainly a matter of grave importance to the House.

[2] The BLAG was formally established by House Rule in the 103rd Congress. *See* H. Doc. No. 102-405, at 336 § 634e (1993). Since that time, the full House has voted to authorize the filing of an *amicus* brief only once. *See* Opp'n 6 (citing *United States v. Texas*, 136 S. Ct. 2271 (2016)). In every other instance, the *amicus* filing was authorized by the BLAG, just as here.

The House seeks to provide the Court with "a broader perspective" on the constitutional implications of the questions presented in this appeal, and its *amicus* submission is therefore appropriate. *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1377-78 (Fed. Cir. 2000). For the foregoing reasons, and those expressed in the House's motion, the motion for leave to file a brief as *amicus curiae* should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 11, 2017, I caused the foregoing document to be filed by means of the U.S. Court of Appeals for the Federal Circuit's CM/ECF system.

/s/ Thomas G. Hungar
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