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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA *ex rel.*
BENJAMIN POEHLING,

Plaintiff,

v.

UNITEDHEALTH GROUP, INC. *et al.*,

Defendants.

CASE NO. 2:16-cv-08697-FMO-PVCx

**UNITED'S RESPONSE TO AMICUS
CURIAE BRIEF IN SUPPORT OF
PLAINTIFF'S MOTION FOR
REVIEW OF SPECIAL MASTER'S
REPORT AND RECOMMENDATION**

Hon. Fernando M. Olguin

Hearing Date: June 12, 2025

Hearing Time: 10:00 a.m.

Courtroom: 350 W. First Street

Courtroom 6D, Los Angeles,
CA 90012

1 **INTRODUCTION**

2 The Court should give no weight to the last-minute amicus brief filed by a small
3 number of Members of Congress. Dkt. 640-1. While amici express various misguided
4 policy critiques of the growing and successful Medicare Advantage program Congress
5 itself designed, their brief displays a remarkable lack of understanding of the issues
6 presented in this case. The brief focuses almost entirely on so-called “upcoding”—
7 something DOJ has not alleged against United at any point in this case—and entirely
8 ignores the actual legal and factual questions before the Court. In fact, the brief supports
9 United’s position by arguing that diagnosis codes submitted by doctors are more reliable
10 than coding by United’s blind chart reviewers. That is the polar opposite of the assumption
11 on which DOJ’s entire case depends. After all, all 28 million codes at issue in this case
12 were submitted *by doctors*—the same ones who saw the patients and certified that those
13 patients had the conditions diagnosed. The amicus brief thus adds nothing to the legal
14 analysis, recycles arguments that are either irrelevant or already in the record, and reads
15 less as an effort to persuade the Court than one to pressure it. And its dismissive treatment
16 of the Special Master’s careful Report and Recommendation, Dkt. 631 (R&R), is not only
17 unhelpful, it is also insulting. The Court should disregard the amicus brief and adopt the
18 Special Master’s R&R in full.

19 **ARGUMENT**

20 The amicus brief offers no help to the Court because it is grounded in a fundamental
21 misunderstanding of the theory of liability at issue in this case.

22 For years, DOJ has advanced a single, categorical theory of liability in this case:
23 that whenever a United coder conducting blind review did not identify a diagnosis code
24 that a doctor previously certified and submitted, then that diagnosis code was necessarily
25 unsupported by the medical record. Dkt. 616 at 16-18 (collecting sources); Dkt. 638 at 5-
26 6 (collecting sources); *see also* Dkt. 623 at 3-4; Dkt. 636-1 at 6-7. In these circumstances,
27 DOJ argues that the doctor who submitted the code must have been mistaken, and the
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1 United coder who failed to independently re-identify that code must have been correct and
2 the code was in fact not supported. DOJ has consistently pressed this theory since at least
3 2020 when it responded to United’s first interrogatory, where it claimed that all 28 million
4 such codes are unsupported. Dkt. 638 at 5-6. And it has reaffirmed that position many
5 times, including at the hearing before the Special Master: When asked whether “[a]ll 28
6 million codes are incorrect or just a percentage?” DOJ responded: “No. We are not
7 alleging any type of percentage.” Hr’g Tr. 10:20-24, Dkt. 634-1; *see also id.* at 11:8-11
8 (answering “yes” when asked whether it alleges that “all 28 million codes are unsupported
9 by the medical records”). In short, DOJ has been abundantly clear about its sole theory of
10 liability, claiming that “*every time* one of United’s coders reviewed a medical chart” and
11 did not identify a particular diagnosis code, “the diagnosis was not supported by that
12 medical record.” Dkt. 636-1 at 8 (emphasis added).

13 The Special Master ultimately found that DOJ failed to support this theory with
14 sufficient evidence for any reasonable jury to find in its favor. R&R at 23, 25. As the
15 Special Master explained, it is undisputed that even expert coders will fail to identify some
16 diagnosis codes that are documented in medical records when conducting blind chart
17 review and that CMS’s own coders overlook supported codes in blind review. *Id.* at 20-
18 21, 25; *see also* Dkt 638 at 9-10. Indeed, DOJ’s coding expert identified multiple reasons
19 why coders will miss diagnoses—including the length and complexity of the medical
20 record, unfamiliarity with a doctor’s specialty, and that the medical record available to the
21 coder is incomplete. Dkt. 638 at 15 & n.4. As the Special Master concluded, DOJ’s
22 speculative and categorical theory cannot survive Rule 56 scrutiny.

23 Despite DOJ’s consistent theory of liability—and the Special Master’s thoughtful
24 analysis of it—amici’s brief primarily addresses a wholly unrelated issue: “upcoding.” *See*
25 Dkt. 640-1 at 2 & n.2, 4-7, 9-10, 12-13; *see also* Dkt. 640 at 2, 4 & n.1, 6. Upcoding occurs
26 when an insurer *adds* diagnosis codes *not* submitted by the treating doctors and that are
27 not in fact supported by the patient’s medical records. Amici’s extensive discussion of
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1 upcoding, which is based entirely on unsubstantiated hearsay accusations in news articles,
2 has literally nothing to do with this case. There is no upcoding allegation against United.
3 Dkt. 616 at 16 (citing undisputed facts). DOJ does not challenge the accuracy of a *single*
4 code added by a United coder. *Id.* Nor does DOJ dispute that chart review programs are a
5 lawful, industry-standard practice. *Id.* Instead, the only diagnosis codes challenged by DOJ
6 in this case are diagnosis codes submitted by *doctors*—who examined the patients and
7 certified that the diagnosis codes are accurate—not by United’s coders. *Id.*

8 Amici do not appear to understand this distinction. The brief repeatedly proceeds
9 on the faulty premise that United is accused of fraudulently inflating risk scores by adding
10 unsupported codes that were not identified by the treating doctors. *See* Dkt. 640-1 at 2 &
11 n.2, 4-7, 9-10, 12-13; *see also* Dkt. 640 at 2, 4 & n.1, 6. Their brief urges the Court to
12 “allow this case to proceed to jury trial in a public courtroom,” claiming that “United’s
13 practice of having its coders review patient charts in search of diagnoses to bill should not
14 be conducted under cover of darkness, but should be explained and scrutinized in the light
15 of a federal courtroom.” Dkt. 640-1 at 2-3. But, again, DOJ’s case does not challenge
16 United’s practice of reviewing charts “in search of diagnoses.” And none of the codes at
17 issue in the case were added by United’s coders. They were submitted by doctors. Amici’s
18 fundamental misunderstanding renders the brief wholly irrelevant to the legal issues before
19 the Court.

20 More still, amici actually support *United’s* position. Amici insist that diagnosis
21 codes should be trusted when they are submitted by “healthcare providers [who] actually
22 know and care for their patients because they have treated them” and “verify that all codes
23 are accounted for and properly submitted”—not by coders employed by insurers to review
24 a chart at a later date. Dkt. 640-1 at 1-2. But that point just proves United’s argument: the
25 fact that United’s chart reviewers, who were conducting blind review without knowledge
26 of what the doctor had seen or certified, did not identify a diagnosis code, does not mean
27 that the doctors who actually know and cared for the patients (and certified that the patients
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1 had those conditions) were always wrong. Dkt. 638 at 13-17. Amici’s insistence that the
2 diagnoses submitted by the treating doctors should be trusted over coding by an insurer’s
3 coders simply highlights one of the core defects in the unproven assumption underlying
4 DOJ’s entire case.

5 The amicus brief also provides no facts, data, or specialized legislative insight. Like
6 DOJ, it merely assumes—without evidence—that all of the codes DOJ alleges to be
7 unsupported are, in fact, unsupported. *See, e.g.*, Dkt. 640-1 at 3, 12. But amici offer no
8 analytical contribution that would aid the Court in assessing the summary judgment
9 record. Amici make much of the idea that United is “iron[icall]y” concerned about fraud
10 elsewhere in the healthcare system, as if that were somehow inconsistent with its position
11 here. *Id.* at 1; *see also* Dkt. 640 at 4 & n.1. But of course, United opposes *actual* fraud—
12 just not unfounded accusations based on sheer speculation, which, as the Special Master
13 made clear, is all DOJ has offered in this case.

14 Amici’s filing appears to be an effort to pressure the Court through extraneous and
15 wholly unsubstantiated atmospherics. It offers no respect for the careful, fact-intensive
16 analysis undertaken by the Special Master, whose R&R spans 50 pages and is rooted in a
17 thorough application of Rule 56. *See* Dkt. 631. Instead, the brief dismisses the R&R out
18 of hand, mischaracterizing its conclusions and failing to grapple seriously with the Special
19 Master’s analysis. *See, e.g.*, Dkt. 640-1 at 3 (asserting that the Special Master’s R&R
20 would “embolden United in its fraudulent upcoding practices,” despite the fact that
21 “upcoding” is irrelevant to this case); *id.* at 12-13 (failing to provide any substantive
22 analysis of the Special Master’s R&R). This sort of political theater has no place in a
23 judicial proceeding, which should be based on *evidence*, not rhetoric. The Court should
24 not indulge it.

25 Finally, if amici believe there is something inherently wrong with insurers
26 reviewing charts to identify diagnoses that doctors documented in their medical charts but
27 did not submit on claims forms, then it is their prerogative to try to enact legislation to
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1 address it. But they have not done so, presumably because the hundreds of Members of
2 Congress who did not join their amicus brief do not share their views. The legislative
3 process is where these arguments belong. They do not justify disrupting a fully briefed
4 matter on the eve of a hearing with a misdirected and inflammatory filing that fails even
5 to understand, much less address, the real issues before the Court.

6 **CONCLUSION**

7 The amicus brief changes nothing. The Court should adopt the Special Master's
8 R&R in full and grant summary judgment for United and deny DOJ's motion for partial
9 summary judgment.

10
11 Dated: May 30, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendants, hereby certifies that this Response to the Amicus Curiae Brief in Support of Plaintiff's Motion for Review of Special Master's Report and Recommendation (Dkt. 640-1) contains 1,562 words, which complies with the word limit of L.R. 11-6.1.

Dated: May 30, 2025

/s/ David J. Schindler

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