

# Another Lawsuit. Another Partisan Investigation. Another Republican Attempt to Undermine the ACA.

House Republicans' so-called investigation into the cost-sharing reduction (CSR) subsidies continue a six-year effort to undermine or repeal the Affordable Care Act (ACA), which has provided 20 million Americans with affordable health insurance and offered millions more protections against discrimination for pre-existing conditions, age, and gender. Having failed more than 60 times to pass bills that would undermine or repeal the health care law, the Republicans have now turned to an unprecedented lawsuit and a concurrent Congressional investigation in an attempt to invalidate a key component of the ACA that ensures health coverage is affordable for all Americans. This report provides background on the CSR program, the underlying lawsuit, and the Republican investigation.

## Background on the CSR program

The **cost-sharing reduction (CSR) subsidies** are a key part of making health insurance coverage affordable to American families. These subsidies help ensure that, for moderate income families, out-of-pocket health care costs do not become a crippling financial burden. Not only premiums, but actual care itself, should be affordable for American families; that is the role of the CSR program.

The ACA provides two key subsidies for individuals and families who enroll in the reform law's insurance exchanges to ensure insurance coverage is affordable and benefits are accessible. The first is a premium tax credit, which is advanceable and refundable and helps exchange enrollees afford the premiums for insurance coverage. The premium tax credits are generally available to individuals and families with income between 100 percent and 400 percent of the federal poverty level (FPL) (\$11,880 to \$47,520 for individuals; \$24,300 to \$97,200 for a family of four). The premium tax credits are indexed to the local cost of health insurance premiums. If the premium tax credits are advanced, the federal government pays insurance companies directly for the assistance with premiums.

The second subsidy is the CSR program. This is a program that helps exchange enrollees afford the out-of-pocket costs of health care when they see a medical provider by lowering the co-pays and deductibles for their insurance plan. This program is available to enrollees who are eligible for the premium tax credits if their income is between 100 and 250 percent of the FPL (\$11,880 to \$29,700 for individuals; \$24,300 to \$60,750 for a family of four). The program is structured so that enrollees are only responsible for meeting the lowered co-pays and deductibles. Under the ACA, insurers offering coverage in the exchanges are required to provide the CSR program to eligible enrollees. The federal government directly reimburses insurance companies for the difference between the co-pays and deductibles that would apply but for the program.

The CSR program was first operational on January 1, 2014—the same date as the effective date for the premium tax credits and the individual insurance market reforms (e.g., banning pre-existing condition exclusions).

As of March 2016, more than 11 million consumers were enrolled in ACA marketplace plans. Nearly 6.4 million individuals benefited from CSR subsidies to make their coverage more affordable. Payments in 2014 to insurance companies under the CSR program totaled \$3 billion. Without the CSR program, many of the more than 6.4

million Americans who are receiving assistance with out-of-pocket costs could face medical bankruptcy as a result of unforeseen illness or injury. More than 62 percent of bankruptcies before the ACA were due to medical reasons – the Republicans want to return America to a time where medical costs were the most prevalent reason for bankruptcy.

## The investigation is duplicative of a Republican lawsuit

The House Republican investigation centers on the Obama Administration's funding of the ACA's CSR program. House Republicans believe that the CSR program requires an annual appropriation, and cannot be funded without additional action by Congress. The Obama Administration disagrees with House Republicans.

The House Republicans are conducting their investigation at the same time that a lawsuit on the same issue is pending in federal court. Given that the funding issue has been submitted to the court system and is currently on appeal and that the parties have stipulated that there are no contested material facts at issue in the case, the impact of this investigation is to intimidate civil servants and tie up agency resources.

The Republican-led House of Representatives voted in July 2014 to file a lawsuit against the Obama Administration over implementation of the ACA. The case (now *House v Burwell*) raises two ACA issues: (1) the Administration's decision to delay the ACA's employer shared responsibility requirement for a year; and (2) the Administration's determination that the CSR program is permanently funded and does not need an annual appropriation. The lawsuit was filed in November 2014 in the federal district court for D.C. In September 2015, the court dismissed the first issue in the lawsuit (delay of employer shared responsibility).

In December of 2015, both the House and the Obama Administration moved for summary judgement on the CSR funding issue, arguing that there were no material issues of fact in dispute in the case and therefore a judgement could be made by the court based on interpretation of law. On May 12, 2016, Federal District Court Judge Rosemary Collyer (appointed by George W. Bush) ruled in favor of the House on its CSR program claim.

The Obama Administration is appealing the District Court's ruling to the D.C. Circuit Court of Appeals.

As part of the lawsuit, the Republican-led House, the Administration, and the presiding District Court Judge concluded that there are no factual issues in dispute. In denying the Obama Administration's request for an appeal on a procedural ruling, the District Court Judge observed that "[u]nlike typical civil litigation, where the denial of a motion to dismiss would be followed by months or even years of discovery, this case is presently suited for summary disposition: the facts are not in dispute."

## Key findings of the "investigation"

What the Republicans had hoped to find in their deposition was a manipulative political process relating to the funding of the cost-sharing reduction payments—perhaps they hoped to find a process during which career employees objected to a program funding decision made by political appointees. Instead what they found was that most agency employees believed that an annual appropriation was not necessary to fund the CSR program.

One career employee disagreed—David Fisher, the former Chief Risk Officer for the IRS—but he acknowledged that he held the minority view. Mr. Fisher believed Commissioner Koskinen "gave me plenty of time to air my concerns" and "made the choice that I bet you 99 out of 100 people would have made." Mr. Fisher said that there was "free and open discussion, as Commissioner Koskinen really always does in his management approach,"

adding that Commissioner Koskinen “is not only a phenomenal leader but one of the best managers we've ever had in government.”

The following are highlights from Mr. Fisher’s deposition on May 11, 2016 [full transcript is available [here](#)]:



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*Mr. McDermott asked Mr. Fisher about the number of meetings that he’s been in where there was a disagreement within the Department about how a particular issue should be resolved or administered.*

FISHER: They're not that unusual. This was perhaps a more -- probably a stronger disagreement than is typical, but disagreements certainly occur all the time in the course of, you know, meetings where all sides get aired on their perspectives.

I'm trying to think through the case at the IRS with Commissioner Koskinen. You know, oftentimes, it's certainly desirable to resolve those disputes before you get to the agency head, if possible, amongst other senior colleagues. But I think part of the transparency drive that the Commissioner was trying to institute with an enterprise risk management program was to make sure that if there was disagreement or risks that had been identified that were not being resolved and he needed to be part of the resolution, then he wanted them brought to him. That's what he felt was his responsibility as the agency head. [Pages 67-68]

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*Mr. Fisher was asked by Amanda Neely, the Majority’s Oversight Subcommittee Counsel, about a meeting he attended with Commissioner Koskinen during the week of January 13th.*

AMANDA NEELY: Do you recall -- or could you explain what happened in the course of that meeting?

FISHER: So the Commissioner gathered together all of the people who had attended the meeting at OMB. There were some additional attendees that would typically attend a senior-leader meeting with the Commissioner -- as I recall, his chief of staff, his deputy chief of staff, the Deputy Commissioner for Services and Enforcement --

NEELY: Who was that?

FISHER: John Dalrymple was there. There may have been a couple of others. But it was sort of the typical senior folks that you would expect to be with the Commissioner when a meeting of some import was taking place.

And it was a free and open discussion, as Commissioner Koskinen really always does in his management approach. He is not only a phenomenal leader but one of the best managers we've ever had in government. And his advocacy for transparency of opinions was, frankly, a major

support component of our enterprise risk management program. And he not only, you know, talked the talk, he walked the walk. And his management style was to make sure, if a decision needed to be made and he needed to be in the loop, we would hold those meetings, and we always have a free and open exchange.

In this case, there were really just a couple of perspectives. He was informed of -- well, two things. There was a memo that was circulated at that meeting that you shared with me last week in the transcribed interview that showed -- I believe it was a memo from Mark Mazur to Secretary Lew that Secretary Lew had signed and initialed "Approve" that was more of the directive kind of note that Treasury had concluded that -- now it was Treasury's counsel -- had concluded that these payments were appropriate. I recall that memo. We discussed that briefly. And that was provided -- I don't remember who brought that memo. It was either through the Chief of Staff or Chief Counsel -- was brought to the group, and the Commissioner became aware of that.

He had also been informed that the Justice Department had seen the memo and had been approving of it, obviously was aware of OMB's position. This is, again, mostly through the General Counsel or Chief Counsel's communication to the Commissioner.

**And so there was a very strong consensus of the people who had been in the loop on this at, you know, fairly senior positions in government that these payments were appropriate.**

I was in the dissent. I think I was wearing two hats in that perspective. As the Chief Risk Officer, I felt there was some risk to making these payments with respect to the appropriations law and the Antideficiency Act, recognizing that there were other opinions on the other side. I expressed that I felt that the memo that we read was not compelling to me to counter my concerns about the Appropriations Act issues related to the payment, as I read the law over and over again to try to convince myself, you know, what's the appropriate reading of this, recognizing that many others have now come to a different conclusion.

The Commissioner gave me plenty of time to air my concerns. And, in the end, he made the decision that I actually would expect him to make. It was a decision that I disagreed with. But when a senior leader, an agency head, has brought his senior advisers together, he is given a lot of information -- there was nothing held back. He had, I think, a presentation that did appear to him to be compelling, that these payments out of the permanent appropriation were appropriate, again, with multiple components within the executive branch concurring that that's the appropriate thing to do, including the memo that we had in hand from the leadership at the Treasury Department.

He listened to my concerns and thanked me, actually, in the meeting for expressing those concerns but felt the appropriate course was to go forward and make the payments, you know, per the strong majority of folks who believed that they were appropriate. [Pages 37-40]

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*Rep. Roskam asked Mr. Fisher if he recalls other people raising objections in the meeting with Commissioner Koskinen.*

FISHER: I would say Mr. Kane and/or Mr. Canady -- so Mr. Canady being the CFO, Mr. Kane being the Deputy CFO -- I would say voiced some concern; I wouldn't say "objections." My sense was that they were not necessarily completely convinced that, from an appropriations standpoint and an accounting standpoint, this was totally authorized, but they were not objections. Mine was more the stronger dissent.

MR. ROSKAM: Were there voices that were stronger than yours or yours was the strongest in dissent?

FISHER: **On the dissent side, I would say mine was the strongest.** [Pages 43-45]

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*Ms. Neely asked Mr. Fisher about when Mr. Kane, the Deputy Chief Financial Officer at the IRS, raised concerns related to sequestration and the funding of the CSR subsidies.*

NEELY: So, Mr. Fisher, turning back to the timeline, in that late fall/December time period of 2013, when Mr. Kane first came to you, he raised sequester concerns. Had he also identified this appropriation concern that you're talking about now, or did that come up in the course of those conversations at some other point?

FISHER: I don't recall that being expressed at the outset. Because, again, at the outset, the question was sequester.

NEELY: Right.

FISHER: Which is complicated enough from an accounting standpoint. Especially with all the different kinds of accounts and outlays that the IRS has, getting that right, you know, takes some real thought and effort and sometimes even parsing of language just to make sure what accounts are affected or not. Because, in general, most accounts were affected, but there were exceptions, and the IRS had some of those exceptions. And so this was the natural course of accountants doing what they are supposed to do.

That was initially all we really focused on. As it became clearer that that was not going to be an expected issue because of the migration -- well, not migration -- the path to use the permanent appropriation, which is not subject to sequester, the sequester issue sort of went off the table. And that's when this subsequent question of whether or not an appropriation has been made to use the permanent account specific to cost-sharing reduction payments -- that was the question.

And there was concern raised from the accounting folks. I raised concern from a risk standpoint. And then we engaged with the broader community at OMB. We got guidance from Treasury,

Justice Department involved, IRS's counsel that ultimately concluded that the payments were appropriate.

And, as I said previously, given the strong consensus to support that perspective that was presented to the Commissioner, I was certainly not surprised that he supported that with this level of senior advice given to him as, you know, what should we go do. He made the choice that I bet you 99 out of 100 people would have made. It's just one that I happen to disagree with in terms of my understanding of both appropriation law and my reading of the statute.

NEELY: When did --

FISHER: And I expressed that. And, again, I was not in the final determination, and my position did not carry the final say, and I was okay with that. [Pages 56-58]

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## The Administration has not obstructed the House's "investigation"

The Administration has worked with Republican requests for information on the CSR program over the last two years. Thirteen current and former government officials have voluntarily submitted to interviews conducted by staff of the Ways and Means and Energy and Commerce Committees on the CSR program since the beginning of this year.

Those officials have provided information on how HHS and IRS established the payment systems for the CSR program, and documents related to the establishment of the payment systems have been provided to committee staff.

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## ACA FACTS TO KNOW

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### Failed Republican Efforts to Undermine the ACA

- 1** The number of days Republicans waited after the ACA was signed into law to file the first lawsuit.
- 2** The number of times the Supreme Court has upheld the health care law's constitutionality.
- 49** The number of ACA lawsuits (not related to contraception) filed against the Administration by the House of Representatives and conservative groups. In addition, more than 110 ACA lawsuits have been filed related to contraception.
- 64** The number of failed votes on the House Floor by Republicans to undermine or repeal the ACA.
- 40** The number of letters sent this year by Republicans on the Ways and Means and Energy and Commerce Committees demanding ACA-related information.
- 10** The number of subpoenas issued by Republicans on the Ways and Means and Energy and Commerce Committees related to the health care law.
- 13** The number of current and former Administration officials that have been voluntarily made available for interviews related to the cost-sharing reduction subsidies.
- 5,200** The number of letters HHS has sent in response to Congressional requests over the past two years.
- 150** The number of Congressional hearings that HHS employees have testified at over the past two years, at the request of the Republicans.

### Benefits of the ACA

- 20 million** The number of previously uninsured Americans that have gained health insurance coverage since enactment of the ACA.
- 129 million** The number of Americans with pre-existing health conditions, including 17 million children, who no longer have to worry about being denied coverage or charged higher premiums due to their health status.
- \$21 billion** The amount that seniors in Medicare have saved out-of-pocket on prescription drugs since 2010.
- 13** The number of years that the solvency of the Medicare Trust Fund has been extended since the ACA was enacted.
- 87,000** The number of lives that have been saved due to a 17% reduction in hospital-acquired conditions like infections from 2010 to 2014.
- 137 million** The number of Americans in private insurance plans who now have guaranteed access to free preventive services with no co-pay, thanks to the ACA.