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THE ACA'S COST SHARING REDUCTION PROGRAM:

RAMIFICATIONS OF THE ADMINISTRATION'S

DECISION ON THE SOURCE OF FUNDING FOR

THE CSR PROGRAM

FRIDAY, JULY 8, 2016

House of Representatives,

Subcommittee on Oversight and Investigations,

Committee on Energy and Commerce,

Washington, D.C.

The subcommittee met, pursuant to call, at 9:15 a.m., in Room 2322 Rayburn House Office Building, Hon. Tim Murphy [chairman of the subcommittee] presiding.

Members present: Representatives Murphy, McKinley, Burgess, Blackburn, Griffith, Bucshon, Flores, Mullin, Collins, Cramer, Upton (ex officio), DeGette, Schakowsky, Castor, Tonko, Clarke,

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Kennedy, Green, and Welch.

\*Staff present: Gary Andres, Staff Director; Will Batson, Legislative Clerk, Energy and Power, Environment and the Economy; Ray Baum, Senior Policy Advisor for Communications and Technology; Mike Bloomquist, Deputy Staff Director; Sean Bonyun, Communications Director; Elena Brennan, Staff Assistant; Leighton Brown, Deputy Press Secretary; Allison Busbee, Policy Coordinator, Energy and Power; Rebecca Card, Assistant Press Secretary; Karen Christian, General Counsel; Sean Corcoran, Office Manager, Ford; Jerry Couri, Senior Environmental Policy Advisor; Patrick Currier, Senior Counsel, Energy and Power; Marty Dannenfelser, Senior Advisor, Health Policy and Coalitions; James Decker, Policy Coordinator, Commerce, Manufacturing, and Trade; Paige Decker, Executive Assistant; Jessica Donlon, Counsel, Oversight and Investigations; Graham Dufault, Counsel, Commerce, Manufacturing, and Trade; Emily Felder, Counsel, Oversight and Investigations; Melissa Froelich, Counsel, Commerce, Manufacturing, and Trade; Gene Fullano, Detailee, Telecom; Theresa Gambo, Admin/Human Resources; Giulia Giannangeli, Legislative Clerk, Commerce, Manufacturing, and Trade; Jay

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Gulshen, Staff Assistant; Kelsey Guyselman, Counsel, Telecom; Tom Hassenboehler, Chief Counsel, Energy and Power; Brittany Havens, Oversight Associate, Oversight and Investigations; Charles Ingebretson, Chief Counsel, Oversight and Investigations; A.T. Johnston, Senior Policy Advisor; Peter Kielty, Deputy General Counsel; Grace Koh, Counsel, Telecom; Wayne Laufert, GPO Printer; Ben Lieberman, Counsel, Energy and Power; Emily Martin, Counsel, Oversight and Investigations; David McCarthy, Chief Counsel, Environment and the Economy; Carly McWilliams, Professional Staff Member, Health; Brandon Mooney, Professional Staff Member, Energy and Power; Paul Nagle, Chief Counsel, Commerce, Manufacturing, and Trade; Mary Neumayr, Senior Energy Counsel; John Ohly, Professional Staff, Oversight and Investigations; Tim Pataki, Professional Staff Member; Graham Pittman, Legislative Clerk; Mark Ratner, Policy Advisor to the Chairman; David Redl, Chief Counsel, Telecom; Tina Richards, Counsel, Environment; Annelise Rickert, Legislative Associate; Michelle Rosenberg, GAO Detailee, Health; Krista Rosenthal, Counsel to Chairman Emeritus; Chris Santini, Policy Coordinator, Oversight and Investigations; Chris Sarley, Policy Coordinator, Environment and the Economy; Charlotte Savercool, Professional Staff, Communications and Technology; Dan Schneider, Press Secretary; Adrianna Simonelli, Professional Staff Member, Health; Alan

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Slobodin, Deputy Chief Counsel, Oversight; Sam Spector, Counsel, Oversight and Investigations; Peter Spencer, Professional Staff Member, Oversight; Heidi Stirrup, Health Policy Coordinator; John Stone, Counsel, Health; Tim Torres, Deputy IT Director; Josh Trent, Professional Staff Member, Health; Olivia Trusty, Professional Staff, Commerce, Manufacturing, and Trade; Dylan Vorbach, Deputy Press Secretary; Gregory Watson, Legislative Clerk, Communications and Technology; Chris Wells, GPO Printer; Jessica Wilkerson, Oversight Associate, Oversight and Investigations; Jean Woodrow, Director, Information Technology; Andy Zach, Counsel, Environment and the Economy; Michelle Ash, Minority Chief Counsel, Commerce, Manufacturing, and Trade; Jen Berenholz, Minority Chief Clerk; Jeff Carroll, Minority Staff Director; Jacqueline Cohen, Minority Senior Counsel; Timia Crisp, Minority AAAS Fellow; Elizabeth Ertel, Minority Deputy Clerk; Kyle Fischer, Minority Health Fellow; Jean Fruci, Minority Energy and Environment Policy Advisor; David Goldman, Minority Chief Counsel, Communications and Technology; Lisa Goldman, Minority Counsel; Waverly Gordon, Minority Professional Staff Member; Ryan Gottschall, Minority GAO Detailee; Tiffany Guarascio, Minority Deputy Staff Director and Chief Health Advisor; Caitlin Haberman, Minority Professional Staff Member; Rick Kessler, Minority Senior Advisor and Staff Director, Energy and Environment; Chris Knauer,

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Minority Oversight Staff Director; Una Lee, Minority Chief Oversight Counsel; Elizabeth Letter, Minority Professional Staff Member; Jerry Leverich, Minority Counsel; Lori Maarbjerg, Minority FCC Detailee; John Marshall, Minority Policy Coordinator; Jessica Martinez, Minority Outreach and Member Services Coordinator; Dan Miller, Minority Staff Assistant; Caroline Paris-Behr, Minority Policy Analyst; Rachel Pryor, Minority Health Policy Advisor; Alexander Ratner, Minority Policy Analyst; Tim Robinson, Minority Chief Counsel; Diana Rudd, Minority Legal Fellow; Samantha Satchell, Minority Policy Analyst; Matt Schumacher, Minority Press Assistant; Ryan Skukowski, Minority Policy Analyst; Andrew Souvall, Minority Director of Communications, Outreach and Member Services; Kimberlee Trzeciak, Minority Health Policy Advisor; Eddie Walker, Minority Technology Director; Arielle Woronoff, Minority Health Counsel; and Tuley Wright, Minority Energy and Environment Policy Advisor.

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Mr. Murphy. Good morning, everyone. Just first announce that we know there is a number of things happening over in the Capitol building and on the floor. We will move as quickly and readily as possible, so I appreciate members' patience in trying to get through onto the witnesses. Thank you. If someone could get the door in the back of the room I would appreciate that.

So this is a hearing of the Energy and Commerce Committee on the ACA's Cost Sharing Reduction Program: Ramifications on the Administration's Decision on the Source of Funding for the CSR Program. Let me say the Constitution is clear. No money shall be drawn from the Treasury but in consequence of appropriations made by law.

This means that the Executive Branch cannot spend money unless Congress says they can. Yet just yesterday, the Assistant Secretary for Tax Policy at the Department of Treasury testified

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before the Ways and Means Committee, quote, if Congress doesn't want the monies appropriated it could pass a law saying do not appropriate the monies from that account, unquote. That is a direct quote. It is in direct contradiction to the principles of appropriations law, it is an affront to the powers granted to Congress in the Constitution, and I don't agree with the concept of that which is not forbidden is permitted.

We are here today to examine the ramifications of the Administration's illegal decision to fund the Affordable Care Act's Cost Sharing Reduction program to a permanent appropriation. We aren't here to discuss whether or not the decision is illegal. A federal district court has already decided that it is. We are here today to talk about the consequence of the Administration's brazen attempt to grab the power of the purse from Congress.

The ACA established the CSR program but did not fund it. The Administration knew this and requested an annual appropriation for the CSR program in the President's fiscal year 2014 budget request. Congress, however, denied that request. But just a few months later, the Administration began making CSR payments anyway. How? Well, the Administration decided to raid the permanent appropriations for tax refunds and credits, an action which violated the most fundamental tenet of appropriations law.

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In February 2015, alongside the Committee on Ways and Means, this committee launched an investigation into the Administration's actions. The committee's investigation sought to understand the facts surrounding the Administration's decision to fund the CSR program through a permanent appropriation. Our questions were straightforward and included when and how this decision was made and who made it.

From the onset, the Administration has refused to cooperate with the committee investigation, but despite the Administration's relentless efforts to obstruct our necessary investigation we were able to shed some light on the Administration's decision. The details of the findings from the committee investigation are outlined in our joint report that was released yesterday. And I believe this is the report. You should all have that.

The Administration's position essentially boils down to this. Don't judge my actions, judge my intentions. The President swore an oath to preserve, protect, and defend the Constitution, as members of Congress we have each done the same.

And again this Administration seems to believe it is above the law, and let me be clear: none of us are. This decision is not about the merits of the Affordable Care Act or the ability to provide health care for anyone. I certainly believe we should



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be doing something to help those, particularly those who are low income who struggle for health issues, but this is about a constitutional question and will this committee and this Congress uphold the Constitution or look the other way? No matter your position on the merits of the Affordable Care Act, we should all agree that we all must follow the law.

Today's hearing will examine the consequences of the findings from the committee's investigation into the Administration's decision to unconstitutionally fund the CSR program through a permanent appropriation. These consequences are widespread and they impact the ACA, they impact appropriations law, and they impact congressional oversight.

The Obama administration's actions with respect to the CSR program are part of the broader pattern. There are clear problems with the law if the Administration must violate the Constitution to keep the law afloat. And it is not just the CSR program. There are also problems with the Transitional Reinsurance Program, the Risk Corridors, the Basic Health Program and the list goes on. There are broad institutional concerns in play here.

The Constitution clearly states that the power of the purse lies not with the executive but with congressional branch. This provides Congress an important check on the executive branch and that applies to any President of any party at any time. The

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President's claim of appropriations by inference, however, turns the Constitution on its head and threatens this important power of Congress.

Finally, we as an institution must confront the executive branch's position that can dictate the terms of our oversight. Oversight is critical to a functioning democracy and that is why the Constitution grants Congress extensive authority to oversee and investigate executive branch activities. That is how we improve the efficiency and effectiveness of the laws and how we eliminate waste, fraud, and abuse from government.

As our report makes clear, the executive branch has gone to great lengths to keep information about the Cost Sharing Reduction Program from Congress and therefore the American people. If they think what they are doing is legal then I would invite them to come before this committee and explain it. This subcommittee cannot and will not accept any witness tactics that is delay and deny.

In fact, again today we have another instance of the Administration's obstruction. The committee invited Department of Health and Human Services' Secretary Burwell or a designee of her choosing to attend today's hearing, but the Department has failed to provide anyone. For the alleged most transparent Administration in history, this Administration is trying its

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utmost to avoid congressional scrutiny and that begs the question is someone trying to hide something.

I want to thank our esteemed panel of witnesses for appearing today. We look forward to listening to your expert opinions on the consequences of the Administration's actions.

[The statement of Mr. Murphy follows:]

\*\*\*\*\*COMMITTEE INSERT 1\*\*\*\*\*

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Mr. Murphy. And before I recognize the ranking member of the subcommittee, Ms. DeGette, I want to personally thank this committee for what was done for mental health reform, particularly my friend, Ms. DeGette, and everybody here steadfast in investigating a very important question of this nation. The chair, the vice chair, the full committee, the ranking members, it is powerful what came through and I personally want to thank you for that. But now I recognize the ranking member of the subcommittee, Ms. DeGette, for 5 minutes.

Ms. DeGette. Thank you, Mr. Chairman, and thanks for your praise on the mental health bill. It really was a joint effort. There were a lot of bumps in the road and difficult negotiations. That is an example of what this committee can do when we really work together. And as I said in this committee and on the floor, it is a really good first step. Now we need funding and I think we all know that. Unfortunately today's hearing is not a productive hearing like all of our mental health hearings were, and it is really not intended to improve the ACA or to improve the affordability of health care for middle income and low income people. It is yet another hearing to bash the Administration as they tried to do their best to implement -- well, to enact and implement the Affordable Care Act.

Just for the record, it is the 17th hearing that this

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subcommittee has had since the ACA was passed into law in 2010 in Congress alone. Nearly one-fifth of the hearings that we have had in this subcommittee have focused on ACA oversight. As I have said repeatedly in my various statements in this committee, I wouldn't mind that if there actually was an attempt to do something to improve the way the ACA works.

Now obviously we try to enact constitutional legislation in this Congress. That is our job. That is the thing we were sworn to uphold. But we do have a judicial branch which is there to give checks and balances just in case people get it wrong, and in this case the House Republicans decided that they thought the CSR was unconstitutional. Well, it is not this committee's job to determine whether this program is unconstitutional or not. It is the court's job.

And guess what. The House Republicans filed a lawsuit in federal court. They asked the judge to decide between conflicting interpretations of the law. And guess what. The trial court judge actually chose to rule on the merits of the case and the judge ruled for the House Republicans and said in fact according to that judge's position that this provision of the ACA was not constitutional and now the Administration is appealing that decision.

So what are we doing here today? This matter is in the

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courts. Now I am not here to say whether it is my opinion, even though I am a lawyer, about whether this is constitutional or not, but I will say that everything I knew in the deliberation of this bill was everybody believed this provision to be constitutional. And so once again we are having this oversight where we are hauling in the Administration, we are hauling in other people to talk about whether this provision, this Cost Sharing Reduction Program is constitutional or not, but in fact what we should be talking about is what are we going to do to improve the ACA so that the middle class and lower income taxpayers can afford health care?

Mr. Chairman, I was glad to hear you say that it is not about the merits of health care or provision of health care to low income people, but isn't that really what we should be worried about? Shouldn't we let the courts worry about the ins and outs of the constitutionality? And if in fact the appeals court upholds the trial court decision, shouldn't it be our job to try to figure out how to give some kind of subsidies or other offsets to middle and low income people so they can afford health care?

There is nothing I have seen since 2009 to indicate that there was any ill will on behalf of the Administration with respect to the low cost fund, or the Cost Sharing Reduction Program. There is no indication that the Administration knowingly violated the Constitution. They in fact thought that it was constitutional.

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So why are we here? Once again we are here to bash the ACA, to rake the Administration through the mud, and to continue to question this policy. I think it would be much more useful for this committee to look at legislation or to look at policies that would help fix this program and help make it affordable to get health care. With that I yield back.

[The statement of Ms. DeGette follows:]

\*\*\*\*\*COMMITTEE INSERT 2\*\*\*\*\*

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Mr. Murphy. The gentlelady yields back, and I will recognize the chairman of the full committee, Mr. Upton, for 5 minutes.

The Chairman. Well, thanks, Mr. Chairman. Again, kudos on mental health. It was a great effort, and if I remember it passed our full committee 53 to nothing, so that is not a bad mark.

So it was nearly 18 months ago when former Ways and Means chair Paul Ryan and I sent our first letter to the Administration requesting documents and information about the source of funding for the health law Cost Sharing Reduction, CSR, Program.

Chairman Brady now continued on with me in this investigation after he became chairman of Ways and Means late last year, and we believed then and still believe today that the President illegally and unconstitutionally funded this program to a permanent appropriation used primarily to pay back tax refunds.

Over the course of the investigation we have sent more than a dozen letters and interviewed just as many Administration officials. We have been forced to issue subpoenas to the Administration for documents on the issue and I sent three subpoenas myself. And we have learned a lot during this time despite the unprecedented obstruction from this Administration, but there are even basic facts that the Administration is still withholding from the Congress. Yesterday, the majority



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staff of this committee along with the majority staff of Ways and Means released this report detailing our investigation. We did it because folks at home in my state of Michigan, but frankly across the country and elsewhere, deserve to know how the government is spending their hard-earned tax dollars, and we are taking billions, talking billions in this instance.

The federal government has an obligation to each and every taxpayer to spend the money with full transparency in accordance with the law, and when it comes to the CSR Program I am sorry to say that the federal government has failed to do so. This Administration has gone to great lengths to prop up the health law, going as far to break its signature law to keep it afloat and here the Administration won't even give Congress the documents or the testimony that we need to fully understand how they came to the decision that they made to fund the program, in my view, illegally.

Without access to the information from the executive branch we cannot conduct the effective oversight. Without effective oversight we can't protect the public's interest. Last month I proudly joined my colleagues in introducing our proposal to replace the Affordable Care Act once and for all. I believe that our plan offers a better way forward. One that makes important changes to our health care system to improve access and also to

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decrease costs in a way that won't require the federal government to secretly shuffle around billions of dollars and violate the law like we have seen this Administration do from our report with the Affordable Care Act.

Yesterday's hearing of Ways and Means Oversight Subcommittee focused on the extensive findings detailed in this report. Today we are here to talk about the long-term implications of those findings. Our findings go far beyond the CSR Program and are important to the future of the Affordable Care Act, appropriation laws and principles, and even our institutional powers in the legislative branch.

We did invite Secretary Burwell to attend or provide a witness for today's hearing and I am disappointed that they have declined our invitation to testify. We deserve answers and we are not going to rest. Our work continues, and I yield to Dr. Burgess the balance of my time.

[The statement of The Chairman follows:]

\*\*\*\*\*COMMITTEE INSERT 3\*\*\*\*\*

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Mr. Burgess. I thank the Chairman for yielding, and I certainly want to second his comment about the Department of Health and Human Services owed us the presence of the Secretary or an appropriate designee to continue to investigate this issue.

As we have discovered, this Administration has disregarded the Constitution by taking and transferring money from the authorized and funded premium tax credit account to the Cost Sharing Reduction Program. Throughout this committee's investigation the Administration has gone to unprecedented lengths to delay providing this information, often citing nonexistent legal privileges. If the Administration's rationale for withholding information is accepted we risk exempting the entire executive branch from congressional oversight.

This trend toward an all-powerful Administration must not continue in the next Administration. I look forward to hearing from the witnesses that we do have today about the importance of transparency and oversight and what this committee might do to further prevent this type of activity in the future, and I yield to the gentlelady from Tennessee.

[The statement of Mr. Burgess follows:]

\*\*\*\*\*COMMITTEE INSERT 4\*\*\*\*\*

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Mrs. Blackburn. I thank the gentleman for yielding. And to the answer as to why we are here today, we as Congress have oversight and that is exactly what we are doing, because we have found that there is money that is being reprogrammed and shifted, as Dr. Burgess said, from one account to another without our agreement and appropriation. It is called Article I powers. We are talking, as Chairman Upton said, about billions of dollars. It is inappropriate. We should be doing the oversight and making the determination of what is happening with these dollars. And with that I yield back the balance of my time.

Mr. Murphy. I thank you, and now recognize Mr. Green of Texas for 5 minutes.

Mr. Green. Thank you, Mr. Chairman. It is my job to give our ranking member's statement today because I think he is locked down in the Capitol. But before we do that, the issue of litigation brought by the Republican majority, it is not unusual that a litigant would not show up and not come to a hearing while you are in the court process.

We know the district court made a ruling and that is on appeal, so I don't think there is any problem with somebody from the Administration not showing up simply because we can decide, you know, we have an opinion between all of us on what is constitutional but that doesn't matter. The folks who make that

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decision sit in the black robes over in the Supreme Court building. So I don't think there is any problem with the Administration not showing up, because since the litigation was brought by the majority and let's let the courts work its way through that. But now I will go to my colleague's opening statement.

When we passed the Affordable Care Act into law over 6 years ago, we dramatically changed the health care landscape in the United States. The law has made access to comprehensive affordable health care a reality for the American people, and at the close of the third open enrollment earlier this year nearly 13 million people had selected health plans or had been reenrolled in quality, affordable health insurance through the federal or state exchanges.

The uninsured rate has fallen to a historic low, and an estimated 10 or 20 million previously uninsured adults have gained coverage since the passage of the bill in 2010. To help limit health care costs to consumers, the law includes several mechanisms like the Cost Share Reduction or the CSR Program assists low and middle income Americans afford their deductibles, copayments and coinsurance.

CSRs are also help that ensure that out-of-pocket health care costs do not place a crippling financial burden on American families. Many health care enrollees have taken advantage of the

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benefits offered by the CSR program. Of the approximately 11.1 million consumers who were enrolled at the end of March of this year, 57 percent or nearly 6.4 million individuals were benefiting from the CSRs to make their coverage more affordable.

This CSR program is proven effective in accomplishing what it was designed to do. One study estimates that Americans who are eligible for cost sharing reductions would save an average of \$479 each year. Yet if you listen to my colleagues on the other side of the aisle, you will hear nothing about the benefits of the CSR Program or about the Affordable Care Act at all.

But despite the overwhelming success of the law, this committee has chosen to hold yet another hearing to attack and undermine the Affordable Care Act. This is nothing new. The Republican majority spent 6 years promising to repeal and replace the Affordable Care Act but we have yet to see a meaningful piece of legislation, and I might add until the last week. They recently unveiled a plan that falls laughingly short in providing quality, affordable coverage for our constituents and their constituents.

Those watching this hearing need to understand that the Republican majority is exclusively focused on taking down the Affordable Care Act. They have now voted 64 times to undermine or repeal the Affordable Care Act. They have held hearings, sent

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letters, document requests, conducted interviews, and issued subpoenas. They have filed an unprecedented lawsuit in federal court to challenge the Cost Share Reduction Program.

There are certain ways we could be conducting meaningful oversight of the Affordable Care Act and I am sure we could come together and improve the law and enhance the coverage and options available to our constituents. But this hearing and this investigation will do no such thing. Hearings like this only serve to hurt Americans, reverse the progress that has been made for millions who now benefit from the law, and it is time our Republicans just stop litigating the past and to work with us to continue improving the health care quality of the country.

And I -- anybody else want the time, the minute?

Mr. Murphy. Well, I think the gentleman --

Mr. Green. Being a former state senator I could continue to talk for a minute but I would be glad to yield back.

Mr. Murphy. Well, Senator, I understand. Having been a senator myself I understand that senators are given unlimited time to speak and they always manage to exceed it. So -- but thank you.

I ask unanimous consent that the members' opening statements be introduced into the record, and without objection, the documents will be entered into the record.

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[The information follows:]

\*\*\*\*\*COMMITTEE INSERT 5\*\*\*\*\*



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Mr. Murphy. I would now like to introduce the witnesses for today's hearing. First, we have Mr. Doug Badger who will lead off our panel. Mr. Badger is a former White House Senior U.S. Senate Policy Advisor, currently a senior fellow at the Galen Institute. We thank Mr. Badger for being with us today, and we look forward to his comments. We also want to welcome Tom Miller. A resident fellow at the American Enterprise Institute, Mr. Miller studies health care policy including health insurance and market-based alternatives to the Affordable Care Act. Thanks to Mr. Miller for appearing before us today and we appreciate your testimony.

Next, we welcome legislative consultant Mr. Morton Rosenberg. For over 35 years, Mr. Rosenberg was a specialist in the American Public Law with the American Law Division of the Congressional Research Service where among other topics he focused on the scope and application of congressional oversight and investigative prerogatives. He has been in the forefront of these issues and we appreciate him being here today and offering his testimony on this important issue. And finally we would like to introduce Mr. Simon Lazarus who is senior counsel with The Constitutional Accountability Center. We thank him for being with us today.

I want to again thank all of our witnesses. It is quite an

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esteemed panel with probably a century or more of experience, so we look forward to hearing from you.

Now you are all aware this committee is holding an investigative hearing and when so doing has had the practice of taking testimony under oath. Do any of you have any objections to taking testimony under oath? Seeing no objections, the chair then advises you that under the rules of the House and the rules of the committee you are entitled to be advised by counsel. Do any of you desire to be advised by counsel today? And seeing no requests for that in that case, will you please rise and raise your right hand and I will swear you in.

[Witnesses sworn.]

Mr. Murphy. Thank you. You are now all under oath and subject to the penalties set forth in Title 18 Section 1001 of the United States Code. We will ask you each for a 5-minute summary of your written statement. Because we are on a tight time schedule I hope you will pay attention to the yellow and red lights there.

Mr. Badger, you may begin.

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STATEMENTS OF DOUG BADGER, SENIOR FELLOW, GALEN INSTITUTE; TOM MILLER, RESIDENT FELLOW, AMERICAN ENTERPRISE INSTITUTE; MORTON ROSENBERG, LEGISLATIVE CONSULTANT; AND, SIMON LAZARUS, SENIOR COUNSEL, THE CONSTITUTIONAL ACCOUNTABILITY CENTER;

STATEMENT OF DOUG BADGER

Mr. Badger. Thank you, Mr. Chairman and Ranking Member DeGette and members of the subcommittee for this opportunity to appear before you this morning to discuss the Affordable Care Act's Cost Sharing Reduction Program. Implementation of that program has been irresponsible, unaccountable, and at its heart, unlawful. It is part of a pattern of malfeasance in ACA implementation occasioned by a serious miscalculation of demand for health insurance among young and relatively healthy people.

This miscalculation led to a series of decisions by senior officials at the Departments of Treasury and Health and Human Services during 2014 that ranged from the reckless to the illegal. My colleagues, Brian Blase of the Mercatus Center, Edmund Haislmaier at the Heritage Foundation, and Seth Chandler at the University of Houston, and I, have published two studies of insurer performance in the 2014 benefit year.

Our first study provided information on how insurers fared selling individual qualified health plans, QHPs. We found that

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corporate welfare payments made to these plans in the form of reinsurance payments and risk corridor claims averaged more than \$1,100 per enrollee, or 25 percent of premium. Put another way, had risk corridor payments been made in full, insurers would have received \$1.25 in revenue for every dollar they collected in premiums and still lost money.

Our second paper examined the relative performance of the 174 issuers that sold QHPs in both the individual and small group markets. We found that insurers lost nearly three times as much per enrollee selling QHPs to individuals than they did to small groups. Those losses occurred despite billions of dollars in individual and corporate subsidies that were available for individual QHPs but not for group QHPs. The main reason, individual QHP enrollees incurred medical claims that averaged 24 percent more per enrollee than for group QHPs. Those claims consumed 110 percent of premium dollars.

These losses continued after 2014. McKinsey and Company estimates that they may have more than doubled in 2015. Now why has this happened? Brian Blase of the Mercatus Center I think has laid out why the rules governing the individual QHPs have produced such disastrous results for insurers that billions in lawful and unlawful corporate subsidies cannot cure. He said, quote, the ACA largely replaced risk based insurance in the

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individual market with income redistribution based on age, income, and health status, end quote.

Whatever the merits of the redistribution of wealth, Congress cannot redistribute health. The ACA's rule structure for the individual market seeks to do this by requiring insurers to sell products that are generally unattractive to younger and healthier people, and overcharge them for those products, while discounting premiums for people who are older and less healthy. The result is a so-called market that attracts high risk enrollees and repels low risk ones. Such a market is incurably dysfunctional.

As this began to dawn on Administration officials during 2014, they made a series of sudden policy reversals to entice insurers to remain in exchanges. These included the expenditures of unappropriated money on the CSR Program, the diversion of billions of dollars from the Treasury to insurance companies through the reinsurance program, repeated restructuring of the reinsurance program to make payments 40 percent more generous to insurers than at the time they submitted their premiums, and a slow retreat from the agency's prior position on risk corridor budget neutrality, an effort to turn it into a TARP-like fund that forces taxpayers to bear the costs of bad business decisions made by big corporations.

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This committee has been diligent in calling attention to these actions and Congress has acted to ensure that the risk corridor program operates as intended. Further action is required to end the unlawful diversion of funds from Treasury through the reinsurance program and to ensure that lawsuits filed by insurers do not render Congress' budget neutrality risk corridor requirement meaningless.

The health care reform law is not working in the individual market. The unlawful payment of corporate subsidies cannot fix it. I am encouraged by the remarks of Ranking Member DeGette and by the Chairman. I agree that Congress should repair the health care reform law, but it should not overlook unlawful improvisations that try to disguise its deficiencies. Thank you.

[The prepared statement of Doug Badger follows:]

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Mr. Murphy. Thank you.

Mr. Miller, you are recognized for 5 minutes.

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STATEMENT OF TOM MILLER

Mr. Miller. Thank you, Chairman Murphy, subcommittee Ranking Member DeGette, and members of the subcommittee for the opportunity to testify today on the Obama administration's funding decisions regarding the Cost Sharing Reduction Program under the Affordable Care Act.

The federal district court ruling in *House v. Burwell* reaffirmed the longstanding rules of appropriations law. Advanced payments to insurers to reimburse their expenses in providing cost sharing reductions mandated by the ACA were never appropriated by Congress. Hence, they could not be spent by the Obama administration. All appropriations must be expressly stated. They cannot be inferred or implied. The ACA does not designate a source of funds to make the cost sharing reimbursements.

The Administration has offered a number of legal rationales to try to find authority for its decision to continue funding of the CSR payments, but as Judge Collyer in *House v. Burwell* concluded, the plain text of the ACA outweighed those arguments in most cases when other important textual distinctions did not already.

The Administration's overly broad approach to inferring



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permanent appropriations by Congress in this case would provide no limiting principle to prevent future Administrations from paying for virtually any ACA program on the theory that it is linked somehow to premium tax credits under Section 1401 of the law. It is this Congress and future ones that is the constitutionally designated branch of the federal government that must decide whether or how to appropriate funds for CSR payments to insurers.

This particular legal controversy needs to be placed within a larger and disturbing context. For the last 6 years, the Obama administration has been frustrated by its inability to get Congress to support more funding for a number of its less popular objectives under the ACA. It keeps trying to stretch appropriations law and administrative guidance to spend the money without necessary consent or authority.

The Administration has a lengthy rap sheet in bypassing the Constitution, statutory law and norms of administrative law. Its transgressions and evasions have essentially challenged opponents to just go ahead and sue in court if they want to uphold the law. But this pattern of conduct seriously undermines the minimum level of respect we need for and from our government agencies and officials. Laws passed by Congress are not just mere suggestions to be selectively revised or discarded by the

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executive branch. Elections do matter and so do the decisions by the elected representatives of Congress they empower. Trust in the basic integrity of our government institutions and their adherence to the rule of law is a key foundation of democratic accountability, civil discourse, and economic progress.

And if we are ever going to reduce the partisan rancor and operational gridlock in remedying the long list of dysfunctional components of the ACA, taking illegal shortcuts and making expedient administrative revisions in the law must be replaced by offering a more persuasive case for whatever legislative changes in the underlying statute are necessary and then facilitating actual votes in Congress to do so. But until then, this subcommittee's continuing investigation and oversight of the executive branch's policies and practices in this area remain essential to maintaining political accountability and the rule of law.

I submitted my written testimony earlier this week before the extraordinary joint congressional investigational report into the source of funding for the ACA's Cost Sharing Reduction Program was available for review and comment. It carefully and meticulously details how the Administration first abused and raided another permanent appropriation in order to pay for the Cost Sharing Reduction Program and then obstructed the work of

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several congressional committees to investigate its actions. We have learned over the years that not every serious abuse of executive branch power in implementing the ACA differently than the law passed by Congress can or will be remedied in court.

But at a minimum, the American people need to know more about how officials execute the laws that control taxpayer funds and shape so many vital aspects of their lives in order to hold them politically accountable in our representative form of government. I hope and expect that today's Oversight and Investigation hearing will further that objective. Thank you.

[The prepared statement of Tom Miller follows:]

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Mr. Murphy. Thank you, Mr. Miller.

Now Mr. Rosenberg, you are recognized for 5 minutes. Just make sure your mic is on and you pull it close to you. Thank you. Could you turn your microphone on? Okay.

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STATEMENT OF MORTON ROSENBERG

Mr. Rosenberg. I'm pleased to be here, Mr. Chairman and members of the committee. This is a welcome return to be before a committee that I learned whatever I think I know about investigative oversight from a legendary chairman like John Moss and John Dingell and their great staffs.

I did more work for this committee between 1975 and 2005 than I did for any other committee in the Congress, and if I had to boil down the essence of what I've learned about oversight it would be this. Committees wishing to engage in successful oversight must establish their credibility with the White House and the executive departments and agencies that they oversee early, often and consistently, and in a manner evoking respect, if not fear.

Although the standing committees and special committees have been vested with an array of very formidable tools and rules to support their powers of inquiry, it is absolutely critical to the success of the investigative power that there be a credible threat of meaningful consequences for refusal to provide necessary information in a timely manner. In the past that threat has been the possibility of a citation of criminal contempt of Congress or even earlier in our history a trial at the bar of the House, either of which could result in imprisonment. There can be little

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doubt that such threats were effective in the past at least until 2002.

Between 1975 and 1998 there were ten votes to hold Cabinet level officials in contempt of Congress. Four of those votes came from this committee and were very effective in getting information. Indeed, the first two votes, which were the first two votes ever to hold Cabinet level officials in contempt, involved an issue that is raised here. It involved two statutes that had noncompliant and confidentiality provisions and the heads of each of those departments, the Commerce Department in 1975 and HEW in 1978, claimed that a broad, nondisclosure provision applied to Congress.

John Moss challenged that in both cases, and in both cases votes, preliminary votes of contempt, you know, in the subcommittee were sufficient to have the documents released and the testimony given that was wrought. And similar things happened during the early '80s under John Dingell.

As I said, all of these ten resulted in one way or another of substantial compliance with information demands in question before the necessity of any criminal trial. It was my sense that those instances established such a credible threat of a contempt action it was possible that until 2002 even the threat of a subpoena was often sufficient to move an agency to an

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accommodation with respect to document disclosures or the testimony of agency officials and the White House to allow even officials to testify without a subpoena.

The last such instance was the failed Presidential claim of privilege during the chairmanship of Dan Burton in its 2002 investigation of 2 decades of informant corruption in the FBI's Boston office. I might add that it was a bipartisan effort in which the contempt was a virtual certainty.

The current situation is that Congress is presently under a literal siege by the executive. The last decade has seen among other significant challenges an unlawful raid on a congressional office, Department of Justice prosecutions of Members that successfully denied them speech debate protections, Presidential cooption of legislative agency rulemaking, among other things.

But with respect to investigative oversight since 2000 and recently, the executive branch has adopted a stance of -- which was first enunciated by the Department of Justice in 1984 -- that the historic congressional processes of criminal and inherent contempt designed to ensure compliance with its information gathering prerogative are unconstitutional and unavailable to a committee if the President unilaterally determines that such officials need not comply.

Mr. Murphy. Mr. Rosenberg, I just want to say you are out

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of time. If you could just give a final statement, then I have to move on.

Mr. Rosenberg. Congress has to protect its investigative authority. The current stance of the Justice Department means that every time you issue a subpoena for documents or testimony that is not going to be complied with they're going to force you into District Court. And forcing you into District Court will mean delay and the possibility of aberrant judicial decisions which has occurred in the Myers case and in the present Fast and Furious litigation which in total with its investigative time --

Mr. Murphy. Thank you.

Mr. Rosenberg. -- and the time before the courts has gone on for 5-1/2 years without resolution.

[The prepared statement of Morton Rosenberg follows:]

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Mr. Murphy. Thank you very much, sir. I appreciate it.

Mr. Lazarus, you are recognized for 5 minutes.

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STATEMENT OF SIMON LAZARUS

Mr. Lazarus. Thank you very much, Mr. Chairman, and I think the mic is now on. As Senior Counsel to The Constitutional Accountability Center, I helped draft an amicus curiae brief which CAC filed in House of Representatives v. Burwell which you referenced, Mr. Chairman. That brief was on behalf of Democratic Leader Pelosi and other leading members of the House Democratic Caucus. It supports the Administration's determination that it has authority to fund the Affordable Care Act cost sharing provisions that are at issue in that case and in this hearing. And my sole narrow mission here is to explain why.

To begin with, as all of us here know the Cost Sharing Reduction Program was designed and has in practice operated as an integral component of the Affordable Care Act. However, House leadership and district court for the District of Columbia judge contend that there is no appropriation for the cost sharing reductions even though as they concede 31 U.S.C. Section 1324 does provide a permanent appropriation for the law as complementary premium assistance tax credits program.

With respect, this assertion is at odds with the ACA's plan for restructuring individual insurance markets with the mechanisms Congress designed to effectuate that plan with textual

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provisions defining those mechanisms and how they are intended to operate and with multiple other provisions which would make no sense under these ACA opponents' interpretation. The Administration has determined that the premium tax credits and cost sharing reductions are commonly funded by that permanent appropriation in 31 U.S.C. Section 1324. That interpretation, the Administration's interpretation, suffers from none of the above fatal deficiencies and enables the act to operate as Congress intended.

Just 1 year ago in *King v. Burwell*, the Supreme Court rejected a similarly perverse, contrived interpretation which in the words of its architects was contrived to drive a stake through the heart of Obamacare. I believe at a conference of the American Enterprise Institute I think that was stated. In that case Chief Justice John Roberts held for a six-justice majority in terms which I think everyone interested in how to interpret the provisions at issue here, the Cost Sharing Reductions provision, should read very carefully. He said Congress passed the Affordable Care Act to improve health insurance markets not to destroy them. If at all possible we must interpret the act in a way that is consistent with the former and avoids the latter. Section 36(b) can fairly be read consistent with what we see as Congress' plan and that is the reading we adopt.

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One year later, ACA opponents have mounted a transparent rerun of the same strategy. Once again they brandish an acontextual, hyperliteralist, contrived interpretation ignoring the statute as a whole, crafted to undue the statutory design, and to yield results that are inconsistent with the ACA's plan for improving health insurance markets, precisely the sort of scenario that the court in King ruled out.

The House leadership's argument is that section, the ACA Section 1401 which prescribes the tax credits specifically amends 31 U.S.C. Section 1324, whereas there's no such reference in Section 1402 which addresses the CSR subsidies. But this is a too narrow prism. The text and structure of the ACA overall made clear that the CSR subsidies and the premium assistance tax credits form a mutually interdependent package and that together both are critical to what the Supreme Court characterized as the ACA's series of interlocking reforms.

And I should also add that the House leadership's narrow interpretation would generate as the Department also explained a cascading series of nonsensical results. Now most nonsensical among these -- and I think that there's something like 40 of them, 40 provisions which would make no sense under the leadership's interpretation and the district court's interpretation. Most nonsensical, federal expenditures would actually increase and

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from the same fund from which the House leadership's interpretation purports to save taxpayer dollars.

Chairman Upton is not here and so I can't point this out to him, but the Department of Health and Human Services has determined that the net budget impact of the district court's interpretation would cost the government, quote, billions of dollars higher annually, and I believe that my colleague --

Mr. Murphy. Sir, if you could just wrap up, because we are late and we need to get going.

Mr. Lazarus. Okay. I'm sorry I'm over. I didn't know that. I apologize. So in sum, the Administration has lawfully acted to provide intended benefits for the 6.4 million individuals currently receiving cost sharing reductions. Withdrawing funding for that lifeline would flout the design of the ACA and the textual provisions which establish that design, which is why this latest effort to undermine health reform is no more likely to succeed than its predecessors. Thank you very much.

[The prepared statement of Simon Lazarus follows:]

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Mr. Murphy. Thank you very much. I now recognize myself for 5 minutes of questions. At the Ways and Means hearing yesterday, a Department of the Treasury official stated on the record, quote, if Congress doesn't want the monies appropriated it could pass a law saying do not appropriate the monies from that account.

Now Mr. Miller, there you are. Is that how appropriations laws are supposed to work that Congress has to pass a law specifying how the executive branch cannot spend a specific account or appropriations? You may have heard me reference the idea that which is not permitted is allowed.

Mr. Miller. Your question implies the answer, Chairman Murphy. That's exactly the opposite as to what happens. It's trying to say we can spend whatever we want until you stop us as opposed to it is the role of Congress under the Constitution to first authorize and then appropriate the funding. Failing to say you can't spend is not the same thing as saying it was originally approved for spending.

Mr. Murphy. Thank you.

Mr. Rosenberg, in the course of this investigation the committee has really faced unprecedented obstruction. The Administration has refused to comply with subpoenas issued by this committee and the committee on Ways and Means, and has grossly

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restricted the testimony of important fact witnesses giving us no legally recognizable basis to do so. And one of the excuses given is that the House v. Burwell litigation prevents the Administration from complying with our request. In your professional opinion did the House lawsuit preclude the Congress from conducting oversight over the source of funds for the Cost Sharing Reduction Program? Yes or no.

Mr. Rosenberg. No.

Mr. Murphy. Okay. And then why not?

Mr. Rosenberg. Because the Supreme Court has addressed this issue in at least two major cases, one of them a Teapot Dome case called *Sinclair v. United States*. And that question specifically arose that the witness got up and said, I'm involved in a lawsuit that I'm going to have to testify at and I'm going to leave my testimony for that lawsuit. For that he was held in contempt of Congress, and the Supreme Court upheld it saying there's no way that he can avoid, you know, the breadth and the need of Congress to continue investigations into knowing what was going on there.

A second case some years later, you know, came to the same conclusion with regard to a witness who claimed that the committee that litigation that was going on, this would, you know, might cause him concern or may even, you know, reveal evidence that he was criminally, you know, responsible. The court said too bad.

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Mr. Murphy. Let me ask in addition to that. The Administration has further refused to provide documents or testimony that include any internal or deliberative materials. Now it claims it can withhold this information based on longstanding executive branch confidentiality interest. Is this a valid or a legal reason to withhold information from Congress? Yes or no.

Mr. Rosenberg. No.

Mr. Murphy. And why not?

Mr. Rosenberg. When Congress operates it has in practice kept for itself the discretion to determine whether common law privileges such as deliberative process, attorney-client privilege, work product privilege will be recognized by the chair. Indeed, your processes of investigation and holding hearings and, you know, is based on the need and its ability to get all the information possible no matter what. The court -- Congress has the discretion whether or not to accept a claim of deliberative process. It is entitled to know everything and under law that's the final word.

Mr. Murphy. So Mr. Badger, in expanding from your testimony too, why do you think the Administration is taking these kind of positions that where we see the executive branch bending the law or stretching it?



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Mr. Badger. Well, I think, Mr. Chairman, if Chief Justice Roberts believes that the ACA has improved individual markets and not destroyed them he doesn't get out much. What has happened is that this has turned into a Dumpster fire for insurers forcing them to rely on a series of unlawful subsidies as I laid out in my testimony.

And again I'll return to the ranking member's opening remarks. The idea of honestly addressing these I think would be a very good approach for Congress to take. What happened was as we moved into 2014, the Administration realized what was happening, insurers realized what was happening, and that caused the series of sudden regulatory improvisations of dubious legality to try to get more money to insurance companies to keep them in the game. That has not worked.

Mr. Murphy. Thank you. I see I am out of time. I would now turn to Ms. DeGette for 5 minutes.

Ms. DeGette. Thank you, Mr. Chairman.

Mr. Lazarus, as I read your biography you are a constitutional law expert. Is that correct?

Mr. Lazarus. I'll have to leave that expert part to --

Ms. DeGette. Well, that is what you do.

Mr. Lazarus. I try.

Ms. DeGette. Thank you. And in fact you wrote the amicus

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brief on behalf of the House Democrats that was filed with the court in this case. It is a subject of --

Mr. Lazarus. I helped write it. I was one of three people.

Ms. DeGette. Okay. So I want to ask you a couple of questions about your view of the Administration's interpretation of the statutory provisions at issue here. The first thing is, I think I heard you say in your testimony that you believe the Administration's position that the ACA makes clear that the CSRs and the advance premium tax credits are integral components of a single program that are both funded out of an explicit permanent appropriation in the statute; is that correct?

Mr. Lazarus. That is correct.

Ms. DeGette. And why do you believe that?

Mr. Lazarus. Well, let's try to be brief about it, but the Administration has a perfectly coherent interpretation of the statute which in my view is clearly the most reasonable in -- excuse me.

Ms. DeGette. No. Okay, go ahead. Just move the microphone -- yes.

Mr. Lazarus. The Administration has a perfectly reasonable well thought through interpretation of the appropriation issue with respect to the Cost Sharing Reductions provisions. It's outlined very clearly in the Justice Department's briefs and

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supporting briefs like ours. Just in brief --

Ms. DeGette. Let me just stop you there and say, now -- because we have got your brief and we have got your testimony too.

Mr. Lazarus. Right.

Ms. DeGette. Now as you know, the district court decision went against your position and the Administration position, correct? Yes will work.

Mr. Lazarus. Well, the district court --

Ms. DeGette. Okay. Their ruling went against --

Mr. Lazarus. They simply said that there is no appropriation, it's therefore unconstitutional.

Ms. DeGette. And the case is up on appeal now; is that correct?

Mr. Lazarus. The case is definitely on appeal.

Ms. DeGette. And in your experience some of these, most of these lawsuits that have been filed around the ACA have had a diversity of district court opinions and many have been reversed on the appellate court level.

Mr. Lazarus. That is also true.

Ms. DeGette. And so is it your view that the Administration has an excellent case on appeal?

Mr. Lazarus. I believe that it has on the case --

Ms. DeGette. Okay.

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Mr. Lazarus. -- both with respect to whether or not the House of Representatives can claim that it has standing to bring the lawsuit and with respect to the merits --

Ms. DeGette. Merits.

Mr. Lazarus. -- interpretation.

Ms. DeGette. Now you testified that just a minute ago that the CSR fund has 6.4 million people receiving that benefit; is that correct?

Mr. Lazarus. It is correct that I so testified and I got that information from I think a report by the Department of Health and Human Services.

Ms. DeGette. Okay. And of those 6.4 million people they are all middle class or lower class because that is what the requirement for the fund is; is that right?

Mr. Lazarus. Well, they would have to have incomes that are between 100 and 250 percent of the federal poverty level.

Ms. DeGette. Okay, of the federal poverty level. Okay. Now are you -- and I know you are narrowly an expert on constitutional law, but as you wrote your amicus brief in this matter and as you have reviewed this, were you aware of any proposal that is pending in Congress to replace this fund, the CSR program, with something else? Are you aware of any pending legislation?

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Mr. Lazarus. No, I am not aware. But I would point out that Congress instead of wringing its hands has every ability to change the law if it disagrees with the Administration.

Ms. DeGette. Right. And in fact what will happen if the lawsuit is, if the trial court opinion is upheld by the Court of Appeals the result of that will be that the CSR fund which benefits 6.4 million people will be struck down.

Mr. Lazarus. Yes. It'll be a very complicated process as my colleagues on the other side have explained in their testimony. But that will be the result.

Ms. DeGette. Yes. so the result -- and so you are not aware of any pending legislation in Congress to fix this issue.

Mr. Lazarus. No, I'm not.

Ms. DeGette. So if they win their lawsuit then these people will lose their benefits.

Mr. Lazarus. I believe that that is true. Yes.

Ms. DeGette. Okay, thank you. I yield back.

Mr. Murphy. Thank you. I now recognize the vice chair of the full committee, Mrs. Blackburn, for 5 minutes.

Mrs. Blackburn. Wonderful. I want to come to you, Mr. Miller, because you have looked at the report. You know that we find that the Administration does not have the authority to do these payments, yet they go ahead and they do that. So let's kind

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of go back to the legislation. In your opinion, does the ACA designate any source of funding for the Cost Sharing Reduction Program?

Mr. Miller. No, it does not. The provisions which provide for, in effect, mandatory appropriations by linking it to some preexisting, a list of those categories, added the premium tax credits to that but there's no language that links it to the cost sharing reduction payments so therefore there is not that appropriation.

Mrs. Blackburn. Can a program or can money be appropriated by inference?

Mr. Miller. Well, you can try in this Administration and it's tried that pretty extensively. But under our Constitution you cannot do that and under standard appropriations law which the GAO is longstanding the expertise in that area lays out the general categories of how you approach --

Mrs. Blackburn. And what would the consequences be for an executive branch that chooses to appropriate money by inference?

Mr. Miller. Well, there are several consequences. I don't know whether you mean legal consequences. I mean, first, they're getting a free ride. They're able to basically run roughshod over --

Mrs. Blackburn. And that is why we are doing oversight.

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Mr. Miller. That's correct. And basically saying we're going to do this until you can stop us, and that's why we're in this type of impasse. It's an unusual lawsuit by the House as an institution to have to go into court in order to assert its constitutional authority and that's why they got the ruling they did. But as a general rule this has worked out in the political process.

We're in a very unusual moment where to oversimplify and carry on with my colleague Doug Badger, the Congress passed a law that didn't work. Now the executive branch decided they couldn't fix it or wouldn't fix it and so we're stuck. They're making the law into something else than what it is and trying to appropriate money which wasn't appropriated as opposed to fixing the law which would resolve it or at least bring the issue out more transparently in a political manner.

Mrs. Blackburn. So basically what they did, as you are saying, they passed something. They realized that it is not a workable program much like we in Tennessee realized years ago that TennCare was not a workable program. It was established by an 1115 waiver. It was too expensive to afford, and a Democrat governor came in and completely reshaped it. It took 35.3 percent of the state budget by the year 2005, and he removed 300,000 people from the program and reshaped the drug program because of the

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number of scrips that were being written and said this is not sustainable. The good thing there was we had a governor who would say I am going to be transparent in this and you need to know what this is going to cost you. They couldn't shift the money around and play a game of chess behind the curtain that nobody was going to see. So what they decided to do federally was say, oh my gosh, our theories don't work. We can't afford this. The insurance companies are going to bale on us. Let's start moving some money around here because this is too expensive to afford and we don't want egg on our face -- pretty much?

Mr. Miller. Pretty much. Again this is structure, just respond to what Mr. Lazarus said. This is not a rerun of King v. Burwell which involved -- although we differ in terms of how much statutory ambiguity there may or may not have been on that. This is simply a core provision of the Constitution which says it's the role of Congress assigned to them to appropriate money. It's pretty straightforward. The law doesn't have to change if Congress votes tomorrow to appropriate funds for this. It decided not to. There's not any authority for that money to be spent.

Mrs. Blackburn. Thank you. I yield back.

Mr. Murphy. The gentlelady yields back. I recognize the gentlelady from Florida, Ms. Castor, for 5 minutes.



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Ms. Castor. Thank you, Mr. Chairman. Thank you to the witnesses for being here. Approximately 20 million Americans have gained coverage since the Affordable Care Act became law about 6 years ago, but my Republican colleagues continue to look for ways to pull the rug out from under these Americans. In addition to the over 64 votes to repeal the law, the Republicans in Congress have decided to sue, targeting now the cost sharing reductions that are a key part of ensuring that our neighbors back home have access to affordable health care.

Now the Affordable Care Act, it is a complex law. It had a number of different components. Part of it was to end discrimination against our neighbors who had a preexisting condition, like a cancer diagnosis or diabetes, so insurance companies could no longer block them from purchasing insurance.

Another part of the law was intended to stabilize insurance markets because this was a fundamental change in the way people would purchase insurance, and especially if you had people with preexisting conditions coming in, and I think everyone agrees to that. I would hope so. You know, my Republican colleagues have said we are going to repeal the act in its entirety. It is important to have a stable insurance market especially when they are state based.

And another important part of it was to ensure that our

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neighbors, you know our working class neighbors who are doing everything right can go in and purchase a policy. This has been a remarkable improvement to the way things were handled in the past. We have all talked to so many of our friends and neighbors that now have that stability in their life that they didn't have before.

So of the approximately 11 million consumers who enrolled at the end of March of this year including 1.6 million Floridians, my neighbors at home, nearly 6.4 million individuals were benefiting from this cost sharing reduction piece that helps make their coverage more affordable. And what that really means, it makes the difference on whether or not they can get to see a doctor or nurse, get the checkups they need or not.

So Mr. Lazarus, in your understanding how does the cost sharing reduction piece fit within the broader mission of the Affordable Care Act?

Mr. Lazarus. Thank you. The cost sharing reduction enables people who have insurance and who got premium assistance tax credit funding to afford their insurance premiums, but people who could not afford actually to purchase health care because the deductibles and copays were too much for them to afford, the cost sharing reductions enable those people to have confidence that they will be able to actually use their insurance and therefore

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it encourages them to purchase it.

Ms. Castor. So these are --

Mr. Lazarus. And without that the act wouldn't work because as you just said, insurers must accept people without respect to their health status and unless the pool includes a large number of people, including healthy people, the markets will be destabilized. So the cost sharing reduction provisions are essential to achieving that stabilization.

Ms. Castor. So this is kind of another tack that my Republican colleagues have taken. In addition to the repeal votes, the Republican majority, the Republicans in Congress filed a lawsuit in federal court to undermine families' ability to purchase affordable insurance. And I was surprised about the lower court ruling, but let's be clear here that if the House Republicans prevail in this lawsuit it is going to be our neighbors all across America who are hurt. Mr. Lazarus, if the House Republicans are successful here what is the impact to families across America? And do you know, you know, out of all these 64 votes they have brought there has not been a corresponding plan to address their needs. Are we just going to have many of our neighbors that are out of luck? They have been successful in pulling the rug out from under them and they won't be able to find affordable insurance?

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Mr. Lazarus. Well, first of all, I would certainly not lose hope that the district court's decision is going to be upheld. I think that the Administration has a very powerful case both on whether or not the House standing to get itself into court over this and also on the merits of the Administration's interpretation, which is a very compelling interpretation.

What I do know is I believe that something like 57 percent of all of the people getting insurance on the exchanges -- 57 percent, that's many millions of people -- are eligible for and receiving the cost sharing reduction. So we're talking about a lot of your neighbors.

Ms. Castor. Thank you.

Mr. Murphy. Thank you. The gentlelady's time is expired. I just want to say that with regard to the -- I think there is some confusion about the CSR and also the premium tax credit. The Administration admitted in lawsuits that beneficiaries get the CSR reduction regardless of whether or not the insurers are paid and regardless of whether or not the district court ruling is upheld on appeal.

So the CSR is a subsidy to insurance companies and the premium tax credit goes directly to the people. I just want to make sure we have that on the record.

I recognize Mr. McKinley for 5 minutes.

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Mr. McKinley. Thank you, Mr. Chairman. I feel in many respects like a fish out of water on this. I go back 40 years ago when Sam Ervin was in the Watergate thing, hearings, and he said I am just a country lawyer, and he had made some fairly profound remarks. Well, I am just an engineer and I am dealing with something that is a medical and a legal issue more than anything else.

So I am really enjoying the conversation here with it, but I am caught with some of the discussion that we seem to be, from my perspective, more the ends justify the means. I am not sure that that is the way we are supposed to be doing that. I don't think there is any question that people that are getting health care and medical benefits that that is a good thing for them, but how do we get there? How do we get there?

I mean, I have made some mental notes to myself about food. We could rush food to market, but if we bypass the FDA in the process to make sure that the food is approved that was supposed to get to market, then we shouldn't do it, but they benefited from it. Same thing with medicine, we have a lot of medicine that could help people but we need to follow the process to make sure that it is appropriate for them.

I am lost with this. It just hearkens back again to the same thing we heard a year or so ago, the Administration saying that

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he had no authority. He said it 22 times. I have no authority to deal with this immigration issue, but then he just went ahead and did it.

I know that back during the testimony they said that there was a request; that the President put in a request for appropriation just like he did on immigration. He needed to have authority to do it. Well, he asked for authority for appropriations but it was denied, but he went ahead and did it anyway. And then he apparently was just, said I am going to do it. I am just going to do it.

So I am curious of whether we have a rule of law or a rule of man. I thought all the statements that we see on the walls around here these are all the rules of law. So I am going to go back to this, I guess to Rosenberg perhaps. If Lazarus is right and this thing gets overturned where do we go? Have we just opened the gates to lack of control? Is there something in the appropriation process that we should be doing to prevent this from happening?

If it is upheld then I think we are going to be okay, because it has been, it appears it will be clear you can't spend money that has not been appropriated or authorized, vice versa. What happens if they overturn it? What happens to us in our process? Can you elaborate a little on that how we might essentially, what

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should we be doing here in Congress then? Mr. Rosenberg.

Mr. Rosenberg. With regard to the appropriations process?

Mr. McKinley. Yes, the whole thing. If this thing is overturned what are we supposed to do?

Mr. Rosenberg. Get a new plan.

Mr. McKinley. Get a new what?

Mr. Rosenberg. Pass laws. If the problem is there wasn't an appropriation and you think there should be an appropriation, pass it. But you have to have a plan and you have to have, you know, the votes to do it.

Mr. McKinley. Okay. Mr. Miller, same question. What should Congress be doing at this point?

Mr. Miller. Well, we've tried to fix these problems in the past and your historical example is rather apt because there was a lot of controversy in the 1970s not only about the Watergate but about the budget process. I remember working on impoundment authorities and we passed the whole budget act was supposedly to deal with that.

It encourages the worst instincts in both sides. You get into trench warfare where Congress would retaliate in various ways not as effectively where you'd try to, you'd be shutting down the government, you'd be trying to hold other appropriations hostage, and that just makes our politics descend into a worst example is

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who can get away with as much as possible.

This is a fundamental, legal, structural, constitutional issue here beyond what you prefer in health policy in particular. All parties need to be accountable in broad daylight to say here's what our argument is. We're voting for it. We're going to find out what happens and what the public will support. You can't do an end run around the process or you get this type of improvisation where the Administration tries to run out in front of what the law says and then Congress has to play catch up.

Mr. McKinley. Thank you. I yield back the balance of my time.

Mr. Murphy. The gentleman yields back and now I will recognize Mr. Green for 5 minutes.

Mr. Green. Thank you, Mr. Chairman.

Mr. Lazarus, thank you for testifying, and I think your testimony clearly lays out why the Affordable Care Act includes what we call either permanent or mandatory appropriation for the CSR program. And mandatory spending is not unusual. The Affordable Care Act in 2010 did that along with a bill we just recently passed this year for mandatory funding for the SCHIP program and for the continuation of the FQHC program. So Congress does add on at times.

My Republican colleagues disagree with you and they disagree



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with the Administration in claiming that the Administration acted unlawfully in concluding it had the authority to fund the CSR program without an annual appropriation. In fact, this lawsuit shows that they even were willing to go to court.

Mr. Lazarus, Congress has many tools at its disposal when it disagrees with an agency on policy; is that correct?

Mr. Lazarus. That is very definitely correct, and those tools are available to it right now. This is the sky is not falling, Mr. Miller, this is a simple matter of a difference of interpretation of the relevant statutory provisions on the part of the Administration and Congress. Congress can fix that in an instance if it wants to go on record casting a vote to take these subsidies away from people who need them. Congress has actually done that in the Affordable Care Act and we're all here very well aware of that. And as specifically the risk corridor program, which has been a target of criticism from my colleagues on the right side here, and it has, Congress has actually acted to affirmatively deny appropriations to fund that program.

So you can put your money where your mouth is or your votes are if Congress wants to, and it shouldn't really be running to court to try to protect itself here.

Mr. Green. Well, some of my colleagues seem to claim victory on the legal issue because of the federal district court recently

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ruled in their favor. They suggest that the ruling is conclusive evidence. Being a lawyer I know there is an appeals process. And were you surprised by the district court's decision?

Mr. Lazarus. Well, I wasn't surprised after going to the oral argument, frankly, but I -- yes, I was surprised because the precedents are very clear that there's no congressional standing simply to vet a disagreement over implementation of a law with the executive branch. So I was very surprised that the court ignored those precedents and granted standing.

Mr. Green. And do you expect the ultimate outcome of the case on the appeal?

Mr. Lazarus. Well, I believe that it's more likely than not that on appeal the decision will be reversed, but of course I could be wrong about that. We have to wait and see what it is.

Mr. Green. Well, as a lawyer I normally don't ask a question I don't have the answer to, but I want to ask the panel. Doing health care policy for decades with Republican and Democratic administrations, some way you have to find a way to encourage the private sector to take the poorest folks, the ones who have a lot of claims, and CSR is part of that process.

Can any four of you think that over the period of time whether it be the prescription drug plan of 2003 that encouraged insurance companies to cover poor seniors who took a lot of medications?

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And I would be glad in my one point, 1 minute 10 seconds, how was that dealt with in 2003?

Mr. Badger. Well, Congressman, I represented the White House in negotiations on that and the way it was done was that it was a bipartisan process to agree on a law. The difference here is --

Mr. Green. Oh, I disagree. I was here and it wasn't bipartisan, on our side.

Mr. Badger. I will say on the Senate side we did have over 60 votes and that required substantial Democratic support, but they were part of the conference process. The difference here, Congressman, I don't want to be argumentative, but this is not working. The reality is that despite all of these corporate subsidies, despite all of these changes that were made during the first part of 2014 by the Administration, some of which do appear to be unlawful, the insurance companies are still losing money in the individual market. We haven't solved this problem yet.

And what I would encourage, just to correct the record, of the 6.4 million who are getting these subsidies, even if the Administration were to follow the law, Section 1402(a)(2) says the issuer shall reduce cost sharing under the plan. The insurer has an obligation to do it irrespective of the presence of these funds. But what I would hope that this would precipitate is this

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kind of conversation we had with respect to Part D, where people work together, acknowledge that this is not working in many ways, and try to work together on getting something that does.

Mr. Green. Well, in my last 15, 20 seconds, whatever I have, I agree with you. We need to work together to see how we can fix it because these folks need that health care coverage, and just dropping six million off without this assistance. So hopefully -- and the majority, we can deal with that and fix it instead of going to court and, you know, the law needs to be successful so we need to fix it.

Mr. Murphy. Thank you. Mr. Griffith, you are recognized for 5 minutes.

Mr. Griffith. Thank you, Mr. Chairman. I appreciate it very much. This is an important hearing because it points out some major flaws and problems that we have in the way that Washington is currently working. I think it is high time, and this is a classic example of it. It is high time that we start defending the legislative prerogative.

It is not a matter of Democrat or Republican or Independent or Socialist or whatever party you want to put on there. It is a matter of defending the Constitution from the congressional branch, the legislative branch of our government. We aren't doing it and we should be doing it whether it is Democrats or

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Republicans as I said.

And it is one of the reasons I really hope we will have a Republican President so that my colleagues on the other side of the aisle will see that if a Republican President were to flaunt the law as it has been flaunted in this particular circumstance and try to spend money not authorized by Congress, I will stand up and say to that President just as I am going to say today, you can't do that and we are not going to sit idly by and allow you to do that.

It doesn't matter whether it is a Republican or a Democrat, whether it is a program I like or dislike, we have got to follow the law. Just yesterday -- you know, we are not robots here just doing things. Yesterday I made an independent constitutional decision. We don't have to wait on the courts to tell us what is and isn't constitutional. We get to make some of those decisions ourselves. That is why we take an oath to uphold the Constitution. And I voted against a rule against my party because I thought paragraph 5 of the rule included something that I believe is unconstitutional. Now all that getting off my chest, I have to say this as well. I think the 60-vote rule in the Senate is killing us.

Mr. Lazarus, you said it is easy for us, we can just pass a law. We can in the House pass a law with a majority vote. You

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can't do that in the Senate. They have totally botched up the entire process. Again it doesn't matter whether you are Democrat or Republican, when it takes 60 of 100 votes to pass a piece of legislation it is wrong. The process doesn't work and it is weakening the legislative branch of government and it is dangerous to the Republic.

Mr. Rosenberg, you said to Mr. McKinley, if this ruling is upheld and we now have to flip things around where instead of voting for appropriations we have to vote against appropriations and say you can't spend money here, the problem with just passing a law and having a new plan is that 60-vote rule in the Senate. There, I got all that off my chest.

But I think it is very clear just like in the Solyndra case where they didn't have authority to subrogate, then they subrogated and claimed that, you know, before lunch was different than after lunch because it was, you know, an hour later you could subrogate because you weren't supposed to subrogate at the time of the initial loan but you could come back later.

It is the same kind of thing here. They are interpreting the law in such a way. And when we take the position as a legislative branch of government that we have to sit back and wait for the courts before we can take any action, we lose our authority and it diminishes the legislative branch. Mr. Rosenberg, would

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you disagree with what I have just said?

Mr. Rosenberg. Not at all.

Mr. Griffith. And I appreciate that. Mr. Miller, would you disagree with what I have just said?

Mr. Miller. No. And I would just underscore that what was unique about the House v. Burwell case is -- we need to think about this. The judge knocked out a different complaint that the House had about the employer mandate because that was a matter of statutory interpretation. However, this went to a core constitutional provision, the power of Congress to determine appropriations and spend money, and that's why it was uniquely moved forward and got past the standing considerations. There was really no other plaintiff you could have bring this case before a court and that's why the judge in a very unusual ruling said this is the only way to remedy this issue.

Mr. Griffith. And I think we may have some more of those, but first we have to, you know, stop looking at ourselves as playing for the Republican team or the Democrat team and start playing for the legislative branch of government, because if we follow the process in the legislative branch of government we end up with better government.

I don't think that in due deference, Mr. Lazarus, I don't think that we can say we can flip it. I think that is bad for

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the Republic too, where you say that since we didn't specifically say they couldn't spend it they can spend it. I think that is an error for the --

Mr. Miller. Mr. Griffith, if I could just add one thing you didn't mention. Beyond the 60 votes in the Senate you've got a Presidential veto. So you have an Administration which could act illegally and then protect its illegal actions by vetoing correction by Congress to try to override it.

Mr. Griffith. Well, and that is true, although I respect the constitutional prerogative of the President to veto a bill. But at least if we could get it out of the Senate we could make it veto it, because my position is a President won't veto everything you send him. If we send him 70 bills he doesn't like we are going to get 10 or 15 of them at least past that veto pen.

And my time is almost up. Mr. Rosenberg, I would love to get the cites on that Teapot Dome case that you cited earlier because I think that is important again as a part of a legislative prerogative, and that is really what this hearing is about. It is not about trying to take down the ACA. It is about the legislature defending its right to determine where it is going to spend money and where it is not going to spend money.

And unfortunately the Administration has totally disregarded it, and we need to be more aggressive. My time is



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up so unfortunately I can't let you respond.

Mr. Rosenberg. In my testimony on page 5.

Mr. Griffith. On page 5, all right, very good. And I yield back, Mr. Chairman.

Mr. Murphy. The gentleman yields back. I recognize Ms. Clarke for 5 minutes.

Ms. Clarke. Thank you very much, Mr. Chairman. I thank our expert witnesses for appearing here today. I just want to drill down a little bit more on some specifics with respect to the CSR. Our Congress designed the ACA Cost Sharing Reduction Program to reduce out of pocket costs for certain enrollees purchasing Silver plans on the exchanges. Cost sharing subsidies along with advance premium tax credits lower a beneficiary's pay for health insurance costs. Essentially these discounts lower the amount of money consumers must pay out of pocket for deductibles, coinsurance, and copayments. The Department of the Treasury then reimburse insurance companies for making these cost sharing reductions. This is the basic premise.

So Mr. Lazarus, how is the mission of the Cost Sharing Reduction Program consistent with the broader goals of the Affordable Care Act?

Mr. Lazarus. Thank you very much. The Cost Sharing Reduction Program is essential to the overall operational plan

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of the Affordable Care Act. It enables people who otherwise couldn't afford health care even with premium assistance to help pay their insurance premiums to get health care and therefore encourages them to actually buy insurance. They become part of a larger insurance pool. That leads to the stabilization of markets and it enables the markets to accommodate the fact that the law now forbids insurance companies from turning away people if they have preexisting conditions and so forth. So all of these components work together, just as the Supreme Court ruled in King v. Burwell and the cost sharing reduction provisions are absolutely integral to that. So that's how that works.

Ms. Clarke. Thank you. Since Congress passed the Affordable Care Act in 2010 the number of uninsured in the United States has fallen by 20 million people. This is a remarkable achievement, and such an achievement would not have been possible without ensuring that all elements of the law work together as designed to provide a stable and accessible insurance marketplace.

In his opinion in King v. Burwell, Chief Justice Roberts wrote, quote, Congress passed the Affordable Care Act to improve health insurance markets not to destroy them. If at all possible we must interpret the act in a way that is consistent with the former and avoid the latter.

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Mr. Lazarus, can you apply this same reasoning to the CSR program?

Mr. Lazarus. Well, I would say that if you take the approach that Chief Justice Roberts elaborated there he was applying it to the premium assistance tax credits and stating that under that approach the law, an ambiguous provision in the law, should be interpreted to make them applicable in all states and not just in states with state run exchanges.

I would say that the cost sharing reductions part of the subsidies is on exactly the same footing as the premium assistance tax credits and would fit into that analysis in the same way, and therefore the Administration's interpretation is the proper interpretation.

Ms. Clarke. Very well. Mr. Chairman, we have heard today that the Cost Sharing Reduction Program is a critical component of the Affordable Care Act and it has played a very important role in the efforts to provide health care security for working Americans. To attempt to dismantle this program without providing any other way to ensure access to critical health care services to deserving Americans is frankly, I believe, irresponsible, and I hope we can move on from this partisan investigation to provide all of our constituents with the health care coverage that they need. And having said that Mr. Chairman,

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I yield back.

Mr. Murphy. Thank you. Dr. Bucshon, you are recognized for 5 minutes.

Mr. Bucshon. Thank you. As a health care provider I just want to say I want every American to have access to quality, affordable health care, and that I think is a goal that we all share. But this was a bad law. It was passed in a bad way.

I would just remind everyone the law was a Senate bill that did not have the chance to go to conference because it would -- any change to the law would have resulted in its failure to pass Congress after a change in the makeup of the U.S. Senate. We all know that. And when you do those type of things you end up with this.

I would also encourage everyone to look at our Better Way website, House Republicans and our proposal to replace the Affordable Care Act.

Mr. Lazarus, does the ends justify the means?

Mr. Lazarus. Do the ends justify the means?

Mr. Bucshon. Yes.

Mr. Lazarus. No, they don't.

Mr. Bucshon. Okay, because essentially in your testimony that is what you have said.

Mr. Lazarus. No, that is not what I --

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Mr. Bucshon. It is my time.

Mr. Lazarus. With all respect that is not what --

Mr. Bucshon. Here is what you said. You said because of what will happen if the district court decision is upheld, and our Democratic colleagues implied the same, that it should be overturned even if the Constitution is violated. That is essentially what you said.

Mr. Lazarus. No. That is not what I said. What I said --

Mr. Bucshon. Then what did you say?

Mr. Lazarus. That the Administration has a different interpretation of its appropriation authority here; that the Administration's interpretation's perfectly sensible.

Mr. Bucshon. Can you quote me in the Constitution where their interpretation is, or it says in the Constitution that the only people that can appropriate money is the Congress. Can you tell me in the Constitution where it says that you can interpret that that the executive branch can appropriate money that Congress has not appropriated?

Mr. Lazarus. The Administration's position is that Congress has appropriated the money. Your position is that it has not.

Mr. Bucshon. Well, the district court disagrees with you, so --

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Mr. Lazarus. That's true.

Mr. Bucshon. You know, and the other thing is, is I want to just clear this up. And this could apply to any law, but in this case because the law's intent is to provide insurance to American citizens for health insurance, does it matter -- the gist of your testimony is, is it doesn't matter what the law actually says because the intent of the law is to provide coverage.

Mr. Lazarus. That is not true. That is not at all what I said.

Mr. Bucshon. Because that is what you basically said.

Mr. Lazarus. That's not what the Administration is arguing.

Mr. Bucshon. And again this isn't a partisan issue. This is a legislative branch discussion versus an executive branch discussion, and it honestly in fairness has been a struggle for 240 years. But I agree with my colleagues that have said that unless the legislative branch in a bipartisan way reasserts its authority the future of the Constitution and this country is at risk.

Mr. Lazarus. Well, I certainly agree that if you believe that the Administration's interpretation of its appropriations authority with respect to this program is incorrect, you should attempt to pass a law --

Mr. Bucshon. Okay, the other thing --

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Mr. Lazarus. -- or otherwise use your ample powers to change that result.

Mr. Bucshon. Now let me just say this. You are a partisan in support of the Administration and you know as well as I do, and you can say that because you know the President would just veto anything related to the Affordable Care Act and we don't have the override vote. So it is pretty easy to say that, right? But I would like to know what you were saying back when Republicans had 60 votes in the Senate, the House, and the White House. I think your view would be a little different.

But the other thing I want to get at in this is does it matter if a law makes sense to make it enforceable? I mean obviously the constitutional provision of appropriations doesn't make sense to you in this case. But does that matter? Does it mean that we can't enforce it because it doesn't make sense to you?

Mr. Lazarus. The constitutional provision about --

Mr. Bucshon. You said in your testimony -- well, that doesn't make any sense --

Mr. Lazarus. It makes perfect sense.

Mr. Bucshon. -- because people are going to lose their health insurance if we don't this. That is implying the end justifies the means. It implies that the Constitution doesn't matter. It implies that it doesn't matter why we opposed the

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Affordable Care Act or that in your interpretation that just doesn't make any sense. None of that matters, right? What matters is what the Constitution says about appropriating money.

And the district court at this point, I would argue that I don't think it is going to be overturned because historically Congress has been found to have standing in this, to sue the Administration based on our congressional appropriations and I would hold that we are going to win that. And I would also say that people on both sides of the aisle in the legislative branch should continue to argue that this is in the Constitution and it is our sole authority to appropriate money. It doesn't matter what it is for. It doesn't matter what law it pertains to. I yield back.

Mr. Murphy. I just want to clarify that the Administration in 2014 asked for an appropriations for this. If what you are saying is true they didn't have to, that belies what they did. So in fact that is true. The second thing is the Department of the Treasury said there is currently no appropriation to Treasury or to anyone else for the purpose of cost sharing payments. I just want to say that is, you know, important, so I just wanted to clarify that for Dr. Bucshon.

Ms. DeGette. Mr. Chairman, if you are going to do that you should let him respond to your statement.



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Mr. Murphy. I will let him respond.

Mr. Lazarus. Yes. I'm perfectly aware that the Administration did request an appropriation, but that has often, or at least it has sometimes happened that an Administration will request congressional action in an area where it's unclear whether or not the executive branch has authority to act on its own. It happens all the time. And the only question here is whether in fact the Administration's interpretation of its authority is correct or is not correct.

Mr. Murphy. Well, along those lines, if you can get us examples of that and show me where, show this committee where in the Affordable Care Act it gives that. I mean you just said it was unclear, but also the Treasury said it was not. Treasury said there is currently no appropriation of Treasury or anyone else for the purpose of the cost sharing payments. So you are saying it was unclear to the Administration. They asked for the money. We are just saying for this committee if you could show us the lines in the Affordable Care Act what gave the automatic preauthorization for the future of this and also -- or the appropriations -- and if you could respond to the statement of the Treasury this committee would appreciate that.

Mr. Lazarus. Okay, just two points. The first point is it's hardly surprising that there was disagreement within the

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Administration over this issue. That often happens. But what matters now is whether or not the position that the Administration has finally and with careful attention taken whether that position is correct or not. Now the position is --

Mr. Murphy. Wait, wait. I just want to make sure I understand. They took a position of whether or not that is correct. That is what you said.

Mr. Lazarus. Yes, whether it's correct. I mean --

Mr. Murphy. Well, that is what this committee is trying to find out, sir. You don't get to take a position and then retrospect --

Mr. Lazarus. Well, you asked me --

Mr. Murphy. Okay.

Mr. Lazarus. -- where in the Affordable Care Act does the authority to spend this money come from. The Administration's interpretation is that within the integrated program that includes both the cost sharing reductions and the premium assistance tax credits, within this integrated program both portions of the advance payments to insurers to cover those two halves of the program are, quote, refunds due from Section 36(b) within the meaning of 31 U.S.C. Section 1324 because both are compensatory payments to the insurers made available through the application of Section 36(b) which sets forth conditions

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necessary to qualify for both of those subsidies.

But that's the Administration's textual interpretation and I think that it is a perfectly reasonable interpretation. You may disagree, but that's --

Mr. Murphy. I need to let other members continue on. Mr. Tonko, you are recognized for 5 minutes.

Mr. Tonko. Thank you, Mr. Chair. I do not want -- I do thank our witnesses for being here today, but I regret that we are in a sense wasting your time to reexamine an issue that has been examined to death. This issue fundamentally comes down to a difference of opinion about what was intended by the Affordable Care Act with regard to the CSR program. Yesterday the majority released a 150-page report with the Ways and Means Committee documenting in great detail their opinion of the legality of an appropriation for the CSR Program. So Mr. Lazarus, in your opinion, is it responsible to conclude that the ACA provides a permanent appropriation for the CSR Program?

Mr. Lazarus. I believe that it's correct. I understand that there's an argument, a good argument for the opposite point of view and I respect that. But I believe that it is not only responsible but that it's legally correct.

Mr. Tonko. And my Republican colleagues also claim that the Administration has, quote, overreached in executing the CSR

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provision of the Affordable Care Act. Mr. Lazarus, would you agree with that assessment?

Mr. Lazarus. I not only would not agree, but I think that the constant din of charges coming from the President's political opponents that he's overreaching, violating laws is a very unfortunate distortion of the truth.

We must remember that prior to King v. Burwell last year we heard the same litany of charges that funding the premium assistance tax credits in federal exchange states was a gross violation of the law, and it turns out the Supreme Court didn't agree with that at all but we're still hearing it and we're hearing it over and over again. We heard it with respect to various delays in the effective dates of parts of the Affordable Care Act as the Administration implemented it. But the truth is, when Part D of Medicare, the prescription drug benefit which was a President Bush program and it turns out a very good program -- I can personally testify to that -- when it was implemented there also were delays because it's very complicated implementing these very complicated laws. Secretary Leavitt who was the secretary of HHS at the time said that the Obama administration's delays were, quote, wise, unquote. So I think that this, these charges of overreach reflect a political strategy of demonizing this Administration rather than the facts.

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Mr. Tonko. I thank you. In just a few minutes we have concluded that a difference of opinion exists, yet it is reasonable to believe that the executive branch acted appropriately in executing the law. Now my Republican colleagues have been examining this issue for 2 years without reaching that conclusion.

Today's hearing follows the filing of a lawsuit in federal court questioning the constitutionality of the CSR program. It follows 15 letters from the majority of this committee and from the Ways and Means Committee to Administration officials. It follows six subpoenas for documents to three different federal agencies. It follows interviews with 13 current and former government officials from four federal agencies, and it follows a hearing yesterday by the Ways and Means Committee with four federal witnesses.

So my question is Congress clearly has a wealth of tools at its disposal, Mr. Lazarus, has Congress successfully used its legislative authority to review or to reverse or defund the Administration's implementation of the Cost Sharing Reduction Program?

Mr. Lazarus. Well, I think that the fact that Congress, the Republicans have taken no steps to pass such legislation is an eloquent testimony to the fact that they're failing to use those

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weapons and instead running to court as a kind of diversionary tactic.

Mr. Tonko. I thank you for that assessment. And I would just state enough is enough. After 64 votes on the floor, dozens of hearings, and countless letters to the Administration, it is clear that there is no purpose to this aimless oversight. I call on my Republican colleagues to move on to other important topics that deserve our time and attention and certainly respond much more appropriately to the general public that we serve. With that I yield back.

Mr. Murphy. The gentleman yields back. I now recognize Mr. Mullin for 5 minutes.

Mr. Mullin. Thank you, Mr. Chairman. The Administration's position on the source of funding only changed after the sequestration report; is that correct, Mr. Lazarus?

Mr. Lazarus. I believe that it is correct.

Mr. Mullin. Okay. Mr. Miller, would you mind explaining that a little bit more for us?

Mr. Miller. Well, the timeline was first they requested the appropriation, then they also filed some information that basically confirmed that this would be subject to sequestration. They reversed direction on that because it would be subject to a sequestration, it was not a mandatory appropriation which was

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beyond just that single year and that would have reduced the cost sharing reduction payments.

Mr. Mullin. And the insurance was only going to get 92.8 cents on a dollar?

Mr. Miller. It was an across the board haircut for those funds that are subject to sequestration.

Mr. Mullin. I think the position that we are trying to take is that the timing on this can't be -- what is the word I am looking for here? The timing on this just seems a little odd for it, coincidental. There you go, thank you. The Oklahoma accent wasn't allowing it to be spit out. But it just seems odd to us, and the justification that is coming out behind this I have a hard time to believe it.

Mr. Lazarus, I appreciate your opinion on this but it sounds like you are trying to justify the actions. And all we are trying to do is not keep poking the eye in this Administration even though we do that quite often, but who is hurting here? It is the insurers. It is the people that this was supposed to protect. I mean, in Oklahoma alone the exchanges went up 49 percent this year alone. Insurance costs have skyrocketed through the roof. The same people that we were supposed to take by this law it is hurting. Don't take our word for it. Go out and see how much insurance is costing today versus what it cost in 2010, in 6 years.

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Something is wrong here, and that is all we are trying to do is fix it. We all have constituents. We all, we don't want anybody to go out there without insurance, but yet there already is and with the cost rising the way that it is, why? It is just one piece of it. It is costing the taxpayers some dollars. We are the one holding the bucketful of dollars I guess, but yet this is just one piece of it.

And so Mr. Lazarus, I am not really trying to come after you on this one. I am just disappointed in hearing you trying to justify the Administration's actions and think for some reason it is political. It is not political at all. Mr. Miller, would you like to respond a little bit more to what Mr. Lazarus was saying awhile ago?

Mr. Miller. Well, I could choose a lot of territory. Let me raise one that hasn't been talked about. It's kind of the arguments we try to have it both ways. We even hold this argument in the alternative in court. We've heard that people are going to be suffering because they won't be getting any cost sharing reduction subsidies. Well, actually we know that it will still be required to do it, but even if that was the case then the trying to have it both ways argument is to say, well, the insurance will just raise the premiums and the tax credits will be even larger for the premiums so they'll all be covered anyway. It's one of



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these migrating arguments where no matter what you do you end up in the same place.

Mr. Mullin. Mr. Rosenberg, you are our congressional oversight expert, I mean, literally wrote the book on this. I know you have been asked what, you know, what we could do. I think your response was is that, you know, pass legislation. We tried that. It doesn't work. We have this little guy that keeps holding us up.

What else could we do here in Congress to help hold this Administration accountable to keep things that we feel like is completely outside their boundaries? Everybody says we control the purse strings, so in your opinion as the expert what is our next step?

Mr. Rosenberg. Well, you've got to shore up your abilities to know what's going on, to know how decisions are made, who makes them. And what's clear in your investigation and it's been clear for the last 5 or 6 years in other investigations that the doors have been closed on you. Either slow walking getting information, you know, that gives you the ability --

Mr. Mullin. Deliberately slow walking.

Mr. Miller. Deliberately slow walking and absolute refusals and when subpoenas are issued they are ignored. And when you try to go to what traditionally has been done for 200 years,

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either go for a criminal contempt to show that you mean what you say and we need what you're withholding from it, it's now impossible to do because what they're telling you is, well, if you want to do that go to court for a civil action.

And what that does is put everything on hold and we know that it takes up time, and time in good oversight is a necessity. It's, you know, timely getting the information so that it can be acted on so it would be effective is there.

Mr. Murphy. Thank you. The gentleman's time is expired.

Mr. Mullin. I am sorry. My time is expired. But thank you, Mr. Chairman, for allowing him to try to explain that.

Mr. Murphy. Thank you very much. Ms. Schakowsky, you are recognized for 5 minutes.

Ms. Schakowsky. So I really apologize for missing. There is all these conflicting things. But I appreciate all of you being here and I do have a couple of questions for Mr. Lazarus.

But yesterday the Ways and Means Committee held a hearing on this very same topic, Cost Sharing Reductions. In front of representatives from HHS and Treasury and IRS and OMB, a member of that committee repeatedly declared, quote, this is not about poor people; this is about an insurance subsidy, unquote. I think this is simply disingenuous.

Just like the advance premium tax credit, the cost sharing

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reductions are a direct benefit to consumers. They simply flow through the insurance companies. The average consumer benefiting from these cost sharing reductions receives approximately \$500 per year, and suggesting that it is an insurance subsidy, I think, is a cynical and misleading attempt to distract people from the reality that House Republicans are trying to take health care benefits away from low and middle income families.

Mr. Bucshon. Will the gentlelady yield?

Ms. Schakowsky. No.

Mr. Bucshon. We are not.

Ms. Schakowsky. This tells us all we need to know about the Republican Party's priorities. This investigation is not a good faith effort to improve the Affordable Care Act and ensure that all of our constituents receive quality, affordable health care. This is just a partisan witch hunt. Mr. Lazarus, the Affordable Care Act has now faced its fair share of challenges in the court. Does this lawsuit do anything to improve the quality of health care for the American people?

Mr. Lazarus. Well, I think that the lawsuit is a very inappropriate lawsuit. I think that it's a political food fight between the executive branch and part of the Congress that doesn't belong in court. And I think that ultimately on appeal that

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that's the determination that the courts are going to make.

Ms. Schakowsky. This law was passed to make health care about people not about insurance companies. The Affordable Care Act has provided 20 million Americans with affordable health insurance and offered millions more protections against discrimination for preexisting conditions, age, and gender. Of the approximately 11.1 million consumers who had effectuated enrollment at the end of March 2016, 57 percent or nearly 6.4 million individuals were benefiting from CSRs to make coverage more affordable. Mr. Lazarus, what does the text of the law suggest about Congress' intent when the Affordable Care Act was passed? Is the way the Administration has administered the cost sharing reductions provision consistent with the broader reforms to the individual insurance marketplace and the American health care system?

Mr. Lazarus. Well, yes. In brief, the cost sharing subsidies are an absolutely essential component to the other mechanisms that the Affordable Care Act deploys in order to further its goal of getting as close as possible to universal insurance. And the statute is replete with references to those purposes with the specific components of the plan that are necessary to achieve them and it's replete with specific references to the importance of the cost sharing reductions to

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achieving those purposes.

Ms. Schakowsky. Thank you for that. And it is clear that in passing the law Congress' intent was to make it easier to access quality, affordable health coverage, and I believe the Republican's partisan investigation only takes us further from that goal. The comments made yesterday were misleading and they are disrespectful to the American people who are benefiting from the coverage provided through the law.

Let me just say too, over the years since the passage of the Affordable Care Act, which was a very big and I think powerful and important law, we have attempted to sit down with the Republicans to come up with the kinds of fixes that on a bipartisan basis we could do. What I have seen is that all the bad has been embraced, and there are so many times when I have felt like, give me the name of that constituent and we will take care of it in our constituent service office to try and make it work.

I think we need to be serious about working together, stop these frivolous lawsuits, and get down to making this law the great law that it could be. Thank you. I yield back.

Mr. Murphy. The gentlelady yields back. Now Mr. Collins is recognized for 5 minutes.

Mr. Collins. Thank you, Mr. Chairman. I am hearing a lot of passion by the Democrats on the other side about why we are

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holding what they call a partisan hearing. I guess I have three children and I have three grandchildren with a fourth on the way. That is why I am here. That is why I think this hearing and others like it are important. It is about our children. It is about our grandchildren and the fact that every dollar of deficit that we spend today are dollars that my children, the other children in America, and the grandchildren are going to have to repay.

We are not living within our means. I go back to that every single time I cast a vote. Seems as though the Democrats, whether it is Zika funding or anything else, their solution is always the same. Borrow more money that my children and grandchildren have to pay back. You talk about disrespectful, now that is disrespectful. If we can't pay our way now, what are we doing in borrowing on the backs of our children and grandchildren? It is just fundamentally immoral.

So here we are, Affordable Care Act. Talk about bait and switch. Talk about false advertising. America, here is this great plan and here is what it is going to cost. Well, it is costing billions if not trillions more than it was supposed to cost.

And so, when we get into a hearing like this where the Administration has inappropriately put \$7 billion -- and I would like to remind the Democrats on the other side where that would

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go. That would fully fund Zika and rebuild 5,000 bridges in America that have fallen apart at a million dollar a bridge. Seven billion dollars would fully fund Zika. Seven billion dollars on top of that would rebuild 5,000 bridges in America. That is why this hearing matters, to remind the Americans that dollars matter.

So Mr. Miller, here is kind of a rhetorical question for you. If the \$7 billion hadn't flowed into the insurance companies in what we would say was beyond the constitutional authority of the Administration, what would have happened to premiums across the ACA?

Mr. Miller. There are a lot of moving parts on that front. If you follow one line of argument that the insurers would still be required to provide these subsidies those premiums would be higher. But you've got a lot of moving parts but not at the same time.

Mr. Collins. Well, but if we stop there, because the CSR is part of the ACA so they would have to continue to provide them and if there is not funding you could argue one way or the other. Premiums go up and maybe the federal government then would have to --

Mr. Miller. The broader answer is by making Congress responsible as it should be for deciding how to sort that out there

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would be a lot of cross pressures.

Mr. Collins. Sure.

Mr. Miller. And we don't know how Congress might decide to subsidize low income individuals differently.

Mr. Collins. And in those cost pressures we may decide to change some things. We may decide to prioritize our children's future. We may decide to prioritize our grandchildren's future. We may decide to prioritize Zika funding. We may decide to prioritize infrastructure repairs. But this Administration in what we would say is an unconstitutional overreach decided they would set the priorities, and the President said he had the phone and a pen. I don't know if he ever calls anybody but he sure uses the pen all the time. And so I think that is where this oversight hearing is absolutely proper.

And I will just bring up another point, and maybe this is a nuance but we should do it anyway. There is something called the Antideficiency Act and under the Antideficiency Act Congress can sue an individual, an individual who misappropriates government funding without an appropriation request. It has got to be an individual. And this Administration has continued to refuse to put anyone's name on the line that was involved in what we would say was an illegal decision making, and would just ask you, sir, if that is a proper interpretation. If we don't have



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a name we can't sue someone under the Antideficiency Act that misappropriated money.

Mr. Miller. That's correct. Because of the way it applies you have to have an accountable official, and that is a little bit of a mysterious effort right now.

Mr. Collins. And we have been attempting to get some names. We can't get names, so I guess we will hold hearings. We will invite the secretary in. She refuses to come in. I guess that is her right. I don't know, maybe we can get her in here another way. But those are those little nuances that do matter. I believe they matter quite a lot.

But I will go back and just say this is about my children and grandchildren. It is about respecting the taxpayers. That is why this hearing is occurring. We respect the taxpayers of the United States of America and future generations who will be robbed of the opportunity to live the American dream that we grew up in because they are going to be so saddled with debt the debate will become the debate we are seeing today in Venezuela, in Greece, and Puerto Rico. And I yield back the balance of my time.

Mr. Murphy. The gentleman yields back. I recognize Mr. Flores for 5 minutes.

Mr. Flores. Well, thank you, Mr. Chairman. I want to thank the panel for joining us today. I want to tell the truth to offset

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some of the claims we have heard from the other side about how great the Affordable Care Act has been. The architect of the plan has said publicly that if they could fool Americans into this that they would eventually like it. Well, Americans still don't like it.

Americans were promised they could keep their doctor. That turned out to be a lie. They were promised they could keep their insurance plan, another lie. They were promised that premiums would go lower, a third lie. And it goes on and on and on. And I want to remind everybody what the Constitution simply says, and it says that -- well, let me come back to that in a minute.

Also one of the claims from one of the folks on the other side was that this was a frivolous lawsuit. Mr. Lazarus admitted the validity of the lawsuit. The courts have upheld the validity of the lawsuit. If it was a frivolous lawsuit they would have thrown it out originally, so just so that we have a clear context for where we are going.

Now Article 1 Section 9 paragraph 7 says no money shall be drawn from the Treasury but in consequence of appropriations made by law. It doesn't say if the Administration deems it to be that way or if it reads the law a particular way. So my questions are this, we have had unprecedented levels of obstruction from this Administration and that indicates that they have got something

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to hide. If they didn't have anything to hide they would send us the documents. They would send us every document we ask for. They would send the witnesses. They wouldn't tamper with the witnesses. They would let the witnesses answer the questions. If they didn't have anything to hide they would do that.

But nonetheless, even though they have attempted to cover this up and then cover up their illegal actions, we have learned a lot about the Administration's decision to unconstitutionally fund this program and we are going to continue to pursue the facts.

We have another problem here though. As Congress continues to carry out its constitutional obligation to conduct congressional oversight of the executive branch which is a necessary part, a constitutional part of our checks and balances, the Administration sinks to new depths to withhold information from Congress and this is unacceptable.

So Mr. Rosenberg, I have a couple of questions. There have been executive claims of confidential -- or the Administration has sort of tried to claim privileges. One is called confidentiality claims and the other one is called heightened sensitivities. Are you aware of any such privilege that the executive branch has to withhold information?

Mr. Rosenberg. Not with regard to that no.

Mr. Flores. The Administration has clearly obstructed

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congressional investigation here. Do you agree with that Mr. Rosenberg?

Mr. Rosenberg. I'm sorry?

Mr. Flores. The Administration has clearly obstructed Congress trying to pursue this matter. Do you agree with that?

Mr. Rosenberg. Yes. From what I've been reading and what I know, yes.

Mr. Flores. One of the things, the direction that Mr. Mullin was headed is that he was asking what could Congress be doing to ensure that it has the access it needs to conduct oversight to help Congress pass legislation. I mean what additional steps do we need to take?

Mr. Rosenberg. You need to shore up your ability to enforce your subpoenas.

Mr. Flores. Okay.

Mr. Rosenberg. And there are two ways to do it. Traditionally you had a criminal contempt process, but the Administration has come out with a dicta that says we can block that. That we don't have to, you know, go to court to do it and you can't because it's unconstitutional. It interferes with the Presidential prerogatives. You used to have and still have another course. It's called inherent contempt where you can bring a recalcitrant officer before the bar of the House, question

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him and hold him in contempt and even jail him at that particular point. That's been deemed unseemly and also unconstitutional by the Justice Department.

What you need to do is to make, do two things. One, you have to make the inherent contempt process seemly. That is, don't make it appear draconian. That you go out, you arrest, detain, try, and then can put them in jail for it. What you want is to get information and you need leverage to do it. If you bring someone in, have an adjudicatory proceeding in which the facts about the obstruction are looked at and determined by a committee with a recommendation that there be a trial before the House, have the person, you know, brought in, testify, and as a result there would be a fine. Not imprisonment but a fine that, you know, that went against the salary of the particular person. That would have an effect. After it was upheld -- it will be challenged of course. After it's upheld, a finding of inherent contempt would trigger, you know, a point of order with regard to salaries. And that will get out and that will bring attention.

Mr. Murphy. Thank you.

Mr. Rosenberg. Everything you can do --

Mr. Murphy. Sir, we are way out of time and we have votes coming up in a couple of minutes, if you would be so kind as to submit other recommendations for the record.

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In fact, I would like to thank all the witnesses that participated at today's hearing and remind members they have 10 business days to submit questions for the record. And ask the witness --

Ms. DeGette. Mr. Chairman, can I --

Mr. Murphy. If you would like to make a --

Ms. DeGette. I just want to say one thing briefly which is I really don't question the motives of the majority here. I think it is in the congressional prerogative to file a lawsuit if Congress believes that the Administration has overstepped its constitutional bounds. But, you know, I do think based on what Mr. Lazarus has said today and what the Administration filed in their brief there may be an honest disagreement here. We believe that the Administration had the constitutional ability to establish --

Mr. Murphy. Would the gentlelady yield?

Ms. DeGette. -- no, I won't -- to establish the CSR and also to implement it. But be that as it may, I feel what the Democrats are trying to say here today is that we are trying to say that even if there is a general disagreement on the constitutional authority this problem could be easily resolved by Congress by passing legislation to clarify it. And the thing we are concerned about is that the --

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Mr. Bucshon. Mr. Chairman, can I get a --

Ms. DeGette. If this CSR fund -- -

Mr. Bucshon. Is this out of order?

Mr. Murphy. Yes, but --

Ms. DeGette. If this CSR fund is struck down by the court then 6.4 million people will lose their subsidies.

Mr. Bucshon. Not true. That is not true.

Ms. DeGette. And so -- Mr. Chairman. And so the result is we really hope that what we are trying to say is there has been no effort to fix this, and irrespective of what happens in the court case, we need to work together to try to make sure these people can get affordable insurance. That is all I am trying to say and I yield back.

Mr. Murphy. It has been -- just to the other members, it has been our tradition in the subcommittee that I give the ranking member and myself just a wrap-up moment. And I would say I disagree. I would ask members to read the joint congressional investigative report in the source of funding of the ACA's cost sharing program where we outline a lot of these things.

This committee is dedicated to try to find some solutions for health care. We are not abandoning those who are in need. There is a constitutional question here. I fundamentally disagree with a lot of what Mr. Lazarus says that good intentions

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don't automatically mean good results. And we need to pull together on this. I do agree we need to find some solutions here. None of us want to leave people who are of low income out on the lurch with regard to health care, but simply declaring that because I intend it we can make it so, is not a constitutional answer and we will continue to uphold that.

I thank all the members for this. And I would suggest, if other members have other questions to submit to this panel, please get them to us.

Mr. Flores. Mr. Chairman, I would suggest that if the Administration would provide the documents it might make this a little easier.

Mr. Murphy. Yes.

Mr. Flores. They have covered up.

Mr. Murphy. I want to say that we have asked for a lot of those documents, and we are going to continue to do that. But with all this, I now adjourn this subcommittee.

[Whereupon, at 11:29 a.m., the Subcommittee was adjourned.]