



# The Implications of a Finding for the Plaintiffs in *House v. Burwell*

**\$47 Billion More in Federal Spending over 10 years and Smaller Marketplaces**

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In 2016, the case *House v. Burwell* will be decided in the United States district court of the District of Columbia. In this case, the House of Representatives claims that the cost-sharing reductions (CSRs) the Obama administration paid to low-income enrollees (those with incomes below 250 percent of the federal poverty level [FPL]) in Marketplace coverage were inappropriate because Congress had not made a specific line-item appropriation to do so. We use the Urban Institute's Health Insurance Policy Simulation Model (HIPSM) to estimate the ramifications of eliminating federal reimbursement of CSRs. Given that the Affordable Care Act (ACA) requires insurers to provide low-income Marketplace enrollees with the reductions regardless of explicit funding, we assume that insurers would build the costs associated with them into the premiums for Marketplace silver plans (those with 70 percent actuarial value).

We find that premiums for silver Marketplace plans would increase \$1,040 per person on average. This premium increase would, on average, make silver plan premiums higher than those of gold plans (plans with 80 percent actuarial value). The higher premiums would in turn lead to higher federal payments for Marketplace tax credits because such payments are tied to the second-lowest-cost silver plan premium. All tax credit-eligible Marketplace enrollees with incomes up to 400 percent of FPL would receive larger tax credits, not just those eligible for CSRs. On net, Marketplace enrollment would decrease by 1.0 million people because enrollees ineligible for tax credits could find less expensive coverage elsewhere, and federal government costs would increase \$3.6 billion in 2016 (\$47 billion over 10 years). We estimate that the change would also reduce the number of people uninsured by approximately 400,000.

However, there is substantial uncertainty around insurer decisions to continue to offer Marketplace coverage in the event of a finding for the plaintiff. The timing of such a change in policy could interfere with established, approved premiums, potentially creating financial losses for insurers

and chaos for enrollees. Even if insurers are allowed sufficient time to modify premiums, they may leave the Marketplaces in response to the continued litigation and associated policy changes, the lack of predictability such changes create, and the costs such changes impose on insurers.

## Introduction

In 2016, Judge Rosemary Collyer of the United States district court of the District of Columbia will decide the case *House v. Burwell*. In this case, the US House of Representatives claims that the cost-sharing reductions (CSRs) the Obama administration paid to low-income enrollees (those with incomes below 250 percent of the federal poverty level [FPL]) in Marketplace coverage were inappropriate because Congress had not made a specific line-item appropriation for this expenditure. The House argues that although the premium tax credits in the ACA were permanently appropriated, the CSRs associated with them are subject to the annual appropriations process. The CSRs are available under the law to individuals and families eligible for advanced premium tax credits who enroll in silver plans (those with 70 percent actuarial value)<sup>1</sup> in the Marketplaces, and who have family income at or below 250 percent of FPL. These CSRs increase the actuarial value of silver plan coverage by lowering the deductibles, copayments, coinsurance, and out-of-pocket maximums faced by the low-income enrollees, making their use of medical services more affordable (table 1).

This brief explores the implications of a possible prohibition on the federal reimbursement of CSRs to Marketplace insurers. As the plaintiff in the case acknowledges, the law requires insurers to provide reduced cost-sharing plans to eligible enrollees regardless of whether the federal government makes the payment.<sup>2</sup> Consequently, one can expect that Marketplace insurers would build the expenses associated with these CSRs into their Marketplace premiums to avoid financial losses. Such an increase in premiums would increase federal payments for premium tax credits because tax credit amounts are tied to the second-lowest-cost silver plan premium available to the enrollee. Simultaneously, federal payments for CSRs would fall to zero. In addition, changes to premiums and tax credits will change some individuals' decisions about whether to buy inside or outside the Marketplace, which actuarial level of coverage to buy, and whether to buy coverage at all. All of these decisions have implications for the health insurance risk pool, premiums, federal spending, and household spending.

But the timing of such a potential change would be critical. If payments for CSRs are stopped in the middle of a plan year, insurers would face the choice of exiting the Marketplace or incurring losses by paying out CSRs without the expectation of reimbursement (because their premiums are already approved and fixed for the year). With many states requiring a minimum period of notice before insurers can exit a Marketplace, such a change in the middle of a policy year could create chaos for enrollees and significant financial losses for insurers. If a change in reimbursement policy is delayed until the start of a new plan year, insurers might be given sufficient time to recalculate and seek approval for premium rates that would incorporate the CSRs in them, although that process takes several months to complete. Even with sufficient time, insurers may leave the Marketplaces in response to the continued litigation and associated policy changes, the lack of predictability such changes create, and the costs such changes impose on insurers. This brief assumes a scenario in which insurers would

have sufficient time to adjust premiums before the federal reimbursement for cost-sharing is halted and would not exit the Marketplaces. However, the actual scenario is critical to the outcome for both insurers and enrollees, and the uncertainty around insurer decisions is substantial.

TABLE 1

Premium Tax Credit Caps as a Percentage of Income and CSRs under the ACA, 2016

Income (% of FPL)	Premium tax credit schedule: Household premium as a percentage of income <sup>a</sup>	CSR schedule: AV of plan provided to eligible individuals enrolling in silver coverage <sup>b</sup> (%)
≤ 100–138	2.03	94
138–150	3.05–4.07	94
150–200	4.07–6.41	87
200–250	6.41–8.18	73
250–300	8.18–9.66	70
300–400	9.66	70
≥ 400	NA	70

Source: 26 CFR 601.105, Rev. Proc. 2014-62. <https://www.irs.gov/pub/irs-drop/rp-14-62.pdf>.

Notes: ACA = Affordable Care Act; AV = actuarial value; FPL = federal poverty level; NA = not applicable.

<sup>a</sup> Premium tax credit amounts are set to limit household premium contributions for the second-lowest-cost silver premium available to the given percentage of income. If enrollees choose a more expensive plan, they pay more; if they choose a less expensive plan, they pay less.

<sup>b</sup> Silver plan coverage has a standard AV of 70 percent.

## What We Did

We use the Urban Institute’s Health Insurance Policy Simulation Model—Current Population Survey version (HIPSM-CPS) to simulate the elimination of federal reimbursement for CSRs in the Marketplaces.<sup>3</sup> We simulate the ACA as if it were fully phased in in 2016, and we simulate the elimination of federal reimbursements in the same year, although we recognize that litigation and appellate litigation would render unlikely a final decision on this matter before 2017. All estimates are presented in long-run equilibrium; changes are likely to take more than one premium rating cycle to reach equilibrium, but we do not model that time path here.

We assume that insurers would continue to provide CSRs to eligible enrollees as both parties to the litigation agree would be required. Our simulations do not include an exit of insurers from the Marketplaces, although we recognize that a mid-plan year change in reimbursement policy, or other considerations related to a change occurring even at the beginning of a plan year, could lead to such exits. As such, we do not account for any effects on premiums related to insurers exiting the Marketplaces (e.g., if lower-cost insurers exit or if competition weakens in other ways that would affect the second-lowest-cost premium and the computation of tax credits).

We assume that insurers would recoup their full expenditures on CSRs by building those costs into all their silver plan premiums in the Marketplaces. We do not think that insurers would spread these

costs beyond their silver plan premiums or load them only into premiums for CSR plans, for several reasons. First, the ACA does not permit insurers to charge different premiums for enrollees in CSR silver plans than they do for those in standard silver plans. Second, if insurers spread the CSR costs across non-silver plan premiums, they would be charging those enrollees for a higher actuarial value of coverage than the enrollees would be provided. This would be a strong disincentive for individuals to enroll in these options through the Marketplaces; insurers would not want to create such disincentives. The effect of spreading the costs across all tiers would be particularly unprofitable for any one insurer if the other insurers did not do so: it would lead to those products being priced high relative to competitors because the one insurer would be recouping a portion of the CSRs through them. Third, the federal government, state-based Marketplace management, and state departments of insurance do not generally seem interested in actively managing insurers' pricing policies. Where the law allows, they appear strongly inclined to allow the insurers to determine their own policies; they are reluctant to interfere unless required to enforce specific provisions of the ACA. A few states, such as California, have actively negotiated Marketplace premiums with insurers, but there would be no clear incentive for a state to require that CSR costs be spread across all Marketplace products. Consequently, we believe the most likely scenario is that the Marketplace and regulators would allow the insurers to build the expenses into their silver plan premiums only, which insurers should strongly prefer.

In addition, we do not expect insurers to spread the costs of CSRs to coverage for silver plans sold outside the Marketplaces. Although section 1301(a)(1)(C)(iii) of the ACA requires that a qualified health plan sold inside and outside Marketplaces be assigned the same premiums, we believe elimination of federal CSR funding would create a strong incentive for insurers to offer ACA compliant but non-Qualified Health Plan options outside the Marketplaces, allowing the insurers to charge different premiums for them. Many insurers already offer different plans inside and outside the Marketplaces, so this should not be viewed as a significant burden to the insurers. If insurers did spread the costs associated with CSRs to their non-Marketplace plans, they would place themselves at a competitive disadvantage with insurers only selling non-Marketplace coverage, those that would have no such costs to cover. Thus, in our simulations and consistent with federal law, the health care risk of the nongroup market inside and outside the Marketplace is shared broadly, although the additional premium associated with CSRs is included in the Marketplace silver plan premiums alone, effectively as a premium surcharge.

HIPSM-CPS computes the costs associated with providing CSRs, calculates the premium "add-on" necessary to cover those costs, and increases the Marketplace silver plan premiums accordingly. Premium tax credits are recomputed because they are tied to the now-higher second-lowest-cost silver plan premium, individual and household decisions are made, the costs associated with the CSRs are recomputed, and the process iterates until it reaches equilibrium (i.e., until there are few or no additional changes under additional iterations of the model).

# Results

Three types of changes occur once the expenses associated with CSRs are incorporated into silver plan premiums: changes to premiums, changes to tax credits, and changes in individual and household decisions.

## Changes to Premiums

Silver plan premiums increase in equilibrium \$1,040 on average (table 2). For a 40-year-old, silver plan premiums for single coverage would be \$4,640 per year (\$387 per month) in 2016, exceeding the cost of gold plan premiums, which would be \$4,560 per year (\$380 per month) on average.<sup>4</sup>

## Changes to Tax Credits

Given the rise of the silver plan premiums to which they are pegged, premium tax credits increase \$1,040 on average. Although CSRs are only available to enrollees in Marketplace coverage using tax credits who have income below 250 percent of FPL, the tax credits apply to all eligible individuals up to 400 percent of FPL, regardless of the actuarial tier of coverage they purchase. So as the silver plan premium increases once CSR costs are incorporated, increasing the tax credit calculations, all tax credit-eligible individuals have larger tax credits available to them.

## Changes to Individual and Household Decisions about Purchasing Insurance Coverage

The changes in premiums and tax credits change many Marketplace enrollees' preferences for coverage. These changes in preferences and enrollee behavior are summarized in box 1.

First, given the increase in silver plan premiums in the Marketplace, those purchasing silver plan coverage without a tax credit under current implementation of the ACA are strongly disincentivized to continue to do so. HIPSM-CPS calculates that there would be 1.7 million fewer people ineligible for tax credits enrolled in the Marketplace. A small minority (roughly 100,000) previously enrolled in the Marketplace without tax credits would gain eligibility for tax credits as their premiums increased; the remainder of those not receiving financial assistance would exit the Marketplaces and enroll in silver plan coverage in the non-Marketplace nongroup insurance market.

In addition, as discussed, the increase in silver plan premiums means that the premium for silver plan (70 percent actuarial value) coverage becomes higher than the premium for gold plan (80 percent actuarial value) coverage. This means that individuals above 200 percent of FPL can obtain higher-value plans at a lower cost if they shift from silver to gold plans. Consequently, virtually all tax credit-eligible individuals with incomes above 200 percent of FPL move to gold plans; their tax credit, computed using the second-lowest-cost silver plan, goes further when used for a gold plan. Even those between 200 and 250 percent of FPL, originally eligible for small CSRs that increase the actuarial value of their silver

plans to 73 percent, can increase the value of their coverage by moving to gold plans without paying more.

Those tax credit-eligible individuals with incomes below 200 percent of FPL who receive the largest CSRs (94 percent actuarial value and 87 percent actuarial value) remain in silver plan coverage because their subsidized actuarial value is still greater than that of gold plan coverage. They do not face a disincentive to remain, because their tax credits limit the share of income they pay toward their premiums as long as they enroll in the lowest- or second-lowest-cost silver option available to them. These low-income enrollees are essentially the only individuals that remain in Marketplace silver plan coverage.

Finally, about 700,000 more individuals over 200 percent of FPL would enroll in Marketplace coverage with tax credits under the new scenario. Because their tax credits are more modest and because cost-sharing for plans without cost-sharing assistance are considerable, these individuals do not place sufficient value on the coverage to enroll under current conditions. However, when the tax credits increase and allow them to afford higher-value gold plans at a lower cost than current silver plans, some of them decide to enroll.

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#### BOX 1

##### **Nature of Shifts in Marketplace Enrollment Caused by Increased Silver Plan Premiums and Consequent Larger Tax Credits**

**Those currently enrolled in silver marketplace coverage without tax credits** would purchase their coverage outside the Marketplace instead (although a small number would become eligible for tax credits because of the premium increase and stay in the Marketplace with financial assistance); silver plan premiums in the outside market would be significantly lower.

**Those with incomes above 200 percent of FPL currently enrolled in silver coverage using tax credits** would shift to gold plan coverage; gold plan premiums would be lower than those of silver plans and offer higher actuarial value (lower out-of-pocket costs).

**Those with incomes below 200 percent of FPL currently enrolled in silver coverage using tax credits** would remain in silver plan coverage; their cost-sharing reductions mean their silver plan coverage has a higher actuarial value (lower out-of-pocket costs) than gold plans, and their now-larger tax credits absorb the increased premiums for their coverage.

Some **individuals between 200 and 400 percent of FPL eligible for tax credits** will enroll in Marketplace gold plans even though they remained outside of the Marketplace before; the value of the coverage they can obtain with their tax credits increases from 70 percent actuarial value to 80 percent, creating a stronger incentive for them to obtain coverage there.

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Table 2 summarizes the magnitude of the implications of incorporating the costs of providing CSRs by incorporating these costs into silver plan premiums.

Because of these shifting household preferences and coverage decisions, Marketplace enrollment decreases by 1.0 million people. The number of people with incomes below 200 percent of FPL who enroll in coverage with tax credits remains largely unchanged at 5.7 million; their premium costs and plan actuarial value levels do not change. These lower-income tax credit recipients are virtually the only people who still enroll in silver Marketplace plans. As noted, 700,000 more people with incomes above 200 percent of FPL enroll in Marketplace coverage with tax credits because of the lower cost of gold plans available to them (about 100,000 of these people previously bought Marketplace coverage without tax credits but would now qualify for financial assistance because of the higher premiums), and 1.7 million people ineligible for tax credits under the current implementation of the ACA would no longer enroll in Marketplace coverage because they can obtain equivalent coverage less expensively outside the Marketplace.

TABLE 2

**Changes to Marketplace Premiums, Enrollment, and the Uninsured, Assuming a Finding for the Plaintiffs in *House v. Burwell*, 2016**

		Current ACA with CSRs	Finding for plaintiffs (no federal CSR funding)	Difference
Per capita value of cost-sharing reductions	< 150% of FPL	\$1,070	\$0	-\$1,070
	150-200% of FPL	\$770	\$0	-\$770
	200-250% of FPL	\$150	\$0	-150
Marketplace premium for single coverage, 40-year-old	Silver	\$3,600	\$4,640	\$1,040
	Gold	\$4,450	\$4,560	\$110
Marketplace enrollment (millions)	APTCs < 200% of FPL	5.7	5.7	0
	APTCs > 200% of FPL	2.8	3.5	0.7
	Other	3.4	1.7	-1.7
	<b>Total</b>	<b>11.9</b>	<b>10.9</b>	<b>-1.0</b>
Uninsured (millions)		29.7	29.3	-0.4
Federal costs (\$ billions)	APTCs	\$32.2	\$41.1	\$8.9
	CSRs	\$5.2	\$0.0	-\$5.2
	<b>Total</b>	<b>\$37.5</b>	<b>\$41.1</b>	<b>\$3.6</b>

**Source:** The Urban Institute's Health Insurance Policy Simulation Model, 2016.

**Notes:** ACA = Affordable Care Act; APTC = Advanced Premium Tax Credit; CSR = cost-sharing reduction; FPL = federal poverty level.

The number of uninsured individuals falls about 400,000 as some tax credit eligible—individuals with incomes over 200 percent of FPL take advantage of the new ability to purchase higher-tier (gold) policies with their federal assistance. This change is smaller than the 700,000 tax credit eligible—individuals who newly enroll in Marketplace coverage, because some of these new enrollees switched from employer coverage or had nongroup coverage but newly became eligible for tax credits.

We estimate that federal government costs for Marketplace coverage financial assistance would increase \$3.6 billion per year (computed in 2016 dollars) and \$47 billion from 2016 to 2025. This increase in government cost accounts for the savings from eliminating federal spending on CSRs.

## Discussion

An ultimate finding for the plaintiff in *House v. Burwell* would prohibit federal reimbursement of insurers for the CSRs they are required by law to provide to low-income Marketplace enrollees unless Congress specifically appropriates the funds to do so. In such a case, were there to be no explicit appropriation, a finding in favor of the House of Representatives could cause significant disruption to the ACA's nongroup insurance Marketplaces, depending upon the timing and notice provided to insurers. Without sufficient notice, insurers would be unable to change their approved premiums, causing them to choose among incurring significant near-term financial losses, abruptly leaving the Marketplaces, filing their own legal actions against the federal government, potentially violating notice requirements for exiting the Marketplaces, and causing enormous disruption to their enrollees. If, however, the courts find for the plaintiff but provide the insurers sufficient time to modify their Marketplace premiums through the customary rate review processes, the outcome would likely be quite different.

In this latter scenario, insurers choosing to remain in the nongroup Marketplaces would most likely increase their silver plan premiums to absorb the costs associated with providing eligible low-income enrollees with coverage meeting the actuarial value standards specified in the ACA. Although this would drive up the premiums for silver plan coverage approximately \$1,040 per insured person, those eligible for premium tax credits would be protected from the increased costs because the tax credits limit their premiums as a share of their family income. Thus, premium tax credits would increase for all those eligible for them, including those not eligible for CSRs, increasing net government costs (after accounting for the elimination of cost-sharing assistance). However, financing the CSRs through a silver Marketplace premium surcharge would still allow those eligible for tax credits to continue to purchase coverage of equal or higher value than they would if the government directly financed the cost-sharing assistance.

Our best estimates indicate that federal government costs would increase \$3.6 billion per year (computed in 2016 dollars) and \$47 billion from 2016 to 2025 if there is a finding for the plaintiff. We also estimate an increase in the number of individuals insured because the value of insurance coverage that can be purchased with a given tax credit would increase for eligible individuals with incomes between 200 and 400 percent of FPL, making coverage more attractive for that group.

As noted, however, the importance of how such a change in policy is implemented cannot be overstated. In addition, continuing litigation and uncertainty in how Marketplace policy is implemented could increasingly affect private insurer decisions to participate in the Marketplaces. Insurers may tire both of the instability and inability to plan and of the costs associated with changing their approaches to predicting appropriate premiums and developing systems to ensure that they are making a sufficient return on their Marketplace business. If that is the case, insurers could begin to pull out of Marketplaces that they are only now beginning to understand and feel comfortable competing in.

## Notes

1. A 70 percent actuarial value plan reimburses 70 percent of health expenditures for benefits covered by the plan, on average, for a typical population. The remaining 30 percent of expenditures are paid for by enrollees through cost-sharing requirements (e.g., deductibles, copayments, and coinsurance). The higher the actuarial value of a plan, the more generous the coverage for a given set of covered benefits.
2. “Plaintiff United States House of Representatives’ Motion for Summary Judgment,” at 6, December 12, 2015, ECF No. 53 (Case No. 14-cv-01967-RMC).
3. Buettgens (2011) provides the HIPSM-CPS methodology documentation.
4. The average gold premium rises by about \$100 per year because of a modest change in the average health care risk of those enrolling in Marketplace coverage once the CSR payments are eliminated, tax credits increase, and households make different enrollment decisions.

## References

Buettgens, Matthew. 2011. *Health Insurance Policy Simulation Model (HIPSM) Methodology Documentation*. Washington, DC: Urban Institute. <http://www.urban.org/research/publication/health-insurance-policy-simulation-model-hipsm-methodology-documentation>.

## About the Authors



**Linda J. Blumberg** is a senior fellow in the Health Policy Center at the Urban Institute, having joined in 1992. She is an expert on private health insurance (employer and nongroup), health care financing, and health system reform. Her recent work includes extensive research related to the Affordable Care Act (ACA); in particular, providing technical assistance to states, tracking policy decisionmaking and implementation efforts at the state level, evaluating the effects of reforms, and interpreting and analyzing the implications of particular policies. She codirects a large, multiyear project using qualitative and quantitative methods to monitor and evaluate ACA implementation in select states and nationally. Examples of other research include analyses of the implications of a finding for the plaintiffs in *King v. Burwell*, codirecting 22 state case studies of stakeholder perspectives on ACA implementation, assessing the implications of self-insurance among small employers on insurance reforms, and comparing the importance of employer and individual mandates in reaching ACA objectives. She also led the quantitative analysis supporting the development of a “Roadmap to Universal Coverage” in Massachusetts, a project with her Urban colleagues that informed the 2006 comprehensive reforms in that state. She received her PhD in economics from the University of Michigan.



**Matthew Buettgens** is a senior research analyst in the Health Policy Center at the Urban Institute, where he is the mathematician leading the development of Urban’s Health Insurance Policy Simulation Model (HIPSM). The model has been used to

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