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8
 9 IN THE UNITED STATES DISTRICT COURT
 10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 11 SAN FRANCISCO/OAKLAND DIVISION

12 **THE STATE OF CALIFORNIA; THE STATE**
 13 **OF CONNECTICUT; THE STATE OF**
 14 **DELAWARE; THE DISTRICT OF**
 15 **COLUMBIA; THE STATE OF ILLINOIS;**
 16 **THE STATE OF IOWA; THE**
 17 **COMMONWEALTH OF KENTUCKY; THE**
 18 **STATE OF MARYLAND; THE**
 19 **COMMONWEALTH OF MASSACHUSETTS;**
 20 **THE STATE OF MINNESOTA; THE STATE**
 21 **OF NEW MEXICO; THE STATE OF NEW**
 22 **YORK; THE STATE OF NORTH CAROLINA;**
 23 **THE STATE OF OREGON; THE**
 24 **COMMONWEALTH OF PENNSYLVANIA;**
 25 **THE STATE OF RHODE ISLAND; THE**
 26 **STATE OF VERMONT; THE**
 27 **COMMONWEALTH OF VIRGINIA; and THE**
 28 **STATE OF WASHINGTON,**

Plaintiffs,

v.

23 **DONALD J. TRUMP, President of the United**
 24 **States; ERIC D. HARGAN, Acting Secretary of**
 25 **the United States Department of Health and**
 26 **Human Services; UNITED STATES**
 27 **DEPARTMENT OF HEALTH AND HUMAN**
 28 **SERVICES; STEVEN T. MNUCHIN, Secretary**
of the United States Department of the
Treasury; UNITED STATES DEPARTMENT
OF THE TREASURY; and DOES 1-20,

Defendants.

Case No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Administrative Procedure Act Case)

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INTRODUCTION

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2 1. The States of California, Connecticut, Delaware, Illinois, Iowa, Maryland, Minnesota,
3 New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont and Washington; the
4 Commonwealths of Kentucky, Massachusetts, Pennsylvania, and Virginia; and the District of
5 Columbia, bring this action to protect themselves and their residents from the unlawful actions of
6 the President and the Secretaries of the Treasury and Health and Human Services, and other
7 federal officials responsible for implementing the Patient Protection and Affordable Care Act
8 (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010).

9 2. The ACA is a landmark law that made affordable health insurance coverage available
10 to over 20 million Americans, many for the first time, and brought the number of uninsured
11 Americans to a historic low. To achieve its goals, the ACA created local health markets (called
12 Exchanges), both state run and federally run, that offer health insurance options to consumers.
13 The ACA also created subsidies to make premiums and out-of-pocket expenses more affordable
14 in these markets. 26 U.S.C. § 36B; 42 U.S.C. § 18071.

15 3. This case involves a central feature of those markets: federal cost-sharing reduction
16 (CSR) subsidies. CSRs make health insurance more affordable for low- and middle-income
17 Americans by reducing out-of-pocket costs such as deductibles, co-pays, and similar expenses.
18 Under the CSR provisions, insurance companies pay upfront a portion of covered patients' out-
19 of-pocket costs, with a promise that the insurance company will be reimbursed for those costs by
20 the federal government.

21 4. CSR subsidies are backed by a mandatory payment provision. The ACA requires the
22 Secretaries of Health and Human Services and the Treasury to make "periodic and timely
23 payments" directly to insurance companies that are "equal to the value of the reductions." 42
24 U.S.C. § 18071(c)(3)(A). It also provides a permanent appropriation that authorizes the
25 Secretaries to reimburse insurers for CSR costs without further appropriations from Congress.

26 5. The ACA's permanent appropriation is essential to the Act's proper functioning.
27 Without it, insurers and state regulators alike lack the stability, predictability, and basic fairness
28

1 and rationality necessary to maintain functional health insurance markets. Further, it ensures that
2 beneficiaries have access to healthcare.

3 6. Since insurers began offering health insurance plans through the Exchanges in
4 January 2014, the Secretaries of Health and Human Services and Treasury have made CSR
5 reimbursement payments each month under the authority provided to them by the ACA's
6 permanent appropriation.

7 7. On October 12, 2017, with only minimal explanation, the President announced that
8 his Administration was reversing course. In a curt written statement issued by the White House
9 Press Secretary, the Administration stated that the Department of Health and Human Services had
10 concluded that the ACA's permanent appropriation does not apply to CSR payments. On the
11 morning of October 13, 2017, the U.S. Department of Justice made a court filing including a copy
12 of a new opinion by the Attorney General addressing the purported legal basis for the
13 Administration's action. Early that same morning, the President tweeted, "The Democrats
14 ObamaCare is imploding. Massive subsidy payments to their pet insurance companies has
15 stopped. Dems should call me to fix!"

16 8. The Administration's new refusal to make the required federal payments directly
17 subverts the ACA, and will injure the Plaintiff States, their residents, and the entire healthcare
18 system. The loss of funds and financial uncertainty caused by their actions will lead to higher
19 health insurance costs for consumers and to insurers abandoning the individual health insurance
20 market. The number of uninsured Americans will increase once again, hurting vulnerable
21 individuals and directly burdening the States. The unlawful refusal to make CSR reimbursement
22 payments will also substantially complicate the States' efforts to administer their healthcare
23 markets and in some instances leave consumers with no health plan to access despite their federal
24 entitlements under the ACA. Indeed, across the nation, there are 1,472 counties with only one
25 insurer. The Administration's refusal to make CSR reimbursement payments will cause some
26 insurers to pull out of the market, leaving many counties vulnerable and without health insurance
27 coverage.

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1 *Superior Court*, 1 Cal. 2d 759, 761-62 (1934). This challenge is brought pursuant to the Attorney
2 General's independent constitutional, statutory, and common law authority to bring suit and
3 obtain relief on behalf of the State of California.

4 15. Attorney General George Jepsen brings this action on behalf of Plaintiff the State of
5 Connecticut at the request of Governor Dannel P. Malloy to protect the interests of Connecticut and
6 its residents. Conn. Gen. Stat. § 3-5. The Attorney General is the State's chief legal officer with
7 general supervision over all civil legal matters in which the State is an interested party. The
8 Attorney General shall appear for the State in all suits and other civil proceedings in which the
9 State is a party or is interested. Conn. Gen. Stat. § 3-125.

10 16. Plaintiff the State of Delaware is a sovereign state in the United States of America.
11 The State of Delaware brings this action by and through Attorney General Matthew P. Denn. The
12 Attorney General is the State's chief law enforcement and legal officer, Del. Const., art. III, and is
13 authorized to file civil suits. 29 Del. C. § 2504(3).

14 17. Plaintiff the District of Columbia is a municipal corporation empowered to sue and be
15 sued, and is the local government for the territory constituting the permanent seat of the federal
16 government. The District is represented by and through its chief legal officer, the Attorney
17 General for the District of Columbia. The Attorney General has general charge and conduct of all
18 legal business of the District and all suits initiated by and against the District and is responsible
19 for upholding the public interest. D.C. Code Ann. § 1-301.81(a)(1).

20 18. Plaintiff the State of Illinois, by and through its Attorney General, Lisa Madigan, is a
21 sovereign state of the United States of America. The Attorney General is the chief legal officer of
22 the State, Ill. Const. 1970, art. V, § 15, and is authorized to institute and prosecute all actions and
23 proceedings in favor of or for use of the State, which may be necessary in the execution of the
24 duties of any State officer. 15 Ill. Comp. Stat. 205/4. The Attorney General brings this challenge
25 pursuant to her constitutional, statutory, and common law authority to protect the sovereign,
26 quasi-sovereign, and proprietary interests of the State of Illinois.

27 19. Plaintiff the State of Iowa is represented by and through the Attorney General of
28 Iowa, Thomas J. Miller, its chief legal officer with general charge, supervision, and direction of

1 the State's legal business. The Attorney General's powers and duties include prosecuting and
2 defending all actions and proceedings in which the state may be a party or interested when, in the
3 Attorney General's judgment, the interest of the state requires such action. Iowa Code section
4 13.2(1)(b).

5 20. Plaintiff the Commonwealth of Kentucky is represented by and through the Attorney
6 General, Andy Beshear, its chief law officer authorized to exercise all common law duties and
7 authority pertaining to the office of the Attorney General. This duty permits the Kentucky
8 Attorney General to represent the Commonwealth before all courts in any matter in which the
9 Commonwealth has an interest. Ky. Rev. Stat. § 15.020.

10 21. Plaintiff the State of Maryland is represented by and through the Attorney General of
11 Maryland, Brian Frosh, its chief legal officer with general charge, supervision, and direction of
12 the State's legal business. The Attorney General's powers and duties include acting on behalf of
13 the State and the people of Maryland in the federal courts on matters of public concern. Under
14 the Constitution of Maryland, and as directed by the Maryland General Assembly, the Attorney
15 General has the authority to file suit to challenge action by the federal government that threatens
16 the public interest and welfare of Maryland residents. Md. Const. art. V, § 3(a)(2); 2017 Md.
17 Laws, Joint Resolution 1.

18 22. Plaintiff the Commonwealth of Massachusetts is a sovereign state in the United States
19 of America. The Commonwealth brings this action by and through Attorney General Maura
20 Healey, who is the Commonwealth's "chief law officer," and who has both statutory and
21 common-law authority and responsibility to represent the public interest for the people of
22 Massachusetts in litigation, as well as the Commonwealth itself and state agencies and officials in
23 litigation. *Feeney v. Commonwealth*, 366 N.E.2d 1262, 1266-67 (Mass. 1977); *see also* Mass.
24 Gen. Laws ch. 12, s. 3.

25 23. Plaintiff the State of Minnesota is represented by and through the Attorney General of
26 Minnesota, Lori Swanson, its chief legal officer with general charge, supervision, and direction of
27 the State's legal business. The Attorney General's powers and duties include acting on behalf of
28 the State and the people of Minnesota in the federal courts on matters of public concern. Minn.

1 Stat. § 8.01. The Minnesota Attorney General has the authority to file suit to challenge action by
2 the federal government that threatens the public interest and welfare of Minnesota residents and
3 to vindicate the State's sovereign and quasi-sovereign interests.

4 24. Plaintiff the State of New Mexico is represented by and through the Attorney
5 General, Hector H. Balderas, its chief legal officer with general charge, supervision, and direction
6 of the State's legal business. The Attorney General's powers and duties include acting on behalf
7 of the State and the people of New Mexico in the federal courts on matters of public concern.
8 Under the New Mexico Constitution, and pursuant to New Mexico law, the Attorney General has
9 the authority to file suit to challenge any action that in his judgment threatens the public interest
10 and welfare of New Mexico residents. NM Const. art. V, § 1; NMSA 1978, § 8-5-2 (1975).

11 25. Plaintiff the State of New York is a sovereign state in the United States of America.
12 The State of New York brings this action by and through Attorney General Eric T. Schneiderman,
13 who has charge and control of all the legal business of the State and authority to prosecute and
14 defend all actions and proceedings in which the State is interested. N.Y. Executive Law § 63(1).

15 26. Plaintiff the State of North Carolina is a sovereign state of the United States of
16 America. The State of North Carolina brings this action by and through Attorney General Joshua
17 H. Stein. This challenge is brought pursuant to the Attorney General's independent
18 constitutional, statutory, and common-law authority to bring suit and obtain relief on behalf of the
19 State of North Carolina.

20 27. Plaintiff the State of Oregon is represented by and through the Attorney General of
21 Oregon, Ellen F. Rosenblum. The Attorney General is the State's chief legal adviser whose
22 powers and duties include acting in federal court on matters of public concern. Or. Rev. Stat.
23 180.060 § (1)(d), (7).

24 28. Plaintiff the Commonwealth of Pennsylvania is a sovereign state of the United States
25 of America. This action is brought on behalf of the Commonwealth by Attorney General Josh
26 Shapiro, the "chief law officer of the Commonwealth." Pa. Const. art. IV, § 4.1. The Attorney
27 General has the authority to represent the Commonwealth in civil matters brought by the
28 Commonwealth or its agencies. 71 P. S. § 732-204(c). In filing this action, the Attorney General

1 seeks to protect the citizens and agencies of the Commonwealth from the harm caused by
2 Defendants' illegal conduct.

3 29. Plaintiff the State of Rhode Island is represented by and through its Attorney General,
4 Peter Kilmartin. Pursuant to the constitution, statutes, and common law of the State of Rhode
5 Island, the Attorney General is the legal representative of the State, especially in the area of
6 public interest litigation. *See State v. Lead Industries Ass'n*, 951 A.2d 428, 472 (R.I. 2008). The
7 Department contains the Office of Health Care Advocate, R.I. Gen. Laws 42-9.1-1, and an
8 Insurance Regulatory Unit, *id.* 27-36-1, to advocate for the interest of Rhode Islanders in
9 obtaining quality health care and fair insurance rates. The State of Rhode Island operates its own
10 Health Insurance Exchange. www.healthsourceri.com.

11 30. Plaintiff the State of Vermont is represented by and through the Attorney General of
12 Vermont, Thomas J. Donovan, Jr., its chief legal officer with general charge, supervision, and
13 direction of the State's legal business. The Attorney General's powers and duties include acting
14 on behalf of the State and the people of Vermont in the federal courts on matters of public
15 concern. Under the laws of Vermont, the Attorney General has the authority to file suit to
16 challenge action by the federal government that threatens the public interest and welfare of
17 Vermont residents. *See* 3 Vt. Stat. Ann. secs. 152, 157.

18 31. Plaintiff the Commonwealth of Virginia is represented by, through, and at the relation
19 of Mark R. Herring, Attorney General of Virginia. Virginia law provides that the Attorney
20 General, as chief executive officer of the Department of Law, performs all legal services in civil
21 matters for the Commonwealth. Va. Const. art. V, § 15; Va. Code Ann. §§ 2.2-500, 2.2-507
22 (2017).

23 32. Plaintiff the State of Washington is represented by the Attorney General of
24 Washington, Bob Ferguson, who is the chief legal adviser to the State. The Attorney General's
25 powers and duties include acting in federal court on matters of public concern. Washington
26 brings this action to redress harms to its proprietary interests, its sovereign and quasi-sovereign
27 authority to protect the health, safety, and well-being of its residents, and its interests as *parens*
28 *patriae*.

1 allows people to compare and purchase insurance plans.” *King v. Burwell*, 135 S. Ct. 2480, 2485
2 (2015).

3 41. To make health insurance more affordable for low- and moderate-income Americans,
4 the ACA also provides for billions of dollars in federal funding. Those subsidies help offset the
5 two kinds of costs that consumers must pay in order to obtain health insurance: premiums and
6 out-of-pocket expenses such as co-pays and deductibles. The latter are known as “cost-sharing”
7 expenses.

8 42. Section 1401 of the Act provides tax credits that reduce monthly insurance premiums
9 for individuals who earn between 100% and 400% of the federal poverty level—in 2017, between
10 \$24,600 and \$98,400 for a family of four—and who satisfy additional criteria. 26 U.S.C. § 36B.
11 The vast majority of individuals who buy insurance through the Exchanges rely on premium tax
12 credits to lower the costs of insurance.

13 43. Section 1402 of the Act requires insurers to cover at least some portion of cost-
14 sharing expenses for individuals who are eligible to receive tax credits under Section 1401 and
15 whose household income is less than 250% of the federal poverty level—in 2017, less than
16 \$61,500 for a family of four. 42 U.S.C. § 18071. An insurer that wants to offer a plan through an
17 Exchange must offer at least one “silver” plan that reduces cost-sharing expenses for eligible
18 individuals. *Id.* § 18071(c)(2).

19 44. The ACA requires the Secretaries of HHS and the Treasury to pay both of these
20 subsidies directly to insurers. 42 U.S.C. § 18082(a)(3). For each individual who is eligible to
21 receive a premium tax credit, the Secretary of the Treasury must make “advance payments” to the
22 insurer in the amount of the premium tax credit allowed on a monthly basis. *Id.*

23 § 18082(c)(2)(A). For each individual eligible to receive cost-sharing reductions, the Act
24 similarly provides that the Secretary of HHS “shall make periodic and timely payments to the
25 [insurer] equal to the value” of those cost-sharing reductions. *Id.* § 18071(c)(3)(A).

26 45. These payments are made through a single, integrated program created by the ACA.
27 42 U.S.C. § 18082. Under that program, the Secretary of the Treasury must make “advance
28 payments” of both premium tax credits and cost-sharing reductions. *Id.* § 18082(a)(3).

1 46. To fund this integrated system of health insurance subsidies, the Act amended 31
2 U.S.C. § 1324. Section 1324 provides a permanent appropriation for amounts necessary to
3 “refund[] internal revenue collections provided by law,” including “refunds due ... from” listed
4 provisions of the tax code. *Id.* § 1324(a), (b)(2). The ACA amended this list to include “refunds
5 due ... from” 26 U.S.C. § 36B.

6 47. By amending 31 U.S.C. § 1324, the ACA created a permanent appropriation for both
7 premium tax credits and CSR subsidies. As a result, the Executive Branch has both the authority
8 and the obligation to make premium tax credit and CSR payments to insurers on a regular basis.
9 No further appropriation from Congress is required.

10 **II. AFTER MAKING CSR PAYMENTS ON A MONTHLY BASIS SINCE 2014, THE**
11 **SECRETARY OF HHS HAS NOW “DETERMINED” THAT HE LACKS THE AUTHORITY**
12 **TO MAKE THEM ABSENT FURTHER APPROPRIATIONS FROM CONGRESS**

13 48. Since the Exchanges began operating in January 2014, both the Obama and Trump
14 Administrations have reimbursed insurers for CSR payments each month.

15 49. Those payments have created substantial reliance interests. Residents who are
16 eligible for CSRs have relied on them to reduce their out-of-pocket expenses. Insurers also
17 assumed that those payments would be made when they set premiums for the 2017 plan year.
18 And the Plaintiff States assumed that those payments would be made when they reviewed
19 proposed premium rates and approved insurers to participate in the Exchanges during the 2017
20 plan year.

21 50. Like their predecessors in the Obama Administration, the Secretaries of the Treasury
22 and HHS in the Trump Administration have reimbursed insurers for CSR payments on a monthly
23 basis since taking office in January 2017. And they have done so on the authority granted to them
24 by Section 1324.

25 51. On October 12, 2017, however, the Trump Administration announced that it would
26 no longer make CSR payments. In a press statement, the White House stated that “[b]ased on
27 guidance from the Department of Justice, the Department of Health and Human Services has
28 concluded that there is no appropriation for cost-sharing reduction payments to insurance
companies under [the ACA]. In light of this analysis, the Government cannot lawfully make the

1 cost-sharing reduction payments.” HHS also released a press statement, stating: “After a
2 thorough legal review by HHS, Treasury, OMB, and an opinion from the Attorney General, we
3 believe that ... Congress has not appropriated money for CSRs, and we will discontinue these
4 payments immediately.”

5 52. On the morning of October 13, 2017, the U.S. Department of Justice made a court
6 filing including a copy of a new opinion by the Attorney General addressing the purported legal
7 basis for the Administration’s action. Early that same morning, the President tweeted, “The
8 Democrats ObamaCare is imploding. Massive subsidy payments to their pet insurance companies
9 has stopped. Dems should call me to fix!”

10 **III. THE DECISION TO STOP MAKING CSR PAYMENTS IS PART OF THE TRUMP** 11 **ADMINISTRATION’S EFFORT TO “EXPLODE” THE ACA**

12 53. The Administration’s decision to stop funding CSR reimbursement payments is not
13 based on a good-faith reading of the statute. Instead, it is part of a deliberate strategy to
14 undermine the ACA’s provisions for making health care more affordable and accessible.

15 54. Since taking office, the Trump Administration has engaged in a sustained effort to
16 “explode” the ACA by making it more difficult and expensive for individuals to procure health
17 insurance through the Act’s Exchanges. *See* Goldstein & Eilperin, *Affordable Care Act Remains*
18 *“Law of the Land,” but Trump Vows to Explode It*, Wash. Post, Mar. 24, 2017.¹ His first act as
19 President included signing the Executive Order, *Minimizing the Economic Burden of the Patient*
20 *Protection and Affordable Care Act Pending Repeal*.²

21 55. Among other actions, the President has repeatedly threatened to stop making CSR
22 payments at a moment’s notice. Those statements have created substantial market uncertainty.
23 As a result, some insurers, unsure of whether the Administration will continue making the
24 required payments, have decided not to offer plans through the Exchanges in 2018 at all. Others

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26 ¹ https://www.washingtonpost.com/national/health-science/affordable-care-act-remains-law-of-the-land-but-trump-vows-to-explode-it/2017/03/24/4b7a2530-10c3-11e7-ab07-07d9f521f6b5_story.html?utm_term=.9ad0a92dce44.

27 ² <https://www.whitehouse.gov/the-press-office/2017/01/2/executive-order-minimizing-economic-burden-patient-protection-and>.
28

1 have indicated that they will raise premiums by as much as 23% during 2018, to guard against the
2 risk that they will not be reimbursed for these required expenditures. Both of these predictable
3 responses will make health insurance costlier and more difficult to obtain.

4 56. The President's recent Executive Order, *Promoting Healthcare Choice and*
5 *Competition Across the United States*, is also aimed at weakening the Exchanges.³ That order,
6 among many other policies that are in conflict with the ACA, directs the Administration to
7 expand access to association health plans. Those plans do not require the essential health
8 benefits, which could leave people without access to mental health and substance-use disorder
9 treatment, and fewer patient protections (e.g. allowing cherry picking of healthy enrollees over
10 the sick) than those provided under the ACA. By doing this, the President hopes to lure healthy
11 individuals out of the Exchanges. That would leave the sick as the only population receiving
12 insurance through the Exchanges, which would make insurance plans offered there costlier (if
13 insurance companies do not abandon the market altogether). That, in turn, could destabilize the
14 market and create the very "death spirals" that the ACA was intended to prevent.

15 57. The Administration has also substantially reduced its efforts to educate and encourage
16 individuals to sign up for health insurance through the Exchanges. The Department of Health and
17 Human Services slashed its advertising budget for this purpose to \$10 million, a 90% decrease
18 from the \$100 million allocated for this program in 2016. The Department also reduced the
19 amount of money granted to nonprofit organizations that serve as "navigators" to help individuals
20 enroll in health plans offered through the Exchanges to \$36 million, as compared to \$63 million
21 in 2016.

22 58. In addition, the Department of Health and Human Services produced nearly twenty
23 testimonial videos featuring individuals discussing how the ACA harmed them. These videos,
24 which subvert the law, were produced at taxpayer expense.

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27 _____
28 ³ <https://www.whitehouse.gov/the-press-office/2017/10/12/presidential-executive-order-promoting-healthcare-choice-and-competition>.

1 59. HHS has also cut in half the enrollment period during which individuals can sign up
2 for health insurance through the Exchanges established by the Act. Last year, individuals had
3 approximately twelve weeks to sign up for health insurance; this year, they have only six.

4 60. Underscoring this Administration's efforts to sabotage the ACA, HHS announced that
5 it will shut down *HealthCare.gov*, the website through which consumers may enroll in coverage
6 through the Exchanges, for nearly 12 hours every Sunday during the open enrollment period,
7 which will make signing up for health insurance even more difficult.

8 61. Furthermore, the Internal Revenue Service suspended enforcement of a rule designed
9 to encourage individuals to sign up for health insurance. At the beginning of the year, the IRS
10 was set to reject tax returns if filers failed to check a box indicating that they would have health
11 insurance coverage for the "full-year." This would have prodded individuals without health
12 insurance to sign up for it. After President Trump took office, however, the IRS reversed course,
13 and allowed returns to be accepted for processing even if the relevant box is not checked.

14 **IV. THE REFUSAL TO MAKE COST-SHARING REDUCTION PAYMENTS DIRECTLY HARMS**
15 **THE PLAINTIFF STATES AND THEIR RESIDENTS**

16 **A. Failure to Fund CSRs Will Lead to Increased Health Insurance Premiums,**
17 **Insurer Withdrawals from the Exchanges, More Uninsured Residents,**
18 **Uncompensated Care, and Higher State Costs**

19 62. The Secretaries' refusal to make cost-sharing reduction payments will harm millions
20 of state residents and the States themselves by making health insurance more expensive and less
21 accessible.

22 63. The ACA requires participating insurers to offer plans with cost-sharing reductions
23 and to cover those costs, independent of the statutory requirement that the government reimburse
24 them. 42 U.S.C. §§ 18021(a)(1), 18022(a)(2), 18071(a)-(c). The Secretaries' decision to stop
25 making CSR reimbursement payments to insurers thus means that insurers will be required to
26 cover CSR costs, but will not be reimbursed. In response, insurers will raise premiums for plans
27 offered through the Exchanges in future years. The increases in premiums due to the lack of cost-
28 sharing reduction funding will be significant.

1 64. Rising premiums, in turn, will force more people to forgo health insurance, increasing
2 the number of uninsured. As many as 6.7 million residents will have to pay for these increased
3 premiums out of their own pocket, and many of those individuals will be unable to afford that
4 additional cost.

5 65. Rising premiums will also increase the number of uninsured individuals through more
6 indirect channels. The increase in premiums will exempt more residents from the Act's "shared
7 responsibility" provision, which imposes a tax on people who do not have health insurance. No
8 tax is levied if premiums exceed about 8% of household income. 26 U.S.C. § 5000A(e)(1)(A).
9 The rise in premiums triggered by the Secretaries' failure to reimburse insurers for cost-sharing
10 reductions will carry some people above this threshold—and once exempted from the "shared
11 responsibility" tax, many individuals will wait to purchase health insurance until they need care.

12 66. The loss of individual purchasers from the Exchanges will also have a larger
13 destabilizing effect. Healthy individuals are the most likely to stop buying insurance because of
14 increased costs. The loss of healthy participants destabilizes individual insurance markets. It can
15 also lead to "death spirals"—the loss of healthy participants drives up premiums, which in turn
16 drives away additional healthy participants, which further increases premiums, creating a
17 feedback loop that continuously pushes up premium rates and pushes out healthier participants.

18 67. The Secretaries' decision to stop making CSR payments will also make obtaining
19 insurance more difficult because it will cause some insurers to exit the Exchanges altogether.
20 Indeed, many insurers have already exited the Exchanges simply because the Administration
21 refused to guarantee the continued payment of CSRs.

22 68. Fewer insurers will lead to fewer affordable coverage choices and ultimately more
23 uninsured residents.

24 69. This problem will be most acute in counties where no insurer will offer a plan
25 through the Exchanges, as will be true in several counties across the country if CSR payments
26 stop. Qualified residents in those counties will be unable to take advantage of premium tax
27 credits and cost-sharing reductions, because those subsidies are only available for plans offered
28

1 through the ACA's Exchanges. And while some might have other options, such as purchasing a
2 non-Exchange individual plan, most would not.

3 70. Even in counties where insurers continue to offer plans, the loss of some insurers will
4 lead to more uninsured. Fewer insurers decreases competition and drives up premiums. Higher
5 premiums force more people to forgo insurance.

6 71. The possibility that Congress might appropriate funds to cover some CSR
7 reimbursements each year does not obviate these concerns. As an initial matter, it is unlikely that
8 Congress would make that appropriation—as recent history demonstrates, any new appropriation
9 for CSRs would be controversial and subject to intense partisan opposition.

10 72. Even if Congress eventually appropriated CSR reimbursement funds, it is unlikely
11 that it would do so before insurers had to make the critical choices of whether to participate in the
12 Exchanges, and if so, where to set premiums. Insurers start to make those decisions in January
13 for the upcoming plan year. Congress, however, often does not make its ordinary annual
14 appropriations decisions until October or later. Thus, insurers wanting to participate in
15 Exchanges will have to commit themselves to known expenses (the CSRs), without knowing until
16 months later whether Congress will pass a specific appropriation to fund cost-sharing reduction
17 reimbursements. Insurers will respond to such uncertainty by preemptively raising premiums in
18 order to cover any shortfall that will result if Congress later decides not to appropriate funds for
19 cost-sharing reduction reimbursements.

20 73. The Secretaries' decision will thus impose a great human cost. It will also directly
21 burden the States by forcing them to spend more on healthcare costs. States ultimately cover the
22 costs of care when uninsured persons seek treatment at state-funded facilities. Under federal law,
23 state-funded hospitals must provide emergency care, regardless of a patient's insurance status or
24 ability to pay. 42 U.S.C. § 1395dd. State law typically imposes similar mandates. *See, e.g., Cal.*
25 *Welf. & Inst. Code* §§ 17000, 17600; *N.Y. Public Health Law* § 2807-k. As the number of
26 uninsured goes up, then, so does state healthcare spending.

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1 **B. The Secretaries' Actions Will Create Annual Uncertainty Concerning**
2 **Whether CSR Subsidy Payments Will Be Made, Increasing the Plaintiff**
3 **States' Administrative Costs and Burdens**

4 74. The Secretaries' refusal to fund cost-sharing reductions will also directly affect and
5 substantially complicate the States' efforts to administer their Exchanges.

6 75. The States play a critical role in delivering plans offered through the Exchanges.
7 State regulators review proposed premium rates to evaluate whether they are "actuarially sound,"
8 Cal. Health & Safety Code § 1385.06(a), and whether proposed rate increases are "unjustified,"
9 *id.* § 1385.11(a), or not "excessive, inadequate, unfairly discriminatory, destructive of
10 competition or detrimental to the solvency of insurers," N.Y. Insurance Law § 2303. *See also* 18
11 Del. Code § 2503; Md. Code, Ins. § 11-603(c)(2)(i); Mass. Gen. Laws ch. 176J, § 6(c). Similarly,
12 the ACA relies on regulators in most States to annually review "unreasonable increases in
13 premiums" and compel insurers to justify such increases before they go into effect. 42 U.S.C.
14 § 300gg-94(a)(1); 45 C.F.R. §§ 154.200-154.230, 154.301.

15 76. The States also review plans offered on their Exchanges to determine, among other
16 things, whether they meet requirements such as covering essential health benefits and paying
17 cost-sharing reductions for eligible individuals. 42 U.S.C. § 18031(b)-(e); 45 C.F.R.
18 §§ 155.1000-155.1010, 156.20, 156.200.

19 77. The Secretaries' failure to fund CSR reimbursement payments will directly affect
20 these state regulatory decisions. While rate review and plan selection take place between May
21 and October, Congress typically does not make appropriations decisions until October or later.
22 Thus, state regulators will be required to evaluate proposed premiums, and select plans for
23 inclusion in Exchanges, without knowing whether insurers will receive federal cost-sharing
24 reduction payments. That will make it more difficult and onerous for regulators to determine
25 appropriate premiums and to ensure adequate insurer participation on Exchanges.

26 78. The Secretaries' failure to fund cost-sharing reductions will also increase States'
27 administrative burdens and costs. Regulators typically review only one proposed premium rate
28 per plan year. The Secretaries' refusal to disburse cost-sharing reduction reimbursement
29 payments unless Congress provides a further appropriation will require regulators either to review

1 two premium proposals or Exchange applications—one assuming cost-sharing reductions will be
2 reimbursed and one not—or to establish processes for modifying premiums or changing
3 participation after the review and selection process has begun. In either scenario, the States will
4 be forced to spend more money to carry out these administrative burdens.

5 **CLAIMS FOR RELIEF**

6 **FIRST CLAIM FOR RELIEF**

7 **(Action Not in Accordance with Law in Violation of the Administrative Procedure Act, 5**

8 **U.S.C. §§ 701-706)**

9 79. Plaintiffs reallege and incorporate herein by reference each and every allegation and
10 paragraph set forth previously.

11 80. Under the APA, 5 U.S.C. §§ 701-706, courts must overturn agency action that is
12 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or that is
13 “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C.
14 § 706(2).

15 81. The Departments of Health and Human Services and the Treasury are “agencies”
16 under the APA. 5 U.S.C. § 551(1).

17 82. The Secretaries’ refusals to make CSR reimbursement payments are actions of
18 administrative agencies and subject to review under the APA. 5 U.S.C. §§ 551(1), (13), 704.

19 83. That refusal is not in accordance with law because the ACA requires and authorizes
20 the Secretaries to reimburse insurers for cost-sharing reductions on a “periodic and timely basis.”
21 42 U.S.C. § 18071; 31 U.S.C. § 1324. That refusal also conflicts with the core purpose of the
22 ACA, which is to provide affordable health insurance coverage.

23 84. The Secretaries’ refusal to make CSR payments therefore violates 5 U.S.C. § 706.

24 **SECOND CLAIM FOR RELIEF**

25 **(Arbitrary and Capricious Action in Violation of the Administrative Procedure Act, 5**

26 **U.S.C. §§ 701-706)**

27 85. Plaintiffs reallege and incorporate herein by reference each and every allegation and
28 paragraph set forth previously.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Declare, pursuant to 28 U.S.C. § 2201(a), that the Secretaries have the authority and obligation to make cost-sharing reduction payments to insurers under 31 U.S.C. § 1324, 26 U.S.C. § 36B, and 42 U.S.C. § 18071;

2. Declare that the Secretaries' failure to make the required CSR reimbursement payments is:

- a. an action not in accordance with law, in violation of Administrative Procedure Act, 5 U.S.C. §§ 701-706;
- b. an arbitrary and capricious action, in violation of the Administrative Procedure Act, 5 U.S.C. §§ 701-706; and
- c. a violation of the Take Care Clause of the United States Constitution, U.S. Const., art. II, § 3, cl. 5;

3. Grant a temporary restraining order, preliminary injunction, and permanent injunction compelling the Secretaries, their officers, agents, employees, and all persons who are in active concert or participation with them to make the required cost-sharing reduction payments under 31 U.S.C. § 1324, 26 U.S.C. § 36B, and 42 U.S.C. § 18071 immediately, and on a periodic and timely basis going forward;

4. Award to Plaintiffs their costs of litigation including, but not limited to, reasonable attorneys' fees, pursuant to 28 U.S.C. § 2412, and any other applicable law; and

5. Order such other and further relief as this Court deems just and appropriate.

1 Dated: October 13, 2017

Respectfully submitted,

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