IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. Scott Pruitt, in his official capacity as Attorney General of Oklahoma,	)	
Plaintiff,	)	
v.	)	No. 6:11-cv-00030-RAW
KATHLEEN SEBELIUS, et al.,	)	
Defendants.	)	

MOTION FOR LEAVE TO SUPPLEMENT THE SUMMARY JUDGMENT RECORD, OR ALTERNATIVELY, MOTION FOR LEAVE TO FILE NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiff, State of Oklahoma, ex rel. E. Scott Pruitt ("Plaintiff" or "Oklahoma") hereby moves for leave to supplement the summary judgment record—specifically, Plaintiff's Motion for Summary Judgment and Plaintiff's Response to Defendants' Cross-Motion for Summary Judgment. In the alternative, Plaintiff moves for leave file a notice of supplemental authority. Plaintiff would note, however, that supplementation of the summary judgment record is most appropriate, as Plaintiff wishes to present newly-discovered facts, and not merely legal authorities. In support of this motion, Plaintiff states as follows:

1. New facts have come to light that squarely refute two contentions made by Defendants in this and similar litigation in other circuits. While these facts have been widely reported in the media,[1] Oklahoma believes it is important that these new facts be made part of the summary judgment record, due to Defendants' reliance on this former advisor's writings in

[1] *See, e.g.*, Robert Pear & Peter Baker, *Ex-Obama Aide's Statements in 2012 Clash With Health Act Stance*, N.Y. TIMES, July 26, 2014, at A16 ("A former adviser to the Obama administration on health policy made public statements in 2012 that undercut arguments it is now making in court about the government's authority to subsidize insurance premiums.").

support of their Cross-Motion for Summary Judgment. *See* Defs.' Mot. for Summ. J., Ex. 14 (Dkt. #92-14).

2. More specifically, Plaintiff has explained throughout this litigation that there is a quite reasonable, rational explanation for why Congress limited the availability of tax credits and subsidies to those who purchase insurance on "an exchange established by a State pursuant to section 1311." *See* 26 U.S.C. § 36B. As we explained in our Motion for Summary Judgment:

> Defendants' interpretation of the statute is impermissible because it flatly contradicts Congress's very specific language and intent with the limitation it placed in Section 36B, which was to induce the States to cooperate with Congress's desire to have the States establish and operate Exchanges by conditioning the availability of credits and subsidies on the States establishing an Exchange. So, rather than further the congressional intent behind Section 36B, the Challenged Regulations undermine that intent, and all but guarantee that the States who have declined to establish an Exchange will never have a reason to change their minds.

Pl.'s Mot. for Summ. J., Dkt. #87 at 18; *see also id*. at 39 ("[W]hile Defendants claimed that the 'purpose' of the ACA as a whole supported the Challenged Regulations, Defendants utterly failed to consider the purpose Congress had in mind when it limited the availability of credits and subsidies, which was to induce the States to cooperate with implementation of the ACA.").

3. Because the text of Section 36B is so unambiguous on its face, Defendants have worked to convince this and other courts considering similar challenges that the plain language of Section 36B creates an absurdity. Arguing that the "overarching purpose" of the ACA is "to achieve 'near-universal coverage' for all Americans," (Defs.' Cross-Mot. for Summ. J. 33 (Dkt. #91-1)), Defendants have derided Plaintiff's explanation of Congress's intent with Section 36B, telling this and other courts that it is "implausible" that "Congress meant to give the states 'incentives to establish an Exchange,' . . . and that it elevated this goal above its purpose to provide for affordable, universally available health coverage." *Id*. at 46. Defendants argued further that "it does not follow…that a Congress that sought to show that it was *solicitous* of

states' interests in choosing whether to operate their own Exchanges would try to prove the point by *threatening* to deprive those states' residents of tax credits, amounting to billions of dollars annually, if the states did not comply," *id*. at 35, and that '[i]t should not be surprising, then, that 'there is simply no evidence in the statute itself or in the legislative history of any intent by Congress to ensure that states established their own Exchanges.'" *Id*. (quoting *Halbig v. Sebelius*, --- F. Supp. 2d ---, 2014 WL 129023, at *18 (D.D.C. 2014) *rev'd, remanded sub nom, Halbig v. Burwell*, 14-5018, 2014 WL 3579745 (D.C. Cir. 2014).

4. To bolster this line of argument, Defendants attached to their Cross-Motion for Summary Judgment evidence in the form of a paper written by Professor Jonathan Gruber that explains why subsidies are critical to the success of the ACA—with the implication that the drafters of the ACA could not possibly have intended to leave something so important in the hands of the States. Defs.' Cross-Mot. For Summ. J. 33 (Dkt. #91-1) (citing Jonathan Gruber, *Health Care Reform Is a "Three-Legged Stool": The Costs of Partially Repealing the Affordable Care Act* (Aug. 2010)).

5. Professor Gruber is an MIT economist who is widely credited with being the "architect" of both the ACA and Massachusetts' similar health care reform legislation, and who served as a paid advisor to Defendants on the subject of health care reform. *See Gruber: "I helped write the bill"* (C-Span broadcast March 11, 2010), http://www.c-span.org/video/?c4505002/gruber-helped-write-bill ("I helped write the federal bill as well. I was a paid consultant to the Obama Administration to help develop the technical details of the bill, so I come to you with my biases."); *see also* Catherine Rampell, *Mr. Health Care Mandate*, N.Y. TIMES, March 29, 2012, at B1, *available at* http://www.nytimes.com/2012/03/29/business/jonathan-gruber-health-cares-mr

mandate.html?pagewanted=all&_r=0 (describing Professor Gruber's role as a paid advisor who "the White House lent . . . to Capitol Hill to help Congressional staff members draft the specifics of the legislation."); *see* Comp. Gen. Dec. B-320482, 2010 WL 4075435, October 19, 2010 (describing several of HHS's contracts with Gruber).

6. On July 24, 2014, it was discovered that, prior to the filing of this and similar lawsuits, Professor Gruber was making the speaking circuit quite candidly admitting that Section 36B was specifically designed to withhold tax credits in states that declined to establish exchanges pursuant to Section 1311 of the ACA. Specifically, on January 10, 2012, while giving a presentation on the ACA and its effects, Professor Gruber made the following statements in describing the "risks" that might plague the ACA as it was implemented:

> *Gruber:* And then finally, the third risk, and one folks aren't really talking about, and which may be most important of all, is the role of the states. Through a political compromise, the decision was made that the states should play a critical role in running these health insurance exchanges. And the health insurance exchange are the centerpiece of this reform, because they are the place that (inaudible) can go to shop for their new, securely priced health insurance. But if they're not set up in a way that is transparent, and which is convenient for shoppers, and which allow them to take their tax credits and use them effectively to buy health insurance, it will undercut the whole purpose of the bill. And a number of states have expressed no interest in doing so. A number of states like California has been a real leader . . . I think the first state to pass an exchange bill . . . has been a leader in setting up its exchange. It's a great example, but California is rare. Only about ten states have really moved forward aggressively in setting up their exchanges.
>
> A number of states have even turned down millions of dollars in federal government grants as a statement of some sort. They don't support health care reform. I guess I'm enough of a believer in democracy to think that when the voters in states see that by not setting up an Exchange, the politicians in their state are costing state residents hundreds of millions and billions of dollars that they'll eventually throw the guys out. But I don't know that for sure. And that is really the ultimate threat, is: **Will people understand that, gee, if your governor doesn't set up an Exchange, you're losing hundreds of millions of dollars of tax credits to be delivered to your citizens?** So that's the other threat, is: Will states do what they need to do to set it up?

Emily Wallace, *Jonathan Gruber*, JCCSF Podcasts (January 10, 2012) *available at* http://podcasts.jccsf.org/2012/01/jonathan-gruber/, Ex. 1 (The transcribed portion begins at the 32:48 mark).

7. A little over a week later, on January 18, 2012, during a presentation to Noblis, a nonprofit research company, Professor Gruber made similar comments about the major threat to successful implementation of the ACA:

> **Gruber:** And then finally, the third threat, and the one that is least well known, is state implementation. This legislation puts enormous power in the hands of states, to implement healthcare reform. Once again, another myth about healthcare reform, this is not a federal takeover. There is a huge role for states, to actually run these exchanges, and decide how people get health insurance in these states, but states have to take up that challenge. It's a challenge, it's a lot of work, and states need to be willing to take up that challenge, and really fairly implement this law. And so, that's really the third threat, that states won't do that.

NoblisNetwork, *Jonathan Gruber at Noblis*, YOUTUBE (January 20, 2012), http://youtu.be/GtnEmPXEpr0, Ex. 2 (portion transcribed above begins at the 28:56 mark).[2] Just a couple of minutes later, in response to an audience question, Professor Gruber further explained the role of the states, and again confirmed that Congress specifically, and intentionally, conditioned the availability of tax credits and subsidies on a state's establishment of an exchange:

> **Questioner:** You mentioned the health-information Exchanges for the states, and it is my understanding that if states don't provide them, then the federal government will provide them for the states.
>
> **Gruber:** Yeah, so these health-insurance Exchanges, you can go on ma.healthconnector.org and see ours in Massachusetts, will be these new shopping places and they'll be the place that people go to get their subsidies for health insurance. In the law, it says if the states don't provide them, the federal backstop will. The federal government has been sort of slow in putting out its backstop, I think partly because they want to sort of squeeze the states to do it. **I**

[2] While both Exhibits 1 and 2 can be accessed through the provided URLs, Plaintiffs will also mail to the Clerk a compact disk containing both recordings.

> **think what's important to remember politically about this, is if you're a state and you don't set up an Exchange, that means your citizens don't get their tax credits.** But your citizens still pay the taxes that support this bill. So you're essentially saying to your citizens, you're going to pay all the taxes to help all the other states in the country. I hope that's a blatant enough political reality that states will get their act together and realize there are billions of dollars at stake here in setting up these Exchanges, and that they'll do it. But you know, once again, the politics can get ugly around this.

Id. (portion transcribed above begins at the 31:26 mark).[3]

8. Plaintiff believes it is critical that these newly-discovered facts be brought to the Court's attention immediately, because judges in related cases have recently relied on Defendants' representations to reach conclusions that are undermined by this new evidence. For example, the district court in *Halbig v. Sebelius* concluded that "Plaintiffs' theory is tenable only if one accepts that in enacting the ACA, Congress intended to compel states to run their own Exchanges—or at least to provide such compelling incentives that they would not decline to do so . . . [and] there is simply no evidence in the statute itself or in the legislative history of any intent by Congress to ensure that states established their own Exchanges." *Halbig v. Sebelius*, --- F. Supp. 2d ---, 2014 WL 129023, at *18 (D.D.C. 2014) (*rev'd, remanded sub nom, Halbig v. Burwell*, 14-5018, 2014 WL 3579745 (D.C. Cir. 2014).

Likewise, the dissenting judge in *Halbig v. Burwell*, 14-5018, 2014 WL 3579745 (D.C. Cir. July 22, 2014) argued that:

> Apparently recognizing the weakness of a claim that rests solely on § 36B, divorced from the rest of the ACA, Appellants attempt to fortify their position with the extraordinary argument that Congress tied the availability of subsidies to the existence of State-established Exchanges to encourage States to establish their own Exchanges. This claim is nonsense, made up out of whole cloth. There is no credible evidence in the record that Congress intended to condition subsidies on

[3] Interestingly, it appears that as late as September 29, 2012, Professor Gruber was still working under the assumption that the States would take the financial inducements and set up exchanges. Russell Mokhiber, *MIT Economist Jonathan Gruber*, YOUTUBE (Sept. 29, 2012), http://www.youtube.com/watch?v=fA243Q4vSIQ&feature=youtu.be&t=6m53s ("We're going to have 50 different exchanges. We're going to see what works. We'll learn.").

> whether a State, as opposed to HHS, established the Exchange. Nor is there credible evidence that any State even considered the possibility that its taxpayers would be denied subsidies if the State opted to allow HHS to establish an Exchange on its behalf.
> ….
> Perhaps because they appreciate that no legitimate method of statutory interpretation ascribes to Congress the aim of tearing down the very thing it attempted to construct, Appellants in this litigation have invented a narrative to explain why Congress would want health insurance markets to fail in States that did not elect to create their own Exchanges. Congress, they assert, made the subsidies conditional in order to *incentivize* the States to create their own exchanges. This argument is disingenuous, and it is wrong.
> …
> The simple truth is that Appellants' incentive story is a fiction, a post hoc narrative concocted to provide a colorable explanation for the otherwise risible notion that Congress would have wanted insurance markets to collapse in States that elected not to create their own Exchanges.

Id. at 19, 21 (J. Edwards, dissenting).[4]

9. Plaintiff has contacted counsel for Defendants, who indicates that Defendants object to the granting of this motion. While Plaintiff does not believe that Defendants will dispute that Professor Gruber made these statements in 2012, Defendants will likely argue that Gruber's statements are immaterial,[5] but such an argument should be squarely foreclosed by the fact that in their Cross-Motion for Summary Judgment, Defendants themselves relied on evidence from Professor Gruber in an attempt to show the supposed "implausibility" of Congress having made something as important as the subsidies hinge on the States' willingness to establish

[4] Oklahoma notes that Judge Edwards' statement that "Nor is there credible evidence that any State even considered the possibility that its taxpayers would be denied subsidies if the State opted to allow HHS to establish an Exchange on its behalf" overlooks the quite obvious fact that Oklahoma filed its Amended Complaint bringing these subsidy related claims *some two months prior* to making its decision to not establish an exchange. So Oklahoma, at least, certainly considered the impact its decision might have on the availability of credits and subsidies.

[5] Oklahoma has always argued that because the text of Section 36B is so clear, there is no need for the Court to look beyond the text in deciding what it means. But because Defendants have urged the Court to look outside the text of Section 36B to find ambiguity in Section 36B's text, this newly-discovered evidence is material to disprove Defendants' centerpiece theory (i.e., that there is no plausible reason for Congress to have meant Section 36B to mean what it says).

exchanges. Plainly, this newly-discovered evidence squarely controverts Defendants' evidence on this point, and establishes that it is *far* from "implausible" that the drafters or Section 36B intended to withhold tax credits and subsidies from states who declined to set up exchanges in order to place pressure on those states to set up exchanges. To the contrary, it is not only plausible, it now appears to be demonstrably true.

For these reasons, the Motion should be granted, and the Court should make Exhibits 1 and 2 a part of the summary judgment record as additional material facts relied upon by Plaintiff.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of July, 2014, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Joel McElvain
Susan S. Brandon

s/PATRICK S. WYRICK