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**
SYLVIA M. BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services; and JACOB J. LEW, in his official capacity as Secretary of the United States Department of the Treasury,	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO SUPPLEMENT THE SUMMARY JUDGMENT RECORD

The defendants respectfully oppose the plaintiff's motion for leave to supplement the summary judgment record or, in the alternative, for leave to submit a notice of supplemental authority. ECF 112. As the defendants have explained in prior briefing, the text, structure, and purpose of the Affordable Care Act ("ACA," or "Act") make clear that participants in all of the newly-created health insurance Exchanges may be eligible for federal tax credits, whether those Exchanges are state- or federally-operated. At a minimum, the Treasury Department has reasonably construed the ACA to so provide. The plaintiff asserts that Congress intended instead to foreclose the residents of states with federally-run Exchanges from receiving federal tax credits. Because the individual insurance markets depend on the availability of these subsidies, the plaintiff's theory asks the Court to believe that Congress meant for the ACA to "function as a poison pill to the insurance markets in the States that did not elect to create their own Exchanges." *Halbig v. Burwell*, --- F.3d ---, 2014 WL 3579745, at *21 (D.C. Cir. July 22, 2014)

(Edwards, J., dissenting), *petition for reh'g en banc filed*, No. 14-5018 (D.C. Cir. Aug. 1, 2014). In other words, the plaintiff asserts that Congress intended the ACA's promise of "state flexibility" in the operation of the Exchanges, 42 U.S.C. § 18041, to be illusory; a state could forgo the operation of an Exchange for itself, under the plaintiff's theory, only at the price of crippling its insurance market and depriving its citizens of the tax credits at the heart of the Act. "[T]his argument is nonsense. [The plaintiff has] no credible evidence whatsoever to support [its] theory" of Congressional intent. *Halbig*, 2014 WL 3579745, at *31 (Edwards, J., dissenting).

Having found no statements from any actual legislators that would support its fanciful theory, the plaintiff now proposes to submit off-the-cuff, disavowed statements made by a non-legislator *two years* after the ACA was enacted as evidence of Congress's intent. No credible method of statutory interpretation would permit such "evidence" to override the defendants' reasonable interpretation of the Act. The plaintiff's proposal to supplement the record is particularly inappropriate in this case, given that the non-legislator that the plaintiffs cite has unequivocally stated that the comments in question were inaccurate, and has confirmed his understanding that Congress meant for federal tax credits to be available for the purchase of affordable health insurance on all of the Exchanges, whether those Exchanges are state- or federally-run. Moreover, if the Court were inclined – again, contrary to all recognized principles of statutory construction – to consider the plaintiff's proffered evidence, it should also consider post-enactment statements from individuals who participated in the drafting of the ACA. The overwhelming consensus among those individuals is that Congress intended for federal tax credits to be available for participants in all of the Exchanges, regardless of the identity of the entity that runs them. The plaintiff's motion accordingly should be denied.

DISCUSSION

Congress enacted the Affordable Care Act "to increase the number of Americans covered by health insurance and decrease the cost of health care." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2580 (2012). As the defendants have explained in prior briefing (ECF 91-1, ECF 99), to achieve these goals, Congress authorized a nationwide system of federal tax credits for insurance purchased through the new health insurance Exchanges, which are operated by states or, where the state has chosen not to do so or has failed to do so consistent with federal standards, by the federal government. 26 U.S.C. § 36B. Both the plain text of the Affordable Care Act – when the Act is read in full, as it must be – and Congress's obvious purpose in enacting the Act point to the same conclusion: participants in all of the Act's Exchanges are eligible for premium tax credits, whether the Exchange is state- or federally-run. At a minimum, the Treasury Department has reasonably interpreted the statute to so provide, and that interpretation must be accorded *Chevron* deference. In sum, "a holistic reading of the Act's text and proper attention to its structure lead to only one sensible conclusion: The premium tax credits must be available to consumers who purchase health insurance coverage through their designated Exchange regardless of whether the Exchange is state- or federally-operated." *King v. Burwell*, --- F.3d ---, 2014 WL 3582800, at *14 (4th Cir. July 22, 2014) (Davis, J., concurring), *petition for cert. filed*, No. 14-114 (July 31, 2014). *See also Halbig*, 2014 WL 3579745, at *19 (Edwards, J., dissenting) ("When the language of § 36B is viewed in context -- *i.e.*, in conjunction with other provisions of the ACA -- it is quite clear that the statute does not reveal the plain meaning that [the plaintiff] would like to find.").

The plaintiff surmises that Congress had a different intent, namely, to coerce states into establishing their own Exchanges by threatening to withhold tax credits from the residents of

those states that chose to permit the federal government to establish Exchanges on those states' behalf. As support for this improbable theory, the plaintiff now proposes to submit statements made by economics professor Jonathan Gruber in January 2012, two years after Congress enacted the ACA, discussing the state- and federally-operated Exchanges. The plaintiff does not offer any evidence that could qualify as "a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081 (2011). The Supreme Court has "said repeatedly that subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." *Doe v. Chao*, 540 U.S. 614, 626-27 (2004) (internal quotations omitted). The plaintiff wanders particularly far afield here, given that it does not even propose to submit post-enactment statements from any legislator. "[A] hindsight, post-enactment review of legislative intent by a non-legislator" should carry no weight in statutory interpretation. *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 170 n.5 (S.D.N.Y. 1997); *see also Ries v. Nat'l R.R. Passenger Corp.*, 960 F.2d 1156, 1161-1162 n.4 (3d Cir. 1992) (cautioning against usage of post-enactment statements by a "non-legislator").

The plaintiff has not offered any evidence that could "override" the Treasury Department's reasonable construction of Section 36B. Professor Gruber's statements must be disregarded, then, even if those statements unambiguously reflected his views. But, in fact, they do not. Professor Gruber has clearly stated, on multiple occasions, his understanding that Congress intended that federal premium tax credits would be available for participants in the federally-facilitated Exchanges. *See, e.g.*, Brief *Amici Curiae* for Economic Scholars in Support of Appellees, *Halbig v. Burwell*, No. 14-5018 (D.C. Cir. filed Feb. 17, 2014) (brief of 48 economists, including Prof. Gruber, describing this understanding). As Professor Gruber has

clarified, the January 2012 statements on which the plaintiff relies were made "off-the-cuff," and they do not reflect his understanding of Congress's intent. "[T]here was never any intention to literally withhold money, to withhold tax credits, from the states that didn't take that step. That's clear in the intent of the law and if you talk to anybody who worked on the law." Jonathan Cohn, *Jonathan Gruber: 'It Was Just a Mistake'*, The New Republic (July 25, 2014), available at www.newrepublic.com/article/118851/jonathan-gruber-halbig-says-quote-exchanges-was-mistake.[1] But, more to the point, there is simply no reason for the Court to engage in a detailed exegesis of Professor Gruber's expression of his views now, or in January 2012. Statutory interpretation does not turn on the parsing of extemporaneous statements made by a non-legislator two years after the fact.[2]

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[1] Indeed, it is apparent that the statements upon which the plaintiff relies do not even accurately reflect Professor Gruber's understanding of the effect of the ACA in January 2012, let alone his understanding now, or at the time of the enactment of the ACA. Professor Gruber co-authored a report for the National Academy of Social Insurance in December 2011 that reported that federal tax credits would be available for participants in federally-run Exchanges. *See* National Academy of Social Insurance, *Federally-Facilitated Exchanges and the Continuum of State Options* at 11 (Dec. 2011) (citing HHS guidance for proposition that "the ACA and proposed regulations are clear that individuals enrolling through a Federally-facilitated or Partnership Exchange will have access to advanced payments of premium tax credits"), available at www.nasi.org/sites/default/files/research/Federally_Facilitated_Exchanges_and_the_Continuum_of_State_Options.pdf. And in February 2012, after the State of Wisconsin announced that it would elect to allow the federal government to operate the Exchange in that state on its behalf, Professor Gruber modeled the effect of federal tax credits in that state, on the premise that the availability of those credits had not been affected by that state's decision. *See* Greg Sargent, *A smoking gun on Obamacare?*, Washington Post (July 25, 2014), available at www.washingtonpost.com/blogs/plum-line/wp/2014/07/25/a-smoking-gun-on-obamacare-maybe-not-so-much/.

[2] The plaintiff faults the defendants for citing a report by Professor Gruber in prior briefing. ECF 112 at 2. The defendants cited that report in support of the *factual* point that the plaintiff's theory, if it were to prevail, would lead to a "death spiral" in the individual insurance markets in the states in which a federally-run Exchange operates. *See* Defs.' Mem. in Supp. of Their Cross-Mot. for S.J. at 34 (ECF 91-1). The plaintiff can hardly take issue with this factual point, given that its counsel's self-proclaimed goal in this lawsuit is to cause "the structure of the ACA [to] crumble." ECF 92-15.

Moreover, if the Court were inclined to consider the statements now belatedly offered by the plaintiff, it should also consider numerous statements from individuals who participated in the drafting of the ACA. The overwhelming consensus among these individuals is that Congress intended for federal tax credits to be available for participants in the federally-run Exchanges. For example, according to Chris Condeluci, who served as tax and benefits counsel for the Republican members of the Senate Finance Committee during the deliberations on the Affordable Care Act, "[i]t was always intended that the federal fallback exchange would do everything that the statute told the states to do, which includes delivering the subsidies." *See* Sarah Kliff, *Halbig says Congress meant to limit subsidies*, Vox (July 23, 2014) (detailing this and numerous additional statements from legislative staff members describing Congress's intent), available at www.vox.com/2014/7/23/5927169/halbig-says-congress-meant-to-limit-subsidies-congress-disagrees. In addition, according to Liz Fowler, who served as chief health counsel for the Senate Finance Committee during those deliberations, "Of course Congress did not intend to deny anyone in any state access to tax credits to which they are entitled. … That is not how the law is drafted and that is not how it was scored by the CBO." Jonathan Cohn, *Brace yourself: Judges are about to rule on Obamacare again*, The New Republic (July 15, 2014), available at www.newrepublic.com/article/118697/facts-about-new-lawsuits-against-obamacare-they-rewrite-history. *See also* Daniel Fisher, *Yes, Congress wanted Obamacare subsidies*, Forbes (July 23, 2014) (reporting additional comments from Mr. Condeluci and others), available at www.forbes.com/sites/danielfisher/2014/07/23/yes-congress-wanted-obamacare-subsidies-it-just-did-a-terrible-job-of-saying-that/. The plaintiff's proffered method of statutory interpretation, then, in which a court would tally statements made by non-legislators -- or even outside observers -- after the fact, would overwhelmingly lead to the conclusion that Congress

intended for federal tax credits for the purchase of affordable health coverage to be available in every state.

In sum, the plaintiff has not offered any evidence that could "override" the defendants' "reasonable interpretation," *Doe v. Chao*, 540 U.S. at 626-27, of the ACA to provide for federal tax credits for participants in all of the Exchanges, whether those Exchanges are state- or federally-run. The plaintiff's motion to supplement the record should be denied.

DATED this 6th day of August, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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