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STATEMENT OF RICK ESENBERG

The lawsuit was filed this morning in the Northern Division of the Eastern District of Wisconsin. The Northern Division sits in Green Bay and the judge assigned to the matter is William Griesbach.

As Senator Johnson pointed out, when Congress passed the Affordable Care Act, it knew that some people – including those who had employer provided coverage – would lose it. To build confidence - to, in simple terms, accept for themselves and their staffs what they knew would be asked of millions of Americans – it decided that the only coverage that could be made available to Members and their staff was that which could be purchased on an ACA exchange.

There is no doubt about this. Sec. 1312(d)(3)(D) of the ACA provides that the only health plan that can be offered to Members or their staff are those created under the ACA or sold through an Exchange created under the ACA.

For our purposes this afternoon, there are two types of exchange. One is the small business or SHOP exchange. While small business employers may pay tax-free subsidies to employees obtaining insurance on the small business exchanges, only small employers may participate in them. Small employers are defined by the ACA as those with fewer than 100 employees. More on that later.

The other – the only one really applicable here – is the individual exchange. But persons who purchase on individual exchanges cannot receive tax-free premium subsidies from their employers and neither sec. 1312 or any other provision of the ACA provides for such subsidies to Members of their staff. Nor can funds from the Federal Employee Health Benefits Program be spent on premiums for exchange plans – none of which qualify for FEHBP funds.

Thus – as a legal matter – Congress has gotten what it wanted. Members and their staff are getting the same deal as the millions of Americans who have lost their coverage as a result of the ACA and must now purchase insurance on the individual exchanges.

This was not a "mistake." Congress was quite aware that this would be the case. As detailed in our complaint, earlier versions of the ACA expressly provided that members and their staffs could receive subsidies through the Federal Employee Health Benefits Program. But those versions were not enacted and the ACA as passed did not provide for such subsidies.

After the ACA passed, Congress was fully aware of what it had done. In fact an amendment to the ACA that would have provided for such subsidies was proposed. But it was not adopted and it did not become law.

Having chosen to express solidarity with millions of Americans who would be adversely affected by the ACA, and reaped whatever political benefit might accrue from that, it appears that many members of Congress do not actually want to share the pain that the ACA has inflicted on others.

One way out would be to change the law – by adopting the provisions permitting the payment of subsidies that Congress refused to adopt when it was attempting to reassure America that the ACA was good enough for Members and their staff.

But Congress does not seem eager to have a vote on – and accept responsibility for – whether or not these subsidies should be paid

Instead – as has become routine with the ACA – this inconvenient provision of the law is simply being ignored. Initially, OPM proposed a rule that would have made an exception for members and staff buying insurance on the individual exchanges and allowed them – but only them – to receive tax free subsidies. After receiving thousands of comments, including from comments from Senator Johnson, OPM abandoned that clearly illegal approach and settled on an entirely different – but equally illegal – approach.

OPM has decided that words can mean whatever the administration wants them to mean – that the phrase "fewer than 100" is actually synonymous with the almost three million civilian employees who actually are employed by the federal government. It has decreed – and had the Center for Medicare and Medicaid Services likewise proclaim - that the federal government is eligible to participate in small business exchanges regardless of whether it is actually a small business and in spite of the fact that the law quite clearly prohibits it from participating.

If words mean anything – if 100 is the number that is preceded by 99 and followed by 101 - the federal government is not a small employer.

This lawsuit is not about whether Members and their staffs should receive tax-free premium support to purchase health insurance. Congress has already decided that questions in requiring Members and staff to purchase insurance through ACA exchanges in which these subsidies may not be paid. In other words, Congress -, not Senator Johnson or Mr. Clement or I - have decided that – to share in the pain that it knew the ACA would cause – its members and staff would forgo employer provided group insurance.

If that is indeed bad policy, Congress could fix it tomorrow and we'd dismiss the case.

But it hasn't and this case is about the quaint notion that the law means something – that it cannot simply be ignored because it has become inconvenient. If it is to be changed, our Constitution requires that certain steps be taken and that elected officials, like Members of Congress and the President, take responsibility for those changes.

Unfortunately, this is not the only example of abandonment of the rule of the law. The ACA has been unilaterally altered with an unending stream of exemptions, deferrals and blatant refusals to administer the law as it has been written. This may not be the worst example, but it is one that Senator Johnson can try to do something about.