IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACQUELINE HALBIG, *et al.*,

Plaintiffs,

v.

KATHLEEN SEBELIUS, *et al.*,

Defendants.

Civ. No. 13-623 (RWR)

MEMORANDUM OF POINTS AND AUTHORITIES

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

The Government's desperation is palpable. Throwing everything and the kitchen sink at this suit, the Government hopes that something—anything—will block judicial review of its patently unlawful Rule. But, under the law, it is clear that nothing should. This is a run-of-the-mill APA challenge to a final agency regulation, the sort of purely legal challenge that federal courts—and especially this Court—resolve every day.

I. Both the individual and business plaintiffs have Article III standing. Individual plaintiff David Klemencic would indisputably be entitled to a certified, guaranteed exemption from the individual mandate if not for the IRS Rule—which deprives him of that exemption, forcing him to buy comprehensive health coverage under threat of penalty and precluding him from buying catastrophic coverage using his own funds. There is nothing speculative about that. Moreover, the Texas-based business plaintiffs would, if not for the IRS Rule, be shielded from the employer mandate penalty; but because that Rule makes their employees eligible for subsidies, they must sponsor costly health coverage or risk devastating penalties, either way impairing their current fiscal strength. Those are straightforward injuries, redressable by the relief Plaintiffs request—namely, vacatur of the IRS Rule authorizing the subsidies.

II. Nor is there any prudential barrier to standing. Contrary to the Government's truly bizarre theory, Plaintiffs are not barred from seeking judicial invalidation of an agency's construction of a statute because they *disagree* with the agency's construction of the statute. Plaintiffs are directly regulated by the Affordable Care Act and plainly fall within its zone of interests. And there is no general rule prohibiting challenges to third-party tax credits; to the contrary, courts—including the Supreme Court—have a long history of resolving such cases. If anything, prudential concerns reaffirm the need to resolve the validity of the IRS Rule *now*, before it triggers billions in spending—a logistical and fiscal nightmare to unscramble.

III. This case is ripe for review now. Plaintiffs are challenging a *final* regulation and their challenge is *purely legal*. Under black-letter D.C. Circuit law, that suffices. Moreover, they face the very dilemma that caused the federal courts to authorize pre-enforcement review in the first place: bear the substantial costs of compliance with the ACA and forfeit their legal challenge, or violate it and risk massive liability if their legal argument is later rejected. Ripeness doctrine is constructed precisely to *avoid* forcing parties to that Hobson's choice.

IV. For the same reasons, Plaintiffs are not relegated to tax-refund suits *after* they are penalized. No applicable statute compels that harsh result. And if it were required as a matter of course, then the Anti-Injunction Act—which *does* require that procedure in other scenarios—would be superfluous. Moreover, there is *no* alternative remedy for depriving the individual plaintiffs of their certificates of exemption from the individual mandate, and the law sensibly does not require them to submit futile applications that cannot and would not be granted.

V. The Anti-Injunction Act's bar against suits for the purpose of restraining the assessment of taxes is plainly inapplicable. The Supreme Court has held that the individual mandate penalty is not a "tax" under that Act; and the Fourth Circuit has concluded that the employer mandate penalty is not a "tax" either. Anyway, the purpose of this suit is not to restrain either penalty—it is, rather, to enjoin the *subsidies* authorized by the IRS Rule. The fact that enjoining those subsidies has a downstream *effect* on the mandates in no way alters that purpose; no case anywhere has ever interpreted the AIA to reach suits based on such effects.

VI. Finally, Rule 19 does not stand in the way of resolving the validity of the IRS Rule. As the D.C. Circuit has long recognized, an APA suit may seek the vacatur of a regulation without joining the entire population affected by it. Otherwise, it would be impossible to obtain review of broad agency action—which, to be sure, is the Government's evident goal.

STATUTORY, REGULATORY, AND FACTUAL BACKGROUND

A. Congress Authorized Subsidies To Encourage States To Establish Insurance Exchanges, But Most States Nevertheless Declined.

The Patient Protection and Affordable Care Act ("ACA" or "the Act") regulates the individual health insurance market primarily through insurance "Exchanges" organized along state lines. Congress determined that it would be preferable for the states themselves to establish and operate these Exchanges. Accordingly, the Act provides that "[e]ach State shall … establish an American Health Benefit Exchange … for the State …." ACA, § 1311(b)(1).

The federal government cannot, however, constitutionally *compel* sovereign states to create Exchanges. The Act therefore recognizes that some states may decline or fail to do so. *See* ACA, § 1321(b)-(c). Section 1321 of the Act therefore authorizes the federal government to establish fallback Exchanges in states that do not establish their own. *See* ACA, § 1321(c). The ACA thus provides for two basic types of Exchanges: those established by states under § 1311, and those established by the federal government under the § 1321 fallback.

To encourage states to establish Exchanges, the Act authorizes premium assistance subsides for state residents who purchase health coverage through state-established Exchanges. These subsidies are available only to those who enroll in coverage "through an Exchange established by the State under section 1311," 26 U.S.C. § 36B(c)(2)(A)(i)—not those who enroll in coverage through an Exchange established by the *federal government* under *§ 1321* of the Act.

Nevertheless, thirty-four states have decided not to establish their own Exchanges, including Kansas, Missouri, Tennessee, Texas, Virginia, and West Virginia. *See State Decisions For Creating Health Insurance Exchanges*, Kaiser State Health Facts, http://kff.org/health-reform/stateindicator/health-insurance-exchanges/; *see also* 77 Fed. Reg. 18,310, 18,325 (Mar. 27, 2012) (categorizing "partnership" Exchanges as federally established).

B. The IRS Promulgated a Regulation Expanding the Availability of Federal Subsidies, Triggering Other Mandates and Penalties Under the ACA.

Although the ACA provides that premium assistance subsidies will not be available in the states with federal Exchanges, the IRS has promulgated a regulation ("the IRS Rule") granting subsidies in those states. Specifically, the IRS Rule states that subsidies shall be available to anyone "enrolled in one or more qualified health plans through an Exchange," and then defines "Exchange" to mean "State Exchange, regional Exchange, subsidiary Exchange, *and Federally-facilitated Exchange.*" *See* Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,378, 30,387 (May 23, 2012) (emphasis added). In effect, the Rule eliminates the statutory language restricting subsidies to Exchanges "established by the State under section 1311 of the [ACA]." Availability of subsidies, in turn, triggers other mandates and penalties under the Act, such as:

Individual Mandate. The availability of subsidies precludes many individuals from obtaining exemptions from the Act's individual mandate penalty. Failure to comply with the individual mandate to buy comprehensive health coverage triggers a penalty, but individuals "who cannot afford coverage" are exempt from it. 26 U.S.C. § 5000A(b), (e)(1). To claim this exemption, the annual cost of one's health coverage—net of any subsidy under the Act—must exceed eight percent of his annual household income. *Id.* § 5000A(e)(1)(A), (e)(1)(B)(ii). An individual whose *projected* income satisfies that condition is entitled, under HHS regulations, to obtain a "certificate of exemption" that would allow him to forgo insurance entirely, or buy inexpensive, high-deductible, catastrophic insurance (which is otherwise restricted to those under age 30, ACA, § 1302(e)). *See* 45 C.F.R. § 155.605(g)(2). (*Accord* MTD 12-13.) Yet, by purporting to make federal subsidies "allowable" in states without their own Exchanges, the IRS Rule disqualifies numerous people in those states from obtaining those certificates of exemption, by reducing their "net" cost of coverage to below 8% of their projected household income.

Employer Mandate. The availability of subsidies also effectively triggers the "assessable payments" used to enforce the Act's "employer mandate." The Act provides that any employer with 50 or more full-time employees will be subject to an assessable payment if it does not offer them the opportunity to enroll in affordable, employer-sponsored health coverage. But the payment is only triggered if at least one employee enrolls in coverage for which "an applicable premium tax credit … is allowed or paid." 26 U.S.C. § 4980H. Thus, if no federal subsidies are available in a state because that state has not established its own Exchange, then employers in that state may offer their employees non-compliant coverage, or no coverage at all, without being threatened with this liability. Given that the IRS Rule authorizes subsidies in all states, however, it exposes businesses in those states to the employer mandate and its assessable payments.

C. The IRS Rule Injures the Individual and Business Plaintiffs.

Plaintiffs are individuals residing and businesses operating in states that have declined to establish their own Exchanges, and they exemplify the injuries inflicted by the IRS Rule.

Individuals Disqualified from Exemption. Plaintiff David Klemencic will be 54 years old on January 1, 2014, and is an unmarried citizen of West Virginia, which has not established its own Exchange. (Exh. A, Decl. of David Klemencic ("Klemencic Decl."), ¶¶ 1-3.) He does not wish to buy comprehensive health coverage for 2014. (*Id.* ¶ 8.) Indeed, he opposes government handouts and would not want such coverage even if the government would pay for it. (*Id.*)

Klemencic is only subject to the individual mandate penalty because of the IRS Rule. He projects that his household income will be $20,000 in 2014. (*Id.* ¶ 4.) Absent any subsidy, the cost of his coverage (through the cheapest "bronze" plan available to him) will exceed 8% of that projected income. (*Id.* ¶ 6; Exh. B, Aff. of Prof. Daniel Kessler ("Kessler Aff."), ¶ 21.) He would therefore qualify for the unaffordability exemption to the individual mandate penalty and be entitled to a "certificate of exemption." 45 C.F.R. § 155.605(g)(2). The subsidy offered by

the IRS Rule, however, guarantees that he need pay no more than 5.1% of his total income toward premiums. *See* 26 U.S.C. § 36B(b)(2)(B), (3)(A)(i). Since 5.1% is less than 8%, the Rule thus disqualifies Klemencic from the exemption (Kessler Aff. ¶ 22), and precludes him from buying catastrophic insurance for 2014, forcing him instead to either pay the individual mandate penalty or buy comprehensive coverage. (Klemencic Decl. ¶ 7.)

The other individual plaintiffs, Jacqueline Halbig, Carrie Lowery, and Sarah Rumpf, allege that they are injured in the same fashion as Klemencic. (Compl. ¶¶ 12, 14-15.)

Businesses Exposed to Employer Mandate Liability. Plaintiffs GC Restaurants ("Golden Chick") and the Olde England's Lion & Rose parties operate in Texas, which has not established its own Exchange. (Exh. C, Decl. of J. Allen Tharp ("Tharp Decl."), ¶ 1.) These businesses are under common control and so are treated, under the ACA, as one employer with over 350 full-time employees. (*Id.*) They do not offer health coverage to all such employees. (*Id.* ¶ 4.)

These businesses are only subject to the employer mandate because of the IRS Rule. That Rule allows their employees to collect subsidies through Texas's federally established Exchange; and a single employee's receipt of a subsidy will trigger potentially huge assessable payments under the employer mandate. 26 U.S.C. § 4980H(a), (c)(1). It is virtually certain that one or more employees will collect a subsidy, given that (for example) Golden Chick alone has 18 full-time employees paid wages that make them eligible for subsidies. (Tharp Decl. ¶ 3.)

To protect against the substantial risk that noncompliance would trigger massive liability, these businesses plan to offer some employees health insurance and reduce others' hours so that all full-time employees have compliant coverage. (*Id.* ¶ 5.) Sponsoring coverage is expensive, and reducing employee hours also costs the businesses money because they must hire and train more employees. (*Id.*) The businesses are currently making the financial plans necessary to

comply fully with the employer mandate, even though that mandate was recently deferred by unilateral executive action until 2015. (*Id.* ¶ 6.) The businesses are also suffering immediate harm to their financial strength and fiscal planning by virtue of this liability. (*Id.*)

Plaintiffs Innovare Health Advocates and Community National Bank allege that they are also injured in a similar fashion as these restaurant plaintiffs. (*See* Compl. ¶¶ 16, 18.)

ARGUMENT

I. PLAINTIFFS HAVE STANDING, BECAUSE THE IRS RULE EXPOSES THEM TO THE INDIVIDUAL AND EMPLOYER MANDATE PENALTIES.

Under basic standing principles, the individual and business plaintiffs alike may sue to challenge the IRS Rule. Absent that Rule, the individuals would indisputably be entitled now to certificates exempting them from the individual mandate penalty and entitling them to buy otherwise-inaccessible catastrophic coverage. Because of the Rule, however, they can no longer obtain those certificates, and are forced as a result to purchase comprehensive coverage that they do not want. As for the business plaintiffs, they do not want to offer health coverage to their employees—and would not be penalized for failure to do so, but for the IRS Rule, which renders their employees eligible for the penalty-triggering subsidies. These are classic, concrete injuries caused directly by the IRS Rule, and redressable by this Court's vacatur of that Rule.

A. The IRS Rule Prevents the Individual Plaintiffs from Obtaining Certificates of Exemption from the Individual Mandate Penalty, Which Would Permit Them To Buy Catastrophic Coverage or Forgo All Coverage.

To challenge the IRS Rule, the individual plaintiffs must have standing, which "contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). *First*, they must be suffering "injury in fact," a "concrete and particularized" invasion of their interests. *Id.* *Second*, there must be a "causal connection between the injury and the conduct complained of," *i.e.*, the Rule. *Id.* *Third*, the injury must be redressable by a favorable decision. *Id.* at 561.

Here, the individual plaintiffs' standing is straightforward. Under the IRS Rule, they are no longer able to claim "certificates of exemption" from the ACA's penalty for failure to buy comprehensive health coverage. Since the individuals do not want to buy that coverage, the IRS Rule concretely injures them; and invalidation of the Rule would remedy that harm.

1. David Klemencic. David Klemencic lives in West Virginia, which has not established an Exchange. (Klemencic Decl. ¶ 3.) He does not want to purchase comprehensive health coverage for 2014. (*Id.* ¶ 8.) Under the ACA's individual mandate, however, he must do so, or pay a penalty if he fails to. 26 U.S.C. § 5000A. However, Klemencic is entitled to an exemption if the cost to him of "bronze" insurance would exceed 8% of his "projected annual household income." 45 C.F.R. § 155.605(g)(2) (directing exemptions under such circumstances); 26 U.S.C. § 5000A(e)(1), (5). Moreover, only by obtaining that certificate prior to January 1, 2014, would Klemencic be able to buy catastrophic coverage under the ACA. ACA, § 1302(e) (providing that only individuals who are under 30 or have "certification in effect … that the individual is exempt" are "eligible for enrollment" in catastrophic coverage); 45 C.F.R. § 155.605(g)(2)(v) (requiring exemption application to be made before "last date on which [individual] could enroll in a [plan] through the Exchange").

If not for the subsidy to which he is entitled under the IRS Rule, Klemencic would be entitled to such an exemption. His projected household income for 2014 is $20,000. (Klemencic Decl. ¶ 4.) Accordingly, he would be exempt from the individual mandate penalty—and entitled, now, to a certificate to that effect—if premiums for the cheapest "bronze" plan available to him would cost more than $133.33 per month. He has alleged that they would (*id.* ¶ 6), which suffices at the motion-to-dismiss stage; anyway, the empirical data confirm as much. (*See* Kessler Aff. ¶¶ 5-17, 21.) Indeed, even *current* premiums for Klemencic well exceed that figure,

and 2014 premiums will be higher. (*See id.* ¶ 21.) The Kaiser Subsidy Calculator, which projects premiums based on Congressional Budget Office ("CBO") data, estimates that a bronze plan would cost Klemencic over $450 per month, more than *three times* the cutoff. *See* Kaiser Subsidy Calculator, *available at* http://kff.org/interactive/subsidy-calculator/.

Because of the subsidy which the IRS Rule makes Klemencic eligible for, however, the cost to him of bronze coverage would drop below $133.33 per month. Consequently, he would no longer be eligible for a certificate of exemption, or allowed to buy catastrophic coverage, or permitted to forgo coverage without penalty. 26 U.S.C. § 5000A(e)(1)(a)(B)(ii) (in calculating cost of coverage to determine whether individual is entitled to exemption, cost of premiums is "reduced by the amount of the credit allowable under section 36B," *i.e.*, the federal subsidy). Given Klemencic's income, the subsidy would assure that he not be required to pay more than 5.1% of his income toward his premiums. *Id.* § 36B(b)(2)(B), (3)(A)(i) (tying value of subsidy to percentage of income). (Kessler Aff. ¶¶ 18-20, 22.) By definition, then, a subsidy would reduce his costs to below 8% of income, disqualifying him from the exemption. (*See id.*)

In sum, the IRS Rule disqualifies Klemencic from an exemption that he would otherwise be legally entitled to, preventing him from procuring catastrophic coverage and forcing him to enroll in comprehensive coverage by January 1, 2014, which he does not want to do. That is a concrete, imminent injury, traceable to the IRS Rule, and redressable by a judgment vacating it.

2. Other Individuals. The other individual plaintiffs allege that they are injured in the same fashion, which suffices at the motion-to-dismiss stage. (Compl. ¶¶ 12, 14-15.) Anyway, because the court "need not consider the standing of the other plaintiffs" so long as "standing can be shown for at least one plaintiff," *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996), the Government's motion fails based on Klemencic alone.

B. Contrary to the Government, the Individual Plaintiffs' Injuries Are Not At All Speculative, But Rather Imminent and Certain.

The Government contends that the individuals cannot establish standing because various things are too "speculative." (MTD 16-17.) But Klemencic's injury from the IRS Rule is a mathematical fact. The only relevant variables are his *projected* income (which is known) and the cost to him of bronze-level premiums (which the Government already knows, which can be easily determined based on existing data, and which will anyway be released before this motion is resolved). Given those basic facts, it is indisputable that the IRS Rule disqualifies Klemencic from an exemption to which he would otherwise be entitled, and thus causes him injury.

1. The Government objects that it is "speculative … what the individual plaintiffs' household income levels will be in 2014." (MTD 16.) However, as the regulations provide and the Government concedes, it is "*projected*" income that determines eligibility for a certificate of exemption. 45 C.F.R. § 155.605(g)(2)(i). (MTD 12 (acknowledging that exemptions are "based on [applicant's] projected annual household income").) It could hardly be otherwise, or else one could not know whether he was exempt until the year is *over*, when it is too late. Moreover, the regulations provide that an individual's household income projection for a given year will be considered "verified" if it exceeds the income from his most recent tax return on file. 45 C.F.R. §§ 155.615(f)(2), 155.320(c)(3)(iii). For Klemencic, that condition is met, and so his projection is verified. (Klemencic Decl. ¶ 4.)

In other words, because the Government's decision whether to grant Klemencic an exemption turns on projection of his 2014 income, that *projection* ("speculative" or not) is the legally operative fact. For that reason, even assuming that Klemencic's actual income in 2014 is "speculative," there is nothing speculative about his projected income, and it is that projection, not actual 2014 income, that matters for purposes of obtaining a certificate of exemption.

2. The Government next objects that it is "speculative what insurance options will be available to the individual plaintiffs," because they may "have an offer of coverage through an employer" or "a spouse's employer," such that they would not be eligible for a certificate of exemption even absent the IRS Rule. (MTD 16.) Klemencic, however, is unmarried and self-employed. (Klemencic Decl. ¶¶ 2, 4.) And he has no other coverage options available to him. (*Id.* ¶ 5.) So there is no speculation here at all (except by the Government).[1]

3. The Government further objects that premiums for 2014 are "speculative." (MTD 16.) The only premium that matters for standing purposes, however, is the cost of the cheapest bronze plan available to Klemencic on the federal Exchange in West Virginia: If it exceeds 8% of his projected income, then he would be entitled to a certificate of exemption if not for the IRS Rule. Contrary to the Government's assertion (MTD 16-17), the precise *amount* of his subsidy, which turns on the cost of the "second lowest cost silver plan" available to him, 26 U.S.C. § 36B(b)(2), does not matter here. This is because, as explained, his subsidy is high enough to reduce his out-of-pocket costs to below 8% of his household income and thus disqualify him from the exemption to which he would otherwise be entitled. *See supra*, Part I.A.1.

To be sure, bronze premiums have not yet been *announced* by the Exchange in West Virginia. But the Government already *knows* them. *Early Results: Competition, Choice, and Affordable Coverage in the Health Insurance Marketplace in 2014* (May 30, 2013), *available at*

[1] The Government suggests that Klemencic's allegations are somehow inconsistent with allegations he made in an earlier lawsuit, *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012) ("*NFIB*"). (MTD 19.) There is no inconsistency. There, Klemencic alleged that he was "subject to the ACA's individual insurance mandate." (MTD Exh. A, ¶ 8.) Here, he alleges that, but for the IRS Rule, he would be exempt from the mandate's penalty. (Klemencic Decl. ¶ 6.) As the Supreme Court has observed, "some individuals who are subject to the mandate are nonetheless exempt from the penalty." *NFIB*, 132 S. Ct. at 2580. Klemencic is such an individual. Moreover, the earlier affidavit was filed in 2010, well before West Virginia chose not to create its own Exchange. Accordingly, Klemencic did not then know—as he knows now—that he ought not be eligible for a federal subsidy. Only that newfound ineligibility has the effect of exempting Klemencic from the penalty.

http://www.whitehouse.gov/sites/default/files/docs/competition_memo_5-30-13.pdf (proposed premiums have been submitted but "HHS will not release State-specific rate information until September"). The Government cannot withhold data and then secure dismissal on the grounds that rates are "speculative." They are not *speculative*, just undisclosed. If the Government has information that contradicts Plaintiffs' allegations concerning the effect of bronze plan premiums on Klemencic's eligibility for an exemption, it is obliged to come forward with that information, even after the litigation has proceeded beyond the motion-to-dismiss stage, where Plaintiffs' allegations must be accepted as true, *see Lujan*, 504 U.S. at 561. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). Its failure to do so means that Plaintiffs' allegations are undisputed and must be accepted.

In all events, the Government's failure to dispute Plaintiffs' "speculation" merely confirms what is obvious: When bronze premiums are disclosed in approximately 6 weeks, they will plainly exceed 8% of Klemencic's income. The Government's own public estimates establish this basic, indisputable fact. The CBO has projected premiums based on the age, smoking/non-smoking status of the individual, and actuarial value of the coverage. Based on those projections, the Kaiser Subsidy Calculator confirms that bronze premiums for Klemencic would *well* exceed 8% of his income, and so he would be entitled to an exemption absent the IRS Rule. *See supra*, Part I.A.1. Moreover, Professor Daniel Kessler, an expert in health economics, has analyzed the data and reached the same, firm conclusion. (Kessler Aff. ¶¶ 5-17, 21.)

Anyway, the final rates will be *disclosed* in September, so Klemencic's allegations about his premiums will be indisputably confirmed in a matter of weeks. If the Court has any doubt, it should simply wait until then and see for itself. *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 73 (1993) (O'Connor, J., concurring) (observing that ripeness depends on facts as they are

"now," "rather than at the time of the initial complaints"); *Scott v. Germano*, 381 U.S. 407, 409 (1965) (per curiam) (directing court to "retain jurisdiction" until challenge becomes ripe). That would obviously make more sense than requiring Plaintiffs to refile this identical suit.

4. Finally, the Government says it is "speculative whether the cost of (subsidized) bronze coverage will be greater than the cost of (unsubsidized) catastrophic coverage" (MTD 18), apparently suggesting that the individual plaintiffs may be "better off" buying (subsidized) comprehensive coverage if catastrophic coverage turns out to be costly.

The cost of catastrophic coverage is irrelevant for standing purposes. First, and most obviously, the IRS Rule *precludes* Klemencic from buying catastrophic coverage, *see supra*, Part I.A.1, so its cost is beside the point. In any event, the IRS Rule injures Klemencic by subjecting him to a mandate to purchase a product (comprehensive coverage) that he does not want. That is a classic, concrete injury-in-fact, precisely the injury that supported standing in *NFIB*. *See also NCAA v. Califano*, 622 F.2d 1382, 1389 (10th Cir. 1980) ("Compulsion by unwanted and unlawful government edict is injury *per se*."). More generally, preventing Klemencic from purchasing catastrophic coverage is a restriction on his liberty—and thus an injury-in-fact—whether or not the Government thinks that purchasing it is a bad choice because it appears to be more expensive. The point is that it is *his* choice. *See Wilcox Elec., Inc. v. FAA*, 119 F.3d 724, 728 (8th Cir. 1997) (plaintiffs "suffer the requisite injury simply because their activities are being limited"); *Chevron U.S.A., Inc. v. FERC*, 193 F. Supp. 2d 54, 60–61 (D.D.C. 2002). Taking away Klemencic's right to choose is an injury, particularly because he opposes government handouts and does not want to rely on them. (Klemencic Decl. ¶ 8.)

Moreover, Klemencic will not know the amount of the subsidy until *after* 2014. While "advance payment" determinations are made before the year begins on the basis of *projected*

income, ACA § 1412, if *actual* income turns out to be higher, the taxpayer must repay some or all of the difference. 26 U.S.C. § 36B(f)(2). Thus, Klemencic's subsidy under the IRS Rule is a *contingent*, *uncertain* benefit, while the statutory exemption is a *guaranteed* benefit. Some people may think that exchanging the latter for the former is a good trade, but Klemencic reasonably does not, and he therefore may challenge a regulation forcing him to take it.

C. The Business Plaintiffs Also Have Standing, Because the IRS Rule Threatens Them with Substantial Liability for Failure To Sponsor Employee Coverage.

The individual plaintiffs are not the only ones with standing. Among the plaintiffs in this case are multiple businesses who are exposed to massive penalties under the ACA's employer mandate because the IRS Rule makes their employees eligible for subsidies. To be sure, this Court "need not consider the standing of the [business] plaintiffs," because "standing can be shown for at least one [individual] plaintiff," *Mountain States Legal*, 92 F.3d at 1232. But their standing is clear, and the Government's contrary arguments are without merit.

The business plaintiffs' Article III standing to challenge the IRS Rule is plain. They are suffering a concrete, financial injury caused by the Rule and redressable by its invalidation. *Lujan*, 504 U.S. at 560-61. In particular, GC Restaurants ("Golden Chick") and the Olde England's Lion & Rose parties do not want to sponsor ACA-compliant health coverage for all of their full-time employees. (Tharp Decl. ¶ 4.) Absent the IRS Rule, they would be free to not do so: The ACA's "assessable payments" under the employer mandate are only triggered if at least one full-time employee obtains a subsidy by purchasing coverage on an Exchange. 26 U.S.C. § 4980H(a)(2) (assessable payment if "at least one full-time employee of the applicable large employer has been certified … as having enrolled … in a qualified health plan with respect to which an applicable premium tax credit …is allowed or paid"). Because all of these businesses' employees reside in Texas, which has not established its own Exchange, they would not be

eligible for subsidies if not for the IRS Rule. Accordingly, these businesses would, if not for the IRS Rule, face no risk of incurring penalties under the employer mandate.

Yet, as a result of the IRS Rule, those businesses' employees now *are* eligible for the subsidies. And if even one such employee obtains one, that person's employer will be liable for potentially huge "assessable payments." *See* 26 U.S.C. § 4980H(a), (c)(1). Due to that huge threatened liability, these businesses must bear the substantial cost of sponsoring health coverage for full-time employees. (Tharp Decl. ¶ 5.) Such compliance costs constitute a quintessential injury. *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988) (recognizing standing by business forced by threat of liability "to take significant and costly compliance measures"); *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 480 (D.C. Cir. 1986) (holding suit ripe if challenged rule "would reasonably prompt a regulated industry, unwilling to risk substantial penalties by defying the policy, to undertake costly compliance measures"); *Ass'n of Private Sector Colleges v. Duncan*, 681 F.3d 427, 458 (D.C. Cir. 2012) (finding standing based on compliance costs); *Nat'l Rifle Ass'n v. Magaw*, 132 F.3d 272, 287 (6th Cir. 1997) (same).[2]

D. Contrary to the Government, the Business Plaintiffs' Injuries Are Concrete, Certain, and Redressable.

The Government nonetheless challenges the business plaintiffs' standing. It argues that (i) it is speculative whether any employee of the business plaintiffs will obtain a subsidy and thus trigger the assessable payments; (ii) in any event, the harm here is caused by third parties (namely, the employees), not by the IRS Rule; and (iii) the business plaintiffs' injury cannot be redressed because their employees are not parties. Wrong, wrong, and wrong again.

[2] The other business plaintiffs, Innovare Health Advocates and Community National Bank, are similarly situated (Compl. ¶¶ 16, 18), but—again—because standing need only be established for one party, Plaintiffs rely on Klemencic, Golden Chick, and the Olde England's Lion & Rose parties to defeat the Government's motion and for summary judgment purposes.

1. The Government argues that it is speculative that any particular employee of the businesses would receive a subsidy, even given the IRS Rule, and that their injury is therefore not sufficiently certain to give them standing. (MTD 20.) That is wrong for three reasons.

First, as the Fourth Circuit recognized just last month in *Liberty University v. Lew*, No. 10-2347, 2013 WL 3470532 (4th Cir. July 11, 2013), the business plaintiffs do not need to prove that one of their employees is *certain* to receive a subsidy, because their alleged injury is not the assessable payment they would then incur if they fail to offer coverage. Rather, their injury is the cost of *complying* with the employer mandate—*i.e.*, of sponsoring coverage and of related administrative costs—because they have reasonably decided to comply rather than incur the risk of incurring that massive liability. *See id.* at *6-7 ("Liberty need not show that it will be subject to an assessable payment to establish standing" because "it may well incur additional costs because of the administrative burden of assuring compliance."). In other words, the business plaintiffs have made the reasonable decision to bear the expense of the employer mandate rather than risk liability for violating it if one of their employees obtains a subsidy—as they now can, under the IRS Rule. (Compl. ¶¶ 16-18.) And that compliance cost is certain, not speculative. Under Supreme Court and D.C. Circuit precedent, it suffices. *Am. Booksellers*, 484 U.S. at 392 (standing based on "significant and costly compliance measures"); *State Farm*, 802 F.2d at 480 (injury if rule "would reasonably prompt a regulated industry … to undertake costly compliance measures").[3]

[3] The Government tries to distinguish *Liberty* on the ground that the compliance costs involved in that case—namely, reporting under 26 U.S.C. § 6056—would apply to the business plaintiffs here even if they prevail. (MTD 22 n.4.) But the compliance costs here are the even more substantial costs of *actually sponsoring coverage*, which the businesses would not otherwise bear. Moreover, there are other reporting requirements, such as under 26 U.S.C. § 6055, which apply only to businesses that "provide[] minimum essential coverage" to their employees, *id.*, and plaintiff Golden Chick would *not* be subject to the costs of complying with that reporting requirement absent the IRS Rule, because it will only provide minimum essential coverage under the threat of liability created by the IRS Rule. (Tharp Decl. ¶ 4.)

That compliance injury is particularly obvious here because the ACA *itself* presumes that employers will behave in exactly this way: that is, comply with the employer mandate precisely to avoid the payments triggered if one employee obtains a subsidy. In other words, the Act *enforces* the employer mandate through a penalty triggered by an employee subsidy, reflecting a clear congressional judgment that the potential for such subsidies is more than sufficient to coerce employer compliance. Since the Act presumes that subsidies will induce compliance with the mandate, the Government cannot reasonably argue that such compliance is improbable.

Second, even focusing erroneously on the risk of assessable payments for *noncompliance* (as opposed to the costs of *compliance*), the threat of that liability—while contingent on an employee's receipt of a subsidy—causes immediate harm to the business plaintiffs, by affecting their financial strength and fiscal planning. In *Clinton v. City of New York*, 524 U.S. 417 (1998), the Supreme Court held that such a "contingent liability" sufficed for standing since it "immediately and directly affect[ed] the borrowing power, financial strength, and fiscal planning of the potential obligor." *Id.* at 431. That is also the theory that allowed parties to challenge (ultimately to the Supreme Court in *NFIB*) the ACA's individual mandate *years before* it was certain whether they would be covered by it; the *threat* caused immediate harm by affecting their financial planning and decisions. *See, e.g.*, *Mead v. Holder*, 766 F. Supp. 2d 16, 26 (D.D.C. 2011) ("It is established that the taking of current measures to ensure future compliance with a statute can constitute an injury."); *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 623 (W.D. Va. 2010) ("The present or near-future costs of complying with a statute … can be an injury in fact sufficient to confer standing."); *Goudy-Bachman v. Dep't of Health & Human Servs.*, 764 F. Supp. 2d 684, 692 (M.D. Pa. 2011) ("[Plaintiffs] must engage in financial preparation … in light of the impending effective date of the individual mandate," and thus

suffer "an injury-in-fact that is imminent and the direct result of the individual mandate."). The same reasoning governs here. The businesses have alleged that the threat of liability under the employer mandate is inflicting *current* injury by reducing their financial strength and altering their fiscal decisions. (Tharp Decl. ¶ 6; Compl. ¶¶ 16, 18.) Those current injuries suffice.

Third, and in any event, it is actually virtually certain that, if the business plaintiffs did not sponsor coverage for their employees, at least one such employee would obtain a subsidy. And the test for standing is not absolute certainty anyway, but rather a "substantial probability" of injury. *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) ("Its burden of proof is to show a 'substantial probability' that it has been injured …."); *Am. Petroleum Inst. v. U.S. EPA*, 216 F.3d 50, 63 (D.C. Cir. 2000) (per curiam). (While the Government cites *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), for the proposition that standing requires a "certainly impending" injury, *Clapper* further clarifies that it suffices to show a "'substantial risk' that the harm will occur." *Id.* at 1150 n.5.)

The business plaintiffs easily satisfy that standard. Plaintiff Golden Chick, to take one example, has approximately 18 employees paid at wages that render them eligible for a subsidy. (Tharp Decl. ¶ 3.)[4] While it is *theoretically possible* that *all* of these individuals would choose to violate the individual mandate rather than buy subsidized insurance, the "substantial probability" is plainly otherwise. *Cf. Florida ex rel. McCollum v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1147 (N.D. Fla. 2010) ("If the defendants' position were correct, then courts would essentially *never* be able to engage in pre-enforcement review.").

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[4] W-2 income does not always equal household income, of course, but the IRS has recognized in a related ACA context that it is reasonable for employers, who lack perfect information, to assume that it does. *See* 26 C.F.R. § 54.4980H-5(e)(2)(ii). Moreover, of these 18 eligible employees, 11 are not married and therefore are highly unlikely to have any other source of household income and certain not to have "coverage offered by the taxpayer's spouse's employer" (MTD 20). (Tharp Decl. ¶ 3.)

2. The Government also advances the argument that, even if the business plaintiffs are injured, that injury is caused by the acts of third parties—namely, the employees who obtain subsidies and thereby trigger the assessable payments—not by the IRS Rule. (MTD 20-21.) Again, this argument is fatally flawed because it focuses on the wrong injury: the penalties for noncompliance, rather than the costs of compliance.

Anyway, under binding precedent, the argument is wrong. "Both the Supreme Court and this [D.C.] circuit have repeatedly found causation where a challenged government action *permitted* the third party conduct that allegedly caused a plaintiff injury, when that conduct would have otherwise been illegal." *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 442 (D.C. Cir. 1998) (en banc); *accord Tel. & Data Sys., Inc. v. FCC*, 19 F.3d 42, 47 (D.C. Cir. 1994) (holding that "injurious private conduct is fairly traceable to the administrative action … if that action authorized the conduct"); *Int'l Ladies' Garment Union v. Donovan*, 722 F.2d 795, 811 (D.C. Cir. 1983) (standing where "relief sought … would make the injurious conduct of third parties complained of in this case illegal"). That is precisely the scenario here: The IRS Rule "permit[s]" and "authorize[s]" the employees to obtain subsidies, which they otherwise would have been unable to do. *Animal Legal*, 154 F.3d at 442; *Tel. & Data*, 19 F.3d at 47. And the relief sought—invalidation of the Rule—would make that conduct impossible.

The Government's cases, in which the injurious private acts could continue even if the agency action ceased, are therefore inapt. *Lujan*, 504 U.S. at 571 (no standing where challenged government funding supplied "only a fraction of the funding" for private projects that were causing injury); *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 939 (D.C. Cir. 2004) (no standing where appellants could not show that "educational institutions whose choices lie at the root of [their] alleged injuries will behave any differently … if appellants prevailed").

To be sure, the business plaintiffs' injury arises through two steps: promulgation of the IRS Rule, followed by receipt of a subsidy pursuant to that Rule. But "mere indirectness of causation is no barrier to standing, and thus, an injury worked on one party by another through a third party intermediary may suffice." *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 705 (D.C. Cir. 1988). And, as shown above, the notion that at least one of the businesses' employees will obtain a subsidy is hardly speculative; to the contrary, given the individual mandate and the employees' incomes, it is virtually certain—and certainly substantially probable.

3. The Government further submits that the business plaintiffs lack standing because their injury "would not be redressable in this action" because no judgment by this Court "could bind … the employees of the employer plaintiffs" and so "could not prevent those plaintiffs' employees from seeking premium tax credits." (MTD 21.) This nonsensical argument fundamentally misconceives Plaintiffs' claim and the requested relief.

The business plaintiffs are not trying to bind their employees. They are trying to bind *the Government*—to vacate the IRS Rule that purports to render the employees eligible for subsidies. *See* 5 U.S.C. § 706(2) (authorizing courts to "hold unlawful and set aside" agency regulations); Compl. 15. That is the typical relief in an APA suit: "When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated." *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989). This relief would completely redress the injuries inflicted by the IRS Rule, regardless whether it is accompanied by an injunction precluding employees from *seeking* the (now-invalid) subsidies. Without the IRS Rule, the businesses' employees would not be *eligible* for subsidies; the Rule is what purports to authorize those subsidies; if it is vacated, there would no basis for providing them. It therefore does not matter that the employees are not parties here, because they cannot obtain subsidies unless the

IRS provides them—and this Court, by vacating the IRS Rule, will preclude the IRS from doing so. *See Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 17–18 (D.D.C. 2004) (holding that it is "entirely appropriate" for court to furnish "[g]overnment-wide injunctive relief"). Put another way, this suit does not need to stop *employees* "from *seeking* premium tax credits" (MTD 21 (emphasis added)), because it would stop the *Government* from *providing* those credits.

II. THERE ARE NO PRUDENTIAL STANDING BARRIERS TO THIS SUIT.

The Government submits that Plaintiffs cannot pursue this suit even if they are concretely injured, due to purported "prudential" doctrines. (MTD 22-28.) It claims that Plaintiffs fall outside the "zone of interests" protected by the relevant ACA provisions because they dispute the IRS's atextual construction thereof; and that the business plaintiffs are barred because they are seeking to affect whether third parties—their employees—are eligible for tax credits. Both arguments are flatly wrong. In fact, prudential concerns powerfully *favor* adjudicating the legality of billions in subsidies before they are disbursed (and may need to be clawed back).

A. Plaintiffs Are Not Barred from Obtaining Judicial Review Simply Because They Disagree with the Government About Congressional Intent.

In rare cases, parties who may technically be injured by agency action are nonetheless so remote from the interests Congress was advancing in the relevant statute that Congress could not have intended to allow them to sue to enforce the law. Under prudential standing doctrine, the plaintiff's interest must be "arguably within the zone of interests to be protected or regulated by the statute." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). The Supreme Court has emphasized that this test "is not meant to be especially demanding." *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 399 (1987). In applying it, "the benefit of any doubt goes to the plaintiff." *Match-E-Be-Nash-She-Wish Band v. Patchak*, 132 S. Ct. 2199, 2210 (2012).

1. The Government makes the almost-comical assertion that Plaintiffs are not within the Act's "zone of interests," and so should be denied any opportunity to be heard on the merits, because they disagree with the Government's view of the Act on the merits. (MTD 23-24.) Plaintiffs argue that the Act is only intended to make insurance more "affordable" for those to whom the Act actually extends subsidies—*i.e.*, citizens in states with state-run exchanges—and that their suit thus advances that "interest" (quite clearly articulated in the Act's plain language). The Government contends that the Court should adopt its contrary merits view—*i.e.*, that the Act's "interest" is to make insurance "affordable" for everyone, even those in states with federal exchanges—and then deem the Plaintiffs outside that "zone of interests." (MTD 24.) But, of course, disagreement with the Government about a statute's true "interests" does not render Plaintiffs outside the "zone of interests" and the Court cannot resolve the merits question of the statute's true interests as a means of denying Plaintiffs the chance to make their merits argument.

To the contrary, the Court must assume for standing purposes that Plaintiffs are correct on the merits. *See, e.g.*, *City of Waukesha v. EPA*, 320 F.3d 228, 235-36 (D.C. Cir. 2003) (per curiam). Thus, the Court must assume, for standing purposes, that denying subsidies for federally run exchanges directly *furthers* the Act's "interests" in limiting the expenditure of taxpayers' money and expanding the number of low-income people satisfying the Act's exemption from the individual mandate penalty. Conversely, the Act *cannot* be deemed, for standing purposes, to serve an "interest" in making insurance "affordable" for everyone in every state and in minimizing the number of poor people eligible for the hardship exemption. In short, since the Government's "zone of interests" argument depends on accepting the Government's merits view, rather than, as is required at this stage, the Plaintiffs' merits position, it is plainly invalid and would turn administrative law on its head.

Plaintiffs challenging agency action *always* dispute the agency's construction or application of the relevant statute and routinely bring suit to enforce putative *limits* on agency authority. On the Government's theory, those plaintiffs would lack prudential standing, because enforcing such limits would not serve the overreaching purposes of the general authorities that the agencies broadly construe. But Congress is just as "interested" in *exemptions* from monetary entitlements and compelled actions as it is in the underlying largesse and mandates. Therefore, parties may sue to enforce those limits so long as their interests are not "f[ar] removed" from the statutory scope. *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 179 (D.C. Cir. 2012). Hence it did not matter that the plaintiff in *Match-E-Be-Nash-She-Wish* wanted to *stop* an acquisition of land for Indians under a statute that generally *authorized* such, because "issues of land use (arguably) f[e]ll within [the statute's] scope." 132 S. Ct. at 2210 n.7. Nor, in *Bennett v. Spear*, 520 U.S. 154 (1997), did it matter that the plaintiffs were not "seek[ing] to vindicate [the statute's] overreaching purpose of species preservation," because their suit *did* serve "another objective" of the Act. *Id.* at 175, 177. So too here: Plaintiffs properly seek to vindicate the congressional interest in *not* granting subsidies in states without their own Exchanges and in *not* subjecting low-income people in those states to the harsh individual mandate penalty.

2. In fact, it is clear that under the lenient prudential standing test, Plaintiffs may sue to enforce the state-established Exchange restriction in § 36B. As to the individual plaintiffs, the Supreme Court and D.C. Circuit have been clear that *subjects* of agency action have prudential standing *per se*. *See Clarke*, 479 U.S. at 399 (zone test only must be met if "plaintiff is not itself the subject of the contested regulatory action"); *Grand Council of Crees v. FERC*, 198 F.3d 950, 955 (D.C. Cir. 2000) (same). Here, the individuals are the direct subjects of the IRS Rule; the Rule purports to make them eligible for subsidies, and that is precisely the action they contest.

For the businesses, it is irrelevant whether "Congress specifically intended to benefit" them by limiting subsidies. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492, 499 (1998). Congress inextricably linked the subsidies to enforcement of the employer mandate, such that employers are effectively regulated by changes to the subsidies and thus at least "arguably" within the zone of interests of the latter. *See PDK Labs., Inc. v. USDEA*, 362 F.3d 786, 791-92 (D.C. Cir. 2004) (finding it "obviously clear" that prudential standing existed where regulation of third party "necessarily regulated" plaintiff); *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 600 (D.C. Cir. 2007) (prudential standing objection "absurd" where agency "effectively regulate[d]" plaintiff). Indeed, the Government *concedes* that the businesses could challenge the IRS Rule in a post-enforcement refund suit; that "would make no sense" if their interests fell outside the statute's scope. *Shays v. FEC*, 414 F.3d 76, 83 (D.C. Cir. 2005).

In short, unlike the very few cases in which courts have found prudential standing absent, the link between Plaintiffs and the statute that the IRS Rule contravenes is not remote, marginal, or unexpected—but rather direct, plain, and obvious from the face of the ACA itself.

B. Plaintiffs May Challenge the IRS Rule Even Though It Grants Tax Credits to Third Parties, as Such Challenges Are Commonplace.

The Government argues that the *business* plaintiffs (and only the business plaintiffs), cannot challenge the IRS Rule's expansion of subsidies because of an allegedly general principle preventing parties from "challeng[ing] the tax liability of another." (MTD 25-28.) Because invalidating the Rule would deprive third parties of tax credits, the Government believes that the business plaintiffs cannot bring this suit. But the Government's alleged general rule does not, in fact, exist. To the contrary, there are legions of cases allowing challenges to the tax treatment of third parties—when the challengers, like Plaintiffs here, had Article III standing and invoked an appropriate cause of action.

1. The Government's argument that there is a categorical rule against challenges to laws and rules granting tax credits to others is wholly refuted by the countless cases in which the Supreme Court, this Court, and other federal courts have entertained precisely such challenges.

As the Court observed in *Hibbs v. Winn*, 542 U.S. 88 (2004), "numerous federal-court decisions … have reached the merits of third-party … challenges to tax benefits." *Id.* at 110. *Hibbs* was a challenge to "income-tax credits for payments to organizations that award … tuition grants to children attending private schools," *id.* at 92, and the Court allowed it. Other examples abound. *See, e.g.*, *Byrne v. Pub. Funds for Pub. Schs. of N.J.*, 442 U.S. 907 (1979) (challenge to tax deduction for third parties); *Franchise Tax Bd. of Cal. v. United Americans for Pub. Schs.*, 419 U.S. 890 (1974) (challenge to law reducing taxes for third parties); *Comm. for Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (challenge to tax benefits for third parties); *Grit v. Wolman*, 413 U.S. 901 (1973) (challenge to tax credits for third parties); *Finlator v. Powers*, 902 F.2d 1158 (4th Cir. 1990) (challenge to tax exemption for third parties); *Minn. Civil Liberties Union v. Roemer*, 452 F. Supp. 1316 (D. Minn. 1978) (challenge to law allowing tax deduction by third parties). There is also direct precedent in this Court. *McGlotten v. Connally*, 338 F. Supp. 448, 453-54 (D.D.C. 1972) (allowing challenge to income-tax exemptions for third parties); *Tax Analysts & Advocates v. Shultz*, 376 F. Supp. 889, 892 (D.D.C. 1974) (allowing challenge to IRS revenue ruling allowing third parties to avoid federal gift tax).

2. None of the Government's cases remotely holds that there is any rule prohibiting a challenge like this. Some expressly decline to address the issue. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 36 n.14 (1976) ("express[ing] no opinion" on the argument); *Am. Soc'y of Travel Agents v. Blumenthal*, 566 F.2d 145, 150 n.3 (D.C. Cir. 1977) (same); *Apache Bend Apts., Ltd. v. United States*, 987 F.2d 1174, 1177 (5th Cir. 1993) (en banc) (finding it

"unnecessary for us to decide" whether individual may litigate "another taxpayer's tax liability and, if so, under what circumstances," as plaintiffs "concede[d]" that their injury "cannot be redressed by the relief they seek" and thus obviously lacked standing). In others, the third-party challenges are rejected but on *other*, unexceptional grounds. *See Allen v. Wright*, 468 U.S. 737, 754-59 (1984) (finding no *Article III* standing to challenge tax exemptions to discriminatory schools because exemptions were not causing injury); *Louisiana v. McAdoo*, 234 U.S. 627 (1914) (in pre-APA case, rejecting suit on *sovereign immunity* grounds). And in other cases, the courts actually *allowed* the third-party challenges to proceed. *See United States v. Williams*, 514 U.S. 527, 538-40 (1995) (rejecting Government's argument that third party's suit was barred); *Women's Equity Action League v. Cavazos*, 879 F.2d 880, 885 & n.3 (D.C. Cir. 1989) (allowing challenge and mentioning Government's alleged rule only in a footnote describing *Allen*).

The Government also cites a few cases holding that, in the context of certain statutory remedies against the IRS, third parties cannot challenge a taxpayer's assessed liability. *See, e.g.*, *First Am. Title Ins. Co. v. United States*, 520 F.3d 1051, 1053 (9th Cir. 2008) (third party may challenge lien under 26 U.S.C. § 7426 but statute "does not let them challenge the assessment"); *Arford v. United States*, 934 F.2d 229, 232 (9th Cir. 1991) (in quiet title action under 28 U.S.C. § 2410, third parties cannot challenge "the merits of the underlying tax assessments"); *United States v. Formige*, 659 F.2d 206, 208 (D.C. Cir. 1981) (per curiam) (third party cannot intervene in IRS suit under 26 U.S.C. § 7401); *see also In re Campbell*, 761 F.2d 1181, 1186 (6th Cir. 1985) (assessment against third party cannot be challenged in challenge to contempt order); 31 U.S.C. § 3729(d) (exempting tax matters from False Claims Act). But whatever the scope of those particular statutes, none applies here, and none of these cases identifies any general rule barring otherwise-proper challenges to tax treatment of others. As shown, there is no such rule.

C. Prudence Counsels Strongly in Favor of Reviewing the IRS Rule Now.

It is ironic that the Government is invoking "prudential" concerns to defer review of the IRS Rule. After all, it concedes that review may permissibly occur at *some* point; it merely wants to pay out billions of dollars in subsidies *before* the facial validity of the Rule is resolved. That is a recipe for chaos. If the IRS Rule is invalidated only *after* "millions of Americans" (MTD 1) receive subsidies, the tax liability of those millions of individuals will either have to be individually revised or (if the funds are not or cannot be recouped) the Government will have lost billions of dollars. Moreover, all of the many individuals and businesses like Plaintiffs who were improperly penalized for violating the ACA's mandate will have to file individual refund suits. All because the Government refuses to submit to a federal adjudication of whether a rule conflicts, on its face, with clear statutory text. It is hard to imagine a *less* "prudent" course.

III. THIS PURELY LEGAL CHALLENGE TO A FINAL AGENCY REGULATION IS UNQUESTIONABLY RIPE FOR REVIEW.

Next in the Government's grab-bag is ripeness. It argues that this suit is not ripe because the IRS "has not yet applied" the IRS Rule to Plaintiffs. (MTD 28.) In other words, the Government believes that pre-enforcement review is barred. For purely legal challenges to final rules, however, pre-enforcement APA review is the *norm*. And such review is particularly appropriate and necessary where, as here, the regulation forces parties to change their behavior to avoid sanctions—and thus would otherwise evade review. Indeed, this presents the *classic* case for pre-enforcement review under seminal Supreme Court precedent.

A. Purely Legal Challenges to Final Rules Are Presumptively Fit for Review Without Waiting for Enforcement in a Particular Context.

"For ripeness purposes, this case is no different from the myriad cases in which [the D.C. Circuit] entertain[s] challenges to an agency's final rule." *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009). The first, principal prong of ripeness doctrine looks to "the

fitness of the issues for judicial decision," *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967); "purely legal" challenges to rules "promulgated in a formal manner" are quintessentially fit, *id.* at 149, 151, even before they have been applied to a concrete case. The D.C. Circuit has thus "often observed that a purely legal claim in the context of a facial challenge … is 'presumptively reviewable.'" *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1282 (D.C. Cir. 2005) (quoting *Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 757 (D.C. Cir. 2003)); *see also Chamber of Commerce v. FEC*, 69 F.3d 600, 604 (D.C. Cir. 1995) ("[A]n agency rule … is typically reviewable without waiting for enforcement," particularly where "[t]he issue presented is a relatively pure legal one that subsequent enforcement proceedings will not elucidate."); *Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 215 (D.C. Cir. 2007).

Conversely, a final regulation is potentially not fit for review if "further factual development is necessary to evaluate the … challenge," *Home Builders*, 417 F.3d at 1282, or "the agency retains considerable discretion to apply the new rule on a case-by-case basis," *Sprint Corp. v. FCC*, 331 F.3d 952, 956 (D.C. Cir. 2003). But here, Plaintiffs' argument is that the IRS Rule contravenes the ACA's text on its face. The compatibility of the Rule with the statutory text "will not change from case to case or become clearer in a concrete setting." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 440 F.3d 459, 464 (D.C. Cir. 2006); *see also Elec. Power Supply Ass'n v. FERC*, 391 F.3d 1255, 1263 (D.C. Cir. 2004) ("No further factual development is necessary," because issue "can be wholly resolved by an analysis of the [statute]."). Nor does the IRS Rule reserve any case-by-case discretion.

Indeed, the Government offers no specific reason why delay would serve the court or the parties. It says that no tax assessments have yet been conducted (MTD 30), but it never explains why waiting for those assessments to occur would add anything relevant to the legal equation.

Unlike in the cited case of *American Petroleum Institute v. EPA*, 683 F.3d 382 (D.C. Cir. 2012), which involved a challenge to a regulation that the agency was proposing to amend, waiting for Plaintiffs to be hit with tax assessments would not "simplify the factual context [or] narrow the legal issues at play," *id.* at 387. If anything, the Government's quote from *American Petroleum* supports ripeness here, because pre-enforcement review of the IRS Rule would avoid "inefficient and unnecessary piecemeal review" in subsequent one-off tax refund actions. *Id.*

The Government also suggests that the Rule's validity may "never arise with respect to" Plaintiffs. (MTD 30.) But as explained, *see supra*, Part I, the IRS Rule injures Plaintiffs *now*, exposing them to penalties for failing to buy or sponsor coverage. Without pre-enforcement review, Plaintiffs would be forced by threat of sanction to comply with those mandates and thereby forfeit their rights to challenge the Rule—a result that ripeness law is meant to avoid.

B. Deferring Review Would Impose Hardship by Forcing Plaintiffs To Bear the Costs of the Mandates or Risk Incurring Penalties for Violating Them.

Because the legal issue presented is fit for review, Plaintiffs "need not show that delay would impose individual hardship to show ripeness." *Sabre, Inc. v. Dep't of Transp.*, 429 F.3d 1113, 1120 (D.C. Cir. 2005). Deferring review would, however, impose precisely the hardship contemplated by *Abbott Labs*, and thus provides an additional reason why this suit is ripe now.

In *Abbott Labs*, the Court held that deferring review would impose hardship, as it would put the plaintiffs "in a dilemma"—they could either "comply … and incur the costs" of doing so, or violate the regulation "and risk prosecution" if their challenge subsequently fails. 387 U.S. at 152. The Court held that this harm sufficed "to render the issue appropriate for judicial review" pre-enforcement. *Id.* Plaintiffs are in exactly the same boat: They can either "comply" with the individual and employer mandates and "incur the costs" of doing so, or violate those mandates and risk losing an after-the-fact challenge to a devastating tax assessment. *Id.* Ripeness law

does not require that parties be put to that Hobson's choice. *See Ciba-Geigy Corp. v. U.S. EPA*, 801 F.2d 430, 434 (D.C. Cir. 1986) (finding "dilemma of choosing between disadvantageous compliance or risking imposition of serious penalties" sufficient for ripeness).

The Government argues that the business plaintiffs would not suffer hardship because the Administration has said that it will decline to enforce the employer mandate until 2015. (MTD 30.) But whether they risk punishment in 2014 or 2015, the point remains that they need review *in advance*—not *after* incurring penalties, which is the Government's only proposed alternative. The Government's position is particularly ironic, given that it previously criticized Plaintiffs for not bringing suit in *2012*. (*See* Dkt. 18, at 6.)[5] Its schizophrenic position vividly illustrates the Government's desperation to avoid any judicial review of its unlawful Rule.

As to the individuals, the Government cites *Reno v. Catholic Social Services, Inc.*, for the proposition that withholding a government benefit does not impose hardship. (MTD 30.) But, unlike in *Reno*, the "benefit" effectively withheld by the IRS Rule is not an affirmative benefit, but an exemption from a *penalty-imposing* mandate. *Cf.* 509 U.S. at 58. The underlying statute here—the individual mandate—is a typical "duty-creating rule," *id.* at 68 (O'Connor, J., concurring in judgment), and the individual plaintiffs therefore suffer the same hardship as in *Abbott Labs*, being forced to either comply or risk penalties. There is no material difference, for ripeness purposes, between a *duty-imposing* regulation and an *exemption-withholding* one. (The Government cites a treatise to suggest otherwise, but the treatise actually criticizes *Reno* by observing that it could potentially be read so broadly as to compel the absurd result that the Government here, absurdly, openly asks for. *See* 2 Richard J. Pierce, Jr., *Administrative Law Treatise* § 15.14 (5th ed. 2010).)

[5] Plaintiffs' point in the language quoted by the Government (MTD 31 n.6) was that in May 2012 it was not clear whether any particular state would establish its own Exchange, and that this suit would have been premature for that reason. Now that all relevant facts are known, however, the suit is ripe.

IV. PLAINTIFFS ARE NOT REQUIRED TO VIOLATE THE LAW AND INCUR PENALTIES BEFORE THEY MAY BRING THEIR CHALLENGE.

In a similar vein, the Government argues that Plaintiffs cannot use the APA to challenge the final IRS Rule because they purportedly have an alternative remedy—"an action for a tax refund." (MTD 32.) That is, Plaintiffs should violate the individual and employer mandates, pay the penalties, and then sue for *refunds* of those penalties. That argument flies in the face of the foundational premise of modern administrative law: that, unless a statute specifically provides otherwise, parties may challenge ripe agency regulations *before* they are enforced against them. There is nothing to the Government's contrary contention that pre-enforcement challenges are barred just because a post-enforcement remedy is available.

1. Indeed, the flaw in the Government's argument is clearly illustrated by the Anti-Injunction Act ("AIA"), which *specifically and expressly* forbids pre-enforcement suits to enjoin tax collection or assessment. 26 U.S.C. § 7421(a). The whole point of that statute is to foreclose pre-enforcement review, such that "the legal right to the disputed sums be determined in a suit for refund." *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7 (1962). That law would be completely unnecessary if the Government were correct that a refund suit is always an adequate remedy precluding pre-enforcement relief. (And, if the Government were correct, suits falling within *exceptions* to the AIA would *still* not be justiciable—which is clearly false. *See, e.g.*, *id.*) Below, Plaintiffs explain why the AIA itself does not bar this suit. *See infra*, Part V. For present purpose, the relevant point is that the existence of the AIA clearly proves that there is no general background rule relegating plaintiffs to refund actions.

Further confirming that reality is the fact that numerous federal courts—including the Supreme Court—have over the past few years adjudicated numerous pre-enforcement challenges to provisions of the ACA, including direct challenges to the individual and employer mandates.

See, e.g., *Nat'l Fed'n of Indp. Business v. Sebelius*, 132 S. Ct. 2566 (2012) ("*NFIB*") (individual mandate); *Liberty Univ.*, 2013 WL 3470532 (employer mandate); *Ass'n of Am. Physicians & Surgeons, Inc. v. Sebelius*, 901 F. Supp. 2d 19 (D.D.C. 2012) (both mandates). If plaintiffs may *directly* challenge these mandates without violating them and seeking refunds, then *a fortiori* Plaintiffs may challenge the IRS Rule, which authorizes subsidies that *indirectly* trigger those mandates. *See Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2013 WL 3216103 (10th Cir. June 27, 2013) (en banc) (allowing challenge to HHS regulation enforced through tax penalties).

2. Conceptually, the Government is wrong because post-enforcement remedies are *not* "adequate." They require the party to bear the risk of suffering penalties simply to obtain judicial review. Pre-enforcement review under the APA is designed precisely to free parties from those dilemmas. *See Abbott Labs.*, 387 U.S. at 152 (review where parties faced "dilemma" of complying or "risk[ing] prosecution"); *Ciba-Geigy*, 801 F.2d at 434 (review where party must choose "between disadvantageous compliance or risking imposition of serious penalties"); *Investment Annuity, Inc. v. Blumenthal*, 609 F.2d 1, 8 (D.C. Cir. 1979) (APA "embod[ies] a presumption in favor of judicial review that extends … even to pre-enforcement actions"). Indeed, precluding pre-enforcement review may even violate the Constitution. *Ex parte Young*, 209 U.S. 123, 148 (1908) ("[T]o impose upon a party … the burden of obtaining a judicial decision … only upon the condition that if unsuccessful he must suffer imprisonment and pay fines …, is, in effect, to close up all approaches to the courts … and therefore invalid.").

Post-enforcement remedies are therefore not adequate alternatives to pre-enforcement remedies, and existence of the former does not preclude resort to the latter (absent a statute like the AIA). The Government's cases are simply *administrative exhaustion* cases, holding that if the judicial relief sought could first be sought from the agency, such remedies must be

exhausted. *E.g.*, *Darby v. Cisneros*, 509 U.S. 137 (1993) (sanction could not be reviewed by court until administrative appeal exhausted). But invalidation of the IRS Rule *cannot* be sought from an agency. None of the cases remotely holds that pre-enforcement review in an otherwise-ripe case is barred if—as is always true—the party could violate the law and seek an after-the-fact remedy. In fact, *Bowen v. Massachusetts* rejected as "unprecedented" the Government's argument that a damages action was "an adequate substitute for prospective relief." 487 U.S. 879, 904-05 (1988); *see also Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012) (unanimously finding alternative remedy inadequate where party forced to accrue "potential liability" in interim). A potential tax refund in 2015 or 2016 is no more adequate for Plaintiffs here.[6]

3. The inadequacy of an after-the-fact refund suit is particularly obvious for the individual plaintiffs, who may not obtain the certificates of exemption needed to buy catastrophic coverage because of the IRS Rule. No refund suit could remedy that injury. Recognizing this, the Government says that they still cannot sue until they actually apply for exemptions and appeal the denials through "procedures that have not yet been finalized"; only then may they return to court with precisely the same claim. (MTD 33 n.7.) Thankfully, administrative law is not that burdensome and inefficient. For one thing, the individuals are not asking this court to *award* exemptions, only to enjoin a rule blocking them, and so exhaustion doctrine is inapposite.

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[6] Moreover, the statutory refund procedure that the Government suggests for the business plaintiffs would not help them. (MTD 33.) The statute directs the Government to create a scheme for "repayment" of an assessable payment if it was "based on the allowance or payment of an applicable premium tax credit … [and] such allowance or payment is subsequently disallowed." 26 U.S.C. § 4980H(d)(3). That could help the businesses only *after* a court—like this one—concluded that the IRS Rule was invalid and accordingly "disallowed" the tax-credit subsidies to the businesses' employees. But the remedy does not purport to allow the businesses to directly challenge the allowance of a subsidy to their employees. In other words, it creates a remedy "where its employee's Section 36B tax credit is disallowed" (MTD 34), but not a remedy to disallow the tax credit in the first place. For that, a suit like this one is necessary.

The Government also cites cases, like *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1 (2008), about prerequisites to tax refund suits under 28 U.S.C. § 1346. (MTD 33.) But Plaintiffs are not pursuing a tax refund suit—and, as shown, do not have to—so these prerequisites are irrelevant.

See Ass'n of Flight Attendants v. Chao, 493 F.3d 155, 158 (D.C. Cir. 2007) (exhaustion required where party "may petition the agencies directly for the relief they seek in this lawsuit"). For another, a "remedy for denial of action that might be sought from one agency [HHS] does not ordinarily provide an 'adequate remedy' for action already taken by another agency [IRS]." *Sackett*, 132 S. Ct. at 1372. And anyway, because the IRS Rule renders Klemencic legally *ineligible* for the exemption, applying for it "would be futile" and is therefore not necessary. *See Ass'n of Flight Attendants*, 493 F.3d at 159.

V. THE BUSINESS PLAINTIFFS ARE NOT BARRED FROM BRINGING SUIT BY THE ANTI-INJUNCTION ACT.

With respect to the business plaintiffs, the Government further argues that their claim is barred by the Anti-Injunction Act ("AIA"), which prohibits suits "for the purpose of restraining the assessment or collection of any tax." 26 U.S.C. § 7421(a). (*See* MTD 35-37.) This issue is of no relevance except in the unlikely event that the Court concludes that *only* the business plaintiffs have standing, because there is no claim that the AIA bars the individuals' suit.

In any event, the Government's AIA argument is meritless. *First*, the only court to have addressed the issue has concluded that the employer mandate's "assessable payments" are not taxes under the AIA, which renders that statute inapplicable. *Second*, even if the payments were taxes under the AIA, this case is plainly not "for the purpose of restraining the assessment or collection of any tax." To the contrary, it is an APA suit for the purpose of invalidating the IRS Rule, which grants a *subsidy*. Any tax consequences of that relief are just incidental—the sort of downstream, collateral consequences that may arise from *any* litigation. *Third*, the purposes of the AIA would be *disserved* by its novel application in this context. *Fourth* and finally, a long-recognized equitable exception to the AIA is classically applicable here, given that the Government has no hope of success on the merits.

A. The Government's Premise Is Wrong, Because the Employer Mandate's "Assessable Payments" Are Not Taxes Under the AIA.

The Government argues that this case should be treated as a suit to enjoin a "tax," namely the "assessable payments" imposed by the ACA for violation of the employer mandate. But the Government's basic premise fails: The only court to have addressed the issue—the Fourth Circuit—squarely held that the employer mandate's assessable payments are *not* taxes for AIA purposes. So even if this suit were for the purpose of restraining them, it would not be barred.

In *Liberty University*, the Fourth Circuit faced a challenge to the employer mandate, and the Government raised an AIA defense. The court observed that "the AIA applies only where Congress intends it to," and so the dispositive question was whether Congress intended the assessable payments to be treated as a "tax" for AIA purposes. 2013 WL 3470532 at *4. To resolve that question, the court looked to the ACA's text, which "initially identifies the employer mandate exaction as an 'assessable payment,'" not a "tax," and proceeds to so characterize it "six more times." *Id.* at *5. "Because Congress initially and primarily refers to the exaction as an 'assessable payment' and not a 'tax,' the statutory text suggests that Congress did not intend the exaction to be treated as a tax for purposes of the AIA." *Id.* Confirming that evidence, Congress "did not otherwise indicate that the employer mandate exaction qualifies as a tax for AIA purposes." *Id.* And it would be "anomalous" if an individual could challenge the individual mandate pre-enforcement (as in *NFIB*) yet an employer "could bring only a *post*-enforcement suit challenging that provision." *Id.* at *6. It is far more likely that Congress intended the mandates to be treated equivalently, with neither subject to the AIA bar. *See id.*

Liberty University's straightforward reasoning is persuasive, and no court has concluded otherwise. It should be followed here. Because the employer mandate's assessable payments were not intended to be subject to the AIA, this suit is clearly not barred.

B. In Any Event, the Anti-Injunction Act Does Not Apply by Its Terms Because This Suit Does Not Seek To Invalidate or Enjoin the Employer Mandate.

After urging this Court to reject the Fourth Circuit's opinion in *Liberty University*, the Government spends only one sentence explaining why, even if the assessable payments are taxes for AIA purposes, this is a suit for the purpose of restraining those taxes. (MTD 37.) It says that because a ruling for the business plaintiffs "would necessarily preclude" subjecting them to the assessable payments, this somehow means that the suit's purpose is to restrain those payments. (*Id.*) That is wrong. The purpose of this suit, and the relief sought by it, is to invalidate the IRS Rule, which authorizes *subsidies*. The fact that the Rule's invalidation will prevent certain individuals from obtaining subsidies and so, in turn, will prevent the businesses from incurring the assessable payments, is irrelevant to the AIA.

1. The text of the AIA limits its force to suits that whose "purpose" is to "restrai[n] the assessment or collection" of a tax. 26 U.S.C. § 7421(a). And the D.C. Circuit has repeatedly confirmed that limited scope. "The Anti-Injunction Act only bars suits that seek to restrain the IRS's assessment and collection of taxes." *Seven-Sky v. Holder*, 661 F.3d 1, 9 (D.C. Cir. 2011); *see also Cohen v. United States*, 650 F.3d 717, 724 (D.C. Cir. 2011) (en banc) (holding that AIA "prohibits only those suits seeking to restrain the assessment or collection of taxes"). Accordingly, that court "ha[s] held that the Act does not apply to an IRS regulation that does not, by its terms, pertain to the assessment or collection of taxes." *Seven-Sky*, 661 F.3d at 9 (citing *Foodservice & Lodging Inst., Inc. v. Regan*, 809 F.2d 842 (D.C. Cir. 1987) (per curiam)). Nor does it preclude "other claims seeking to enjoin the IRS, regardless of any attenuated connection" to taxes. *Cohen*, 650 F.3d at 727; *see also McGlotten*, 338 F. Supp. at 452-54 (challenge to IRS grant of tax exemption). In short, precedent "does not support reading the AIA to reach all disputes tangentially related to taxes. Quite the opposite." *Cohen*, 650 F.3d at 727.

Even if the employer mandate's assessable payments were "taxes," the AIA would not apply to this suit because it does not "seek to restrain the IRS's assessment and collection" of such. *Seven-Sky*, 661 F.3d at 9. In the Complaint, Plaintiffs seek "a declaratory judgment that the IRS Rule is illegal under the Administrative Procedure Act, and injunctive relief barring its enforcement," not a declaration or injunction restraining the employer mandate. (Compl. ¶ 8.) And the IRS Rule, of course, has nothing to do with assessing or collecting taxes. Rather, it concerns *subsidies* under the ACA. Invalidating the Rule thus only restrains granting a subsidy, not collecting a tax.[7] As in *Cohen* and *Foodservice & Lodging*, the challenge here is to a distinct regulation with no direct tax significance. This suit is thus outside the AIA's scope.

This point is so obvious that even the Government does not contend that the AIA bars the *individual* plaintiffs' claim, only that of the *business* plaintiffs. Yet the individual and business plaintiffs are pursuing *exactly the same claim*. Obviously, a claim cannot seek to restrain one thing when articulated by one plaintiff, but something else when articulated by another.

2. The Government conclusorily argues that the *effect* of the suit would be to prevent the assessable payments from becoming due, and that this suffices for AIA purposes. (MTD 37.) But the AIA is not concerned with downstream effects, only with the suit's direct object. It is irrelevant for AIA purposes that success in the suit would have the subsequent consequence of reducing taxes. The AIA applies to suits with the "*purpose*" of "*restraining*" taxes, not those with the "*effect*" of "*reducing*" them. Tellingly, the Government does not cite a *single case* that has applied the AIA to bar a challenge based merely on downstream tax *consequences*.

[7] The subsidies are, in fact, provided in the form of tax credits. But only *taxes*, not tax *credits*, fall within the scope of the AIA, as the Government does not dispute. *See Hibbs*, 542 U.S. at 93 ("In decisions spanning a near half century, courts in the federal system, including this Court, have entertained challenges to tax credits authorized by state law, without conceiving of [the Tax Injunction Act ("TIA"), the analogue to the AIA for state taxes] as a jurisdictional barrier."); *see id.* at 102-03 (observing that TIA was based on AIA and that latter was never understood to restrict challenges to tax *reducing* measures).

The only authority that the Government cites is *Bob Jones University v. Simon*, 416 U.S. 725 (1974), involving an organization challenging the IRS's revocation of its tax-exempt status. But in that case, the suit's direct object was, quite clearly, to interfere with the collection and assessment of taxes—namely, the taxes to be paid by the organizations' donors if the tax-exempt status was denied. *See id.* at 739 ("[P]etitioner seeks to restrain the collection of taxes from its donors."). Moreover, because there is no material difference between forcing the IRS to grant tax-exempt status to an organization and restraining the IRS from rejecting a donor's tax deduction for donations to the organization, it is undeniably true that, at a minimum, "challenges to IRS letter-rulings revoking tax-exempt status are *inextricably linked* to the assessment and collection of taxes." *Seven-Sky*, 661 F.3d at 10. This, indeed, was the "crucial" reasoning of *Bob Jones*. *Id.* By contrast, the businesses here are seeking to enjoin federal subsidies, which have obvious, concrete effects outside the tax sphere and cannot remotely be described as "inextricably linked" to tax collection. *Id.*

The Government's error is well illustrated by the recent Tenth Circuit decision in *Hobby Lobby Stores*, 2013 WL 3216103, which involved a challenge to an HHS regulation requiring employer-sponsored health coverage to include contraceptives. *See* 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012). Hobby Lobby sought to enjoin the regulation and thereby to shield itself from taxes, 26 U.S.C. § 4980D(b)(1). *Hobby Lobby*, 2013 WL 3216103, at *5. Yet the en banc court *unanimously* held that the AIA posed no barrier: "[T]he AIA does not apply to every lawsuit 'tangentially related to taxes,'" *id.* at *7 (citing *Cohen*, 650 F.3d at 727), and the suit was only "seek[ing] to enjoin the enforcement of one HHS regulation." *Id.* "In other words, Hobby Lobby … [is] not seeking to enjoin the collection of taxes" but rather "to enjoin the enforcement, by whatever method, of one HHS regulation that [it] claim[s] violates [its] RFRA rights." *Id.*

The same is true here. The business plaintiffs, like the individual plaintiffs, are "not seeking to enjoin the collection of taxes," only the "enforcement … of one [IRS] regulation that they claim violates their [APA] rights." *Id.* As in *Hobby Lobby*, the actual relief requested is limited to enjoining a regulation that does not assess a tax, so it does not matter that such relief will cause a ripple effect affecting the business plaintiffs' tax liability. Yet in *Hobby Lobby* the Government *conceded* that the AIA did not apply. *Id.* at *8. It is inexplicable why the Government did not make the same concession in this materially identical case.[8]

Expanding the AIA to encompass any suit with tax *consequences* would be a novel and dramatic change in the law, preventing judicial review in a broad class of cases. But the AIA is concerned only with actions that directly interfere with the IRS's tax-collection work. This suit would clearly not impose any such interference.

C. The Purposes of the Anti-Injunction Act Would Be Undermined by Its Extension to This Context.

The AIA's fundamental purposes similarly demonstrate that it does not bar this suit. *First*, because this suit seeks to prevent the Government from paying out billions in subsidies to individuals who are not eligible for those funds under the statute, it obviously does not interfere with "the Government's ability to *collect* a consistent stream of revenue." *NFIB*, 132 S. Ct. at 2582 (emphasis added). Just the opposite. Accordingly, the AIA should not be applied here. *See McGlotten*, 338 F. Supp. at 453 (refusing to apply AIA because suit did not "seek to limit the amount of tax revenue collectible"). *Cf. Dunn v. Carey*, 808 F.2d 555, 558 (7th Cir. 1986) (describing analogous Tax Injunction Act as motivated by concern "that federal judgments were emptying state coffers," not by concern over suits seeking "to collect additional taxes").

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[8] The only difference is that this case involves an IRS regulation as opposed to an HHS regulation, but D.C. Circuit precedent establishes that such a distinction does not matter. *See Foodservice & Lodging Inst.*, 809 F.2d 842 (holding AIA inapplicable to suit challenging an IRS regulation).

Second, while postponing judicial review of taxes generally furthers the public interest by ensuring that government can operate while challenges are pending, deferring review here—until 2016, after 2015 taxes are paid—would cause chaos. Millions of people are making decisions *now* about what coverage to buy, and will do so based on the IRS Rule's promise of subsidies. If the Rule turns out to be invalid, either the individuals wrongly given subsidies will have to pay them back, a logistical nightmare which would unfairly disrupt settled expectations, or else the federal treasury will bear the loss of billions of dollars. Either way, deferring review would "cause serious detriment to the public." *Dows v. City of Chicago*, 78 U.S. 108, 110 (1871).

Third, the usual alternative remedy of an after-the-fact refund suit is not available here. As explained, the businesses intend to comply with the employer mandate; they cannot afford to risk the massive threatened liability for violating it. (Tharp Decl. ¶ 5; Compl. ¶¶ 16, 18.) So they will never be liable for taxes, and so will never be able to seek a "refund." The Supreme Court has held that the AIA does not apply when the alternative "refund" remedy is unavailable. *See South Carolina v. Regan*, 465 U.S. 367, 373 (1984) ("Congress intended the Act to bar a suit only in situations in which Congress had provided the aggrieved party with an alternative legal avenue by which to contest the legality of a particular tax."). That principle fully applies here.

D. Furthermore, Plaintiffs Are the Quintessential Candidates for the Equitable Exception to the Anti-Injunction Act.

In all events, the Supreme Court has recognized an exception to the AIA that classically applies here. *Williams Packing* held that if "under no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable and … the attempted collection may be enjoined if equity jurisdiction otherwise exists." 370 U.S. at 7. The AIA thus "would not apply if the taxpayer (1) was certain to succeed on the merits, and (2) could demonstrate that collection would cause him irreparable harm." *South Carolina*, 465 U.S. at 374.

Both of those prongs are satisfied. As explained in Plaintiffs' summary judgment brief—which the Government, tellingly, refuses to respond to—the ACA's text is unambiguous that subsidies are *only* available for coverage through "an Exchange established by the State under section 1311" of the Act. 26 U.S.C. § 36B(c)(2)(A)(i). If an Exchange was not established by a *state* under *that section*—but by the *federal government* under a *different section*—then no subsidies are available. The IRS's "failure to respect the unambiguous textual limitations" of the statute is "fatal." *Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 490 (D.C. Cir. 2007).

Indeed, agency departure from clear statutory text is the *quintessential* situation in which *Williams Packing* applies. The seminal case upon which the Supreme Court based the exception was *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1932), involving a law defining "oleomargarine," for tax purposes, as including "vegetable-oil annotto." *Id.* at 506-07. But the IRS's regulation "omit[ted] the hyphen and add[ed] a comma," "thus making the phrase to read 'vegetable oil, annotto'"—suggesting that both "vegetable oil" and "annotto" were subject to tax. *Id.* at 508. The AIA was held inapplicable: Such a departure from "clear and definite" statutory text was "without warrant." *Id.* And the D.C. Circuit has similarly suggested that application of the *Williams Packing* exception would be appropriate if an agency "flouted the express terms of the Code." *Investment Annuity*, 609 F.2d at 5.

The other prong of *Williams Packing*—that equity jurisdiction otherwise lies—is plainly met. As explained, the businesses cannot risk being liable for huge assessable payments under the employer mandate if the IRS Rule is somehow upheld. (Tharp Decl. ¶ 5; Compl. ¶¶ 16, 18.) Apart from the AIA, there would thus be no obstacle to enjoining the Rule pre-enforcement. *See supra*, Parts III & IV. The second *Williams Packing* prong requires no more, and so this Court would have jurisdiction over the business plaintiffs' claim even if the AIA applied by its terms.

VI. RULE 19 DOES NOT BAR APA CHALLENGES, LIKE THIS ONE, TO THE VALIDITY OF BROADLY APPLICABLE AGENCY REGULATIONS.

Finally, the Government bizarrely contends that the business plaintiffs' several *hundred* employees are "indispensable" parties to those plaintiffs' claims, because this suit will determine their entitlement to subsidies. (MTD 38-40.) This plainly erroneous and radical interpretation of Rule 19 would preclude all APA challenges to rules affecting people not before the Court, *i.e.*, the vast majority of challenges to generally applicable administrative rules and decisions.

Invalidation of the IRS Rule would, of course, affect *millions* of individuals' entitlement to subsidies. Given that the APA authorizes, and Plaintiffs seek, *across-the-board vacatur* of the unlawful Rule, nothing differentiates the business plaintiffs' employees from those others. Yet surely the Government does not believe that those millions of people are "indispensable" to this case. To the contrary, this type of litigation is commonplace in this Circuit, which has made clear that an APA challenge to a broadly applicable rule does not require joinder of all its beneficiaries, even if they would be harmed by its invalidation. That same rule governs here.

A. The premise of the Government's theory is that the business plaintiffs' employees must be included as parties because they would be affected by a decision in Plaintiffs' favor, by depriving them of subsidies to which, under the IRS Rule, they would be entitled. (*See* MTD 38.) That fundamentally misconceives the operation of the APA and the nature of this suit.

This is a routine APA challenge. Plaintiffs are not asking the Court to enjoin subsidies to *particular* employees but rather—as the APA provides—to "hold unlawful and set aside" the entire Rule, invalidating subsidies for *all* potential claimants. 5 U.S.C. § 706(2); Compl. 15. As the D.C. Circuit has recognized, that is the typical relief in an APA suit. *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001) (explaining that plaintiff who "prevails on its APA claim … is entitled to relief under that statute, which normally will be a vacatur"). Because

vacatur is the remedy, APA plaintiffs necessarily "obtain 'programmatic' relief that affects the rights of parties not before the court." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409-10 (D.C. Cir. 1998) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting); noting that dissent spoke for all Justices on this).

Accordingly, Plaintiffs' success in this suit would invalidate the IRS Rule, affecting not just the business plaintiffs' employees, but *all* Americans in the thirty-four states with federal Exchanges who are made eligible for subsidies under that Rule. In other words, if the business plaintiffs' employees are "indispensable" to this suit, then so are all of those millions of people who are identically situated and who would be identically affected by a decision in Plaintiffs' favor. But Rule 19 obviously does not require their joinder, because that would preclude *all* challenges to regulations benefitting substantial segments of the public. For example, if only the individuals had brought this suit, it would have the same effect on the businesses' employees, yet obviously there would be no argument that those particular employees need be joined.

B. For that reason, in this routine posture of an APA challenge to a broadly applicable regulation, Rule 19 presents no obstacle to broad, programmatic relief. To the contrary, the D.C. Circuit recognizes a "public rights" exception to the rule in cases like this one:

> While the exact contours of the public interest exception have not been defined, the exception generally applies where what is at stake are essentially issues of public concern and the nature of the case would require joinder of a large number of persons. Without the exception, public rights litigation would be severely curtailed because it is often infeasible to join all the persons affected ….

Kickapoo Tribe of Indians v. Babbitt, 43 F.3d 1491, 1500 (D.C. Cir. 1995) (citations and internal quotation marks omitted). The exception has its roots in *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), in which the Supreme Court explained that in proceedings over "public rights," such as administrative litigation, "there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights." *Id.* at 363.

This Court has repeatedly applied the public rights exception in APA cases, with the D.C. Circuit's approval. *See, e.g.*, *Nat'l Wildlife Fed'n v. Burford*, 676 F. Supp. 271, 276 (D.D.C. 1985), *aff'd*, 835 F.2d 305 (D.C. Cir. 1987) (courts "have applied the exception even where disposition could harm the absent parties"); *Swomley v. Watt*, 526 F. Supp. 1271, 1273 (D.D.C. 1981) (applying exception where a *single* nonparty was allegedly necessary); *Natural Res. Def. Council, Inc. v. Berklund*, 458 F. Supp. 925, 933 (D.D.C. 1978), *aff'd*, 609 F.2d 553 (D.C. Cir. 1979) ("To require dismissal of this action which seeks to enforce what are essentially public rights, based upon a failure to join indispensable parties, would effectively preclude such litigation against the government."). This APA case falls squarely within that exception.

C. Moreover, the reasons underlying the public rights exception equally show that Rule 19's elements are not satisfied in an APA challenge to a rule of broad applicability. *First*, contrary to the Government's contention, the absence of the employees in no way prevents this Court from issuing "complete relief among existing parties," Fed. R. Civ. P. 19(a)(1)(A), namely the requested vacatur of the IRS Rule. *See Harmon*, 878 F.2d at 495 n.21. As explained above, *see supra*, Part I.D.3, the businesses can obtain complete relief by precluding the Government from paying subsidies to their employees; it does not matter that the employees would not be bound by any judgment. If the Government cannot *pay* the subsidies, then the employees cannot *receive* them, whether or not they are technically bound by the judgment in Plaintiffs' favor.

Second, once Plaintiffs obtain the "programmatic" relief of vacatur, *id.*, the Government could not be exposed to "a substantial risk of incurring … inconsistent obligations," Fed. R. Civ. P. 19(a)(1)(B)(ii), as the rule purportedly authorizing such obligations would be "set aside," 5 U.S.C. § 706(2). If the IRS Rule were vacated, there would be no plausible basis for an individual in a state with a federal Exchange to sue the Government for a subsidy.

Further, even if the business plaintiffs' employees were somehow deemed "required" under Rule 19(a), they are not "indispensable" under Rule 19(b), and dismissal would therefore not be appropriate. *First*, the absent beneficiaries of the IRS Rule would not suffer "prejudice," Fed. R. Civ. P. 19(b)(1), (2), because it is the duty of opposing counsel's office to "defend against … suits to overturn government policies and programs[] and attacks on the legality of government decisions." U.S. Dep't of Justice Civil Div., Fed. Programs Branch, http://www.justice.gov/civil/fedprog/fedprog_home.html (last visited June 27, 2013). *Cf. Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996) ("Although the allocation of a fixed fund may create a protectable interest in the beneficiaries of that fund, the United States may adequately represent that interest …." (citation omitted)). *Second*, a vacatur issued by this Court would plainly be "adequate," Fed. R. Civ. P. 19(b)(3), in the sense that it would satisfy "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies," *Provident Tradesmen Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968). Finally, if this suit were dismissed under Rule 19, Plaintiffs would have no "adequate remedy" for their injury, Fed. R. Civ. P. 19(b)(4); the post-enforcement remedy that the Government proposes (MTD 40) is plainly inadequate, as it would require the businesses to incur massive liability before allowing them to challenge the IRS Rule. *See supra*, Parts III & IV.

In sum, the Government's Rule 19 argument is meritless. Contrary to D.C. Circuit precedent and the elements of Rule 19, it would prevent any party from challenging the IRS Rule, absent the implausible joinder of millions of people. "Rule 19 was not intended to cause such a result, and courts have not permitted it to do so." *Berklund*, 458 F. Supp. at 933.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' motion to dismiss their Complaint.

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Respectfully submitted,

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