IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACQUELINE HALBIG, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:13-cv-00623-RWR
	)	
KATHLEEN SEBELIUS, in her official capacity as U.S. Secretary of Health and Human Services, *et al.*,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT

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Introduction

The Affordable Care Act provides for premium tax credits that will assist millions of Americans in the purchase of health insurance on the newly-created Exchanges. 26 U.S.C. § 36B. The plaintiffs contend that the Act does not provide for tax credits for participants in federally-facilitated Exchanges. They are simply mistaken, however, in their reading of the Act. Congress made clear that an Exchange established by the federal government stands in the shoes of the Exchange that a state chooses not to establish. *See* 42 U.S.C. § 18041(c)(1). The Treasury Department, accordingly, reasonably interprets the Act to provide for eligibility for the tax credits for individuals in every state, regardless of which entity operates the Exchange.

This case, however, is not the right forum to address this question. The plaintiffs' opposition brief only serves to confirm that their claims are not justiciable. Only one individual plaintiff, David Klemencic, even attempts to show his standing, and even his own calculations estimate that he would pay *nothing* for qualifying coverage on the Exchange. He thus alleges no injury to anything other than his ideological opposition to the receipt of government benefits, which is not a cognizable injury. And the claims of the employer plaintiffs are plainly not redressable. Those plaintiffs fear that they will be assessed with the tax against large employers that fail to provide adequate coverage for their full-time employees, 26 U.S.C. § 4980H, but they could not prevent that assessment without extinguishing the rights of their employees to claim the tax credit under 26 U.S.C. § 36B. That relief cannot be obtained here, and this Court cannot entertain these plaintiffs' request for a purely advisory opinion of their employees' rights.

The lack of Article III standing is only the most glaring of the threshold defects in the complaint; other examples abound. This suit, which seeks to make health insurance more

"unaffordable," directly contradicts Congress's purpose in enacting 26 U.S.C. § 36B, which was to facilitate the purchase of affordable health insurance. The plaintiffs claim they have prudential standing to vindicate the "negative implication" of Congress's decision (in their view) "not to grant a tax credit" to certain persons, but controlling D.C. Circuit precedent, which goes unaddressed by the plaintiffs, prohibits such a claim of prudential standing in a federal tax case. Moreover, the plaintiffs run afoul of the prudential rule that, ordinarily, one may not litigate the tax liability of another. The plaintiffs, surprisingly, deny the existence of this rule, but the principle is well-established, and it bars their claims here.

Moreover, the plaintiffs' claims are neither fit for decision, nor do the plaintiffs suffer from any hardship from a deferral of review. The plaintiffs must wait until their claims ripen, then, before bringing suit. When (or if) they do, the plaintiffs must follow the form of proceeding that Congress specified for their claims, an action for a tax refund, not this APA action; such an action plainly would provide the plaintiffs with an adequate remedy. Further, the Anti-Injunction Act divests the Court of jurisdiction over the employer plaintiffs' attempt to prevent the assessment of the Section 4980H tax against them. And, in the alternative, if the employer plaintiffs' claims somehow otherwise survived, their claims would still fail for the absence of indispensable parties – the employees whose rights to tax credits are at issue here.

Argument

I. The Plaintiffs Lack Article III Standing to Pursue This Action

A. The Individual Plaintiffs Lack Article III Standing

The individual plaintiffs assert that they will be harmed if they are eligible for premium tax credits under 26 U.S.C. § 36B, because those tax credits will make health insurance "less

unaffordable" for them, Compl., ¶ 5, thereby making it less likely that they would qualify for an exemption from the minimum coverage provision, 26 U.S.C. § 5000A. They cannot base their claim of standing on this sort of conjecture. "An Article III injury in fact must be "(i) 'concrete and particularized' rather than abstract or generalized, and (ii) 'actual or imminent' rather than remote, speculative, conjectural or hypothetical." *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 175 (D.C. Cir. 2012), *reh'g denied*, 704 F.3d 1005 (D.C. Cir. 2013), *cert. denied*, 133 S. Ct. 2880 (2013). Because the plaintiffs allege that they will suffer a future injury from the Affordable Care Act's reduction of their federal tax liabilities, they "confront[] a significantly more rigorous burden to establish standing." *Chamber of Commerce of U.S. v. EPA*, 642 F.3d 192, 200 (D.C. Cir. 2011) (internal quotation omitted). The "threatened injury must be *certainly impending* to constitute injury in fact." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (emphasis in original). The individual plaintiffs have failed to allege that they face any injury at all, let alone one that is "certainly impending" against them.

Of the individual plaintiffs, only David Klemencic even attempts to demonstrate his own standing. *See* Mem. of P. & A. in Opp'n to Defs.' Mot. to Dismiss ("Opp'n"), at 8-9, ECF 24. Klemencic contends that, absent his eligibility for premium tax credits, insurance would be unaffordable for him.[1] He also relies on estimates of premiums provided by the Kaiser Family

[1] Premiums for plans on the Exchanges are not yet finalized, but the data so far is encouraging; reported costs are significantly lower than earlier projections. *See* Defs.' Mem. in Supp. of Mot. to Dismiss ("Defs.' Mem."), at 10, ECF 23-1; *see also* Laura Skopec & Richard Kronick, Office of the Ass't Sec'y for Planning & Evaluation, U.S. Dep't of Health & Human Servs., *ASPE Issue Brief: Market Competition Works: Proposed Silver Premiums in the 2014 Individual Market Are Substantially Lower than Expected*, at 1-2 (Aug. 9, 2013) (noting reporting from 16 states for which data is available to date). This data directly contradicts the estimates made by the plaintiffs' purported expert (ECF 24-2), but this point does not matter here.

Foundation, to contend that, with these tax credits, insurance would become affordable for him; "the cost to him of bronze coverage would drop below $133.33 per month." Opp'n 9.[2]

Indeed it would. Given Klemencic's representations in his declaration (ECF 24-1) regarding his income, age, and family status, the Kaiser Family Foundation estimates that he would pay *nothing* for bronze coverage. "[Y]ou could enroll in a Bronze plan for about $0 per year (which is 0% of your household income). By enrolling in a Bronze plan, you would receive $5,341 in subsidies, which would cover the entire amount of your Bronze premium." Henry J. Kaiser Family Foundation, Subsidy Calculator, available at http://kff.org/interactive/subsidy-calculator. (Screen shots of the subsidy calculator's estimate of the net cost of premiums, given Klemencic's allegations, are attached as Exhibit A.)

Klemencic faces no "certainly impending" injury from the likelihood that he will receive bronze-level coverage for free. He contends that he will be injured because "preventing him from purchasing catastrophic coverage is a restriction on his liberty." Opp'n 13. But he alleges no legally cognizable injury by claiming that he wishes to purchase unsubsidized catastrophic coverage at greater expense, instead of receiving bronze-level coverage (which covers all of the benefits available in a catastrophic plan and more, on better terms) at no cost to him. "No [plaintiff] can be heard to complain about damage inflicted by [his] own hand." *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). *See McConnell v. FEC*, 540 U.S. 93, 228 (2003) (political candidates lacked standing to challenge law increasing limits on "hard

[2] The plaintiffs baselessly assert that the government "already knows" the premiums for plans on the Exchanges, Opp'n 11, but even the source they cite for this claim notes that premiums will not be determined until contracts are signed with insurers in September 2013. Office of the White House, *Memorandum to Interested Parties: Early Results: Competition, Choice, and Affordable Coverage in the Health Insurance Marketplace in 2014*, at 5 (May 30, 2013).

money" contributions; injury was caused by "their own personal 'wish' not to solicit or accept large contributions, *i.e.*, their personal choice"), *overruled in part on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010). *See also Bhd. of Locomotive Eng'rs & Trainmen v. Surface Transp. Bd.*, 457 F.3d 24, 28 (D.C. Cir. 2006). If Klemencic truly prefers catastrophic coverage, he may obtain a bronze-level plan, at no cost to him (according to the calculator that he himself relies upon for his allegation of standing), and then submit only those claims that would be paid under a catastrophic plan. His personal wish to pay *more* for the same (or inferior) coverage does not constitute any legally recognized injury.

Klemencic alleges that he does not wish to obtain a bronze plan for free because "[e]ven if the government would subsidize [health coverage] or pay for it completely, I oppose government handouts and therefore do not want to buy that coverage." Klemencic Decl., ¶ 8. But "such a 'generalized grievance,' no matter how sincere, is insufficient to confer standing." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013). To show his standing, Klemencic must allege more than an injury to his ideological objection to subsidized insurance; "Article III standing is not to be placed in the hands of concerned bystanders, who will use it simply as a vehicle for the vindication of value interests." *Id.* at 2663 (internal quotation omitted).

Finally, Klemencic speculates that he might be able to allege an injury after premiums are determined in September 2013. Opp'n 12-13. But "[t]o satisfy Article III, an injury in fact must be both 'concrete and particularized' and 'actual or imminent' *at the time the plaintiff files suit*." *Equal Rights Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1141 (D.C. Cir. 2011) (emphasis added). As should be clear from the foregoing discussion, even at this point in the litigation, Klemencic cannot show that he suffers from any injury. He certainly could not have

made such a showing when the complaint was filed in May 2013. The plaintiffs may believe that it would "make more sense" if they were excused from the rule that standing must be shown at the time of filing, Opp'n 13, but the rule is well-established that a plaintiff may not file a complaint with the hope that his allegation of standing might be borne out by later events. *See, e.g., Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989); *Worth v. Jackson*, 451 F.3d 854, 860 (D.C. Cir. 2006). Neither Klemencic nor the other individual plaintiffs can show their standing, and their claims should be dismissed accordingly.

B. The Employer Plaintiffs Lack Article III Standing

The employer plaintiffs have also failed to demonstrate their standing. Of these plaintiffs, only GC Restaurants SA even attempts to make such a showing. Opp'n 14. It contends that it is "threatened" by Section 4980H, in that it may be assessed with the tax under that provision for applicable large employers that fail to offer adequate coverage to their full-time employees, if one or more of those employees receives a premium tax credit. Compl., ¶ 17. But any injury that it would suffer from this "threat" would not be redressable in this action. The employees of GC Restaurants, such as the 18 employees of the Golden Chick quick-service restaurants described in J. Allen Tharp's declaration (ECF 24-3, ¶ 3), would not be bound by any judgment in this action. *See Taylor v. Sturgell*, 553 U.S. 880, 892-93 (2008) (claim and issue preclusion ordinarily cannot apply to nonparties, given the "deep-rooted historic tradition that everyone should have his own day in court"). Thus, even if this Court were to attempt to award relief in GC Restaurants' favor, it could not prevent the restaurants' employees from seeking premium tax credits under 26 U.S.C. § 36B. And the large employer tax

assessment under Section 4980H arises as a matter of law if such a credit is allowed or paid for at least one of the employer's full-time employees. *See* 26 U.S.C. § 4980H(a), (b).

Thus, the future conduct of the employees would trigger the Section 4980H assessment for GC Restaurants, no matter whether this Court purports to make a declaration of those employees' rights under the Internal Revenue Code in this case. A ruling in GC Restaurants' favor would "not effect any change in federal [tax] law that could bind nonparties." *Urban Health Care Coalition v. Sebelius*, 853 F. Supp. 2d 101, 108 (D.D.C. 2012). As a result, GC Restaurants could not obtain relief from the injury that it claims would arise from the "threat" that it will be subject to the Section 4980H assessment. *See id.* at 109 (injury not redressable where relief in instant suit would not prevent nonparties from relitigating issue). GC Restaurants, and the other employer plaintiffs, thus lack standing to pursue this action. *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 (1992) (plurality opinion); *University Med. Ctr. of S. Nevada v. Shalala*, 173 F.3d 438, 441-42 (D.C. Cir. 1999); *Comite de Apoyo a los Trabajadores Agricolas v. U.S. Dep't of Labor*, 995 F.2d 510, 514 (4th Cir. 1993).

GC Restaurants contends that its injury would be redressed because, if it prevails here, 26 C.F.R. § 1.36B-1(k) would be vacated with nationwide effect. Opp'n 20.[3] The vacatur would, in its view, necessarily bind the restaurant's employees, because absent this regulation, "there would be no basis for providing" tax credits to those employees. *Id.* But this makes no sense; 26 C.F.R. § 1.36B-1(k) is an *interpretive* regulation, not a legislative regulation. Even if the rule announcing the Treasury Department's interpretation of the statute were invalidated, the

[3] This premise is highly debatable. *See Monsanto v. Geertson Seed Farms*, 130 S. Ct. 2743, 2761 (2010) (court should tailor relief to address injuries of plaintiffs before it). But this point is immaterial, because even the relief that GC Restaurants seeks would not redress its injuries.

employees could still bring their own claims advancing *their own* interpretation of the Affordable Care Act to provide for tax credits for participants in federally-facilitated Exchanges.

GC Restaurants, then, does not seek "the typical relief in an APA suit." Opp'n 20. Instead, it is asking this Court to declare whether its employees may rely on a Treasury regulation when they assert their right to tax credits under the Affordable Care Act. A ruling in this case, if it were to have any effect at all, could at most affect the level of deference that would be owed to Treasury's interpretation in the *next* case. This "two-step process . . . does not satisfy redressability." *Urban Health Care Coalition*, 853 F. Supp. 2d at 111. "A court opinion must resolve the issue before it, not 'merely determine a collateral issue governing certain aspects of … pending or future suits' to be justiciable." *Id.* at 112 (quoting *Calderon v. Ashmus*, 523 U.S. 740, 747 (1998) (this Court's alteration)).

GC Restaurants and the other employer plaintiffs thus would remain under the "threat" of tax assessments under 26 U.S.C. § 4980H no matter what happens in this litigation, given that their employees could bring their own claims for premium tax credits, thereby triggering the employer plaintiffs' tax liabilities if those employers fail to provide adequate coverage to their full-time employees. The employer plaintiffs' alleged injuries turn entirely on their response to this "threatened liability." Opp'n 15. That fear of potential liability could not be redressed in this litigation, and thus the employer plaintiffs lack Article III standing.

II. The Plaintiffs Lack Prudential Standing to Pursue this Action

A. The Plaintiffs Do Not Fall Within the Zone of Interests Protected by Section 36B of the Internal Revenue Code

A plaintiff in an APA action must show that he or she is suing to protect an interest that is "arguably within the zone of interests to be protected" by the statutory provision that is in

question. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998). Under this rule, a plaintiff lacks prudential standing where his or her "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (internal quotation omitted). Congress had an obvious purpose when it enacted 26 U.S.C. § 36B to provide tax credits for the purchase of insurance on the Exchanges: "[t]o ensure that health coverage is affordable," and "to help offset the cost of private health insurance premiums." S. REP. NO. 111-89, at 4 (2009); *see also* H.R. REP. NO. 111-443, vol. II, at 989 (2010). It follows, then, that Congress did not intend to permit suit under the APA by plaintiffs who seek to make health insurance unaffordable, or to prevent the offset of the cost of premiums on the Exchanges. *See, e.g.*, *Amgen, Inc. v. Smith*, 357 F.3d 103, 108-09 (D.C. Cir. 2004) (suit is precluded if plaintiffs' "interests are not consistent with the purposes of the statute in question").

Ignoring the House and Senate's explanations of the reasons for the enactment of Section 36B, the plaintiffs contend that (in their reading of the statute) Congress extended tax credits only to certain persons, *i.e.*, participants in state-sponsored Exchanges, and therefore by negative implication Congress meant *not* to provide tax credits for certain other persons, *i.e.*, participants in federally-facilitated Exchanges. Opp'n 22. They argue that they have standing to vindicate Congress's supposed purpose in this regard. In the context of federal tax litigation, however, controlling D.C. Circuit precedent precludes plaintiffs from appealing to this sort of a "reverse zone of interest" argument in a suit to challenge the availability of federal tax credits:

> The argument that appellant Field's interests fall within the relevant zone of Section 901 [of the Internal Revenue Code] *rests on the premise that Section 901*

> *can arguably be read not only as a decision to grant a tax credit* to those who have paid foreign income taxes *but also as a decision not to grant a tax credit* to those who have made other sorts of payments, such as royalties, to foreign governments. Under this "reverse zone of interest" analysis, competitors such as appellant Field could argue that they fall within the zone protected by the negative implication of the statutory provision.
>
> *We cannot accept this "reverse zone of interest analysis" which would extend standing to all those who may be able to allege injury because they were not regulated or protected by a particular statutory provision.* Such an approach would render the zone standard meaningless. Although the test is a generous one, the terms "arguable" and "zone" are subject to definition in the context of particular factual situations such as presented in this case. To define the terms by reference to what they do not mean in these factual settings is clearly inappropriate.

Tax Analysts & Advocates v. Blumenthal, 566 F.2d 130, 144 (D.C. Cir. 1977) (emphasis added and footnote omitted). The plaintiffs, then, may not claim prudential standing to vindicate Congress's supposed "decision not to grant a tax credit" to persons in their position.

The employer plaintiffs contend that they have prudential standing to challenge the Treasury Department's interpretation of 26 U.S.C. § 36B, because they are potentially subject to the large employer tax assessment under 26 U.S.C. § 4980H, and the latter provision is "inextricably linked" to Section 36B. Opp'n 24. Again, however, the plaintiffs ignore the controlling precedential effect of *Tax Analysts & Advocates v. Blumenthal*. As the defendants have shown, Defs.' Mem. 24, in the unique context of federal tax litigation, a plaintiff must show that he or she falls within the zone of interests of the particular provision that he or she alleges has been violated, and may not appeal to other provisions in the Internal Revenue Code. Given that the Code is an "extraordinarily complex statute," the D.C. Circuit has held that a litigant may not "'borrow' the arguable regulatory or protective intent embodied in one provision of the Code, and apply it to a provision where that intent is not evident, in order to satisfy the zone

test." *Tax Analysts & Advocates*, 566 F.2d at 141. Any contrary rule "would distort the role of the courts in relation to the legislative branch, precisely what the zone test serves to prevent, in the area of revenue collection." *Id.*[4] The plaintiffs fail entirely to address this holding in their opposition brief, and that is fatal to their claim of prudential standing.

In sum, the plaintiffs do not assert an interest that is protected by Section 36B, but instead an interest that is diametrically opposed to the purpose that the provision serves. They therefore lack prudential standing to bring an action under the APA to challenge the Treasury Department's interpretation of that provision.

B. The Claims of the Employer Plaintiffs Violate the Principle that a Party May Not Challenge the Tax Liability of Another

It is a "well-established position" in the federal courts "that, ordinarily, one may not litigate the tax liability of another." *Women's Equity Action League v. Cavazos*, 879 F.2d 880, 885 n.3 (D.C. Cir. 1989). The employer plaintiffs' claims directly violate this principle. Not only do they seek to litigate the federal tax liabilities of parties that are absent here, they seek relief that would purport to *increase* those absent parties' tax liabilities. Such relief is not permissible in an APA action, and the employer plaintiffs accordingly lack prudential standing.

Despite the wealth of precedent that reiterates this principle, *see, e.g.*, *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976); *Am. Soc'y of Travel Agents v. Blumenthal*, 566

[4] The individual plaintiffs' claims fail for the same reason. They assert that they need not satisfy prudential standing principles because they are themselves "'the subject of the contested regulatory action.'" Opp'n 23 (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)). But Section 36B is not a "regulatory action"; it simply provides a benefit, in the form of tax credits, to the individual plaintiffs. Their claim instead is that they are potentially subject to regulation under the minimum coverage provision, 26 U.S.C. § 5000A. Under *Tax Analysts & Advocates v. Blumenthal*, however, the individual plaintiffs may not "borrow" the regulatory intent of Section 5000A to challenge the Treasury Department's implementation of Section 36B.

F.2d 145, 150 n.3 (D.C. Cir. 1977), the plaintiffs deny that there is any prohibition at all against litigating third parties' tax liabilities. They quote a passage in *Hibbs v. Winn*, 542 U.S. 88 (2004), which recited that "numerous federal-court decisions – including decisions of [the Supreme] Court reviewing lower federal-court judgments – have reached the merits of third-party *constitutional* challenges to tax benefits without mentioning the TIA [Tax Injunction Act, 28 U.S.C. § 1341]." *Id.* at 110 (emphasis added). In their quotation, however, the plaintiffs omit the word "constitutional," Opp'n 25, thereby grossly distorting the meaning of the passage. There is a basic distinction between the "run-of-the-mine tax case," alleging that the taxing agency exceeded its statutory authority, and a tax suit that "involve[s] [a] fundamental right or classification that attracts heightened judicial scrutiny," such as an Establishment Clause claim, or an Equal Protection claim of racial discrimination. *Levin v. Commerce Energy, Inc*., 130 S. Ct. 2323, 2335, 2336 (2010). Ordinary prudential principles bar the former kind of claim, even in cases where the latter claim might be permitted to proceed. *See id.* Each of the cases that the plaintiffs cite for the proposition that third-party tax challenges may go forward are Establishment Clause or racial discrimination cases, and thus none of those cases provides any support for the claim that a plaintiff may challenge an absent party's tax liability in the "run-of-the-mine" tax case raising purely statutory claims. *See* Opp'n 25.[5]

Indeed, Congress has consistently legislated with the understanding that a party may not litigate a third party's tax liabilities, absent specific statutory authorization to do so. Given this understanding, it is "crystal clear," even in cases where the challenge would affect the plaintiff's

[5] The one exception is the district court's decision in *Tax Analysts & Advocates v. Schultz*, 376 F. Supp. 889 (D.D.C. 1974). That court's holding as to prudential standing, however, was overruled by the D.C. Circuit's subsequent decision in *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 144 (D.C. Cir. 1977). *See supra*, pp. 10-11.

own liability to the government, that "only the taxpayer may question the assessment." *United States v. Formige*, 659 F.2d 206, 208 (D.C. Cir. 1981). The plaintiffs respond that they are not bringing a quiet title action, a wrongful levy action, or any similar action where Congress has authorized suits by non-taxpayers. Opp'n 26. This entirely misses the point. The point is that Congress would not have created such procedures, nor in doing so would it have re-affirmed the principle that "only the taxpayer may question the assessment," if it had believed that the APA contains a general authorization for plaintiffs to question third parties' tax assessments. "[T]he statutory scheme created by Congress is inconsistent with, if not preclusive of, third party litigation" of tax claims. *Fulani v. Brady*, 935 F.2d 1324, 1327 (D.C. Cir. 1991).

The plaintiffs also contend that prudential principles counsel in favor of permitting their suit, because otherwise "chaos" would ensue if the Treasury Department's interpretation of 26 U.S.C. § 36B were to be invalidated. Opp'n 27.[6] But it is the *plaintiffs* who seek relief that would throw the process of tax administration into disarray. The plaintiffs seek to impose *additional* federal tax obligations on absent parties, but a court could not provide such relief (if it could provide that relief at all, *see supra*) in an APA action without "seriously disrupt[ing] the entire revenue collection process." *Apache Bend Apartments, Ltd. v. United States*, 987 F.2d 1174, 1177 (5th Cir. 1993). A judgment in the plaintiffs' favor could only invite confusion and duplicative litigation over the availability of premium tax credits, given that absent parties could not be bound here. The APA does not permit such interference with the "administration and

[6] There is no basis for this assertion, in any event. In the highly unlikely event that the Treasury regulation is later invalidated, the Internal Revenue Code would permit the IRS to apply any such ruling in an orderly fashion. "The Secretary may prescribe the extent, if any, to which any ruling (including any judicial decision or any administrative determination other than by regulation) relating to the internal revenue laws shall be applied without retroactive effect." 26 U.S.C. § 7805(b)(8); *see Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 748 (2004).

enforcement of the tax laws." *Id.* Consequently, the APA does not permit a suit by the employer plaintiffs to declare their employees' rights under the Internal Revenue Code.

III. This Action Is Not Ripe

Even if the plaintiffs could show that they had both constitutional and prudential standing, they could not justify bringing suit at this time, given that the Treasury Department has not yet applied its regulation to the plaintiffs' circumstances in any concrete way. This case is neither fit for resolution now, nor would the plaintiffs suffer any hardship from a deferral of review. The plaintiffs' claims therefore are not ripe.

The plaintiffs argue that their claims are fit for resolution, because those claims present a legal question of statutory interpretation. Opp'n 28. But this argument addresses only part of the "fitness" analysis. "The fitness requirement is primarily meant to protect the agency's interest in crystallizing its policy before that policy is subjected to judicial review and the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting." *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 386-87 (D.C. Cir. 2012) (internal quotation omitted). Thus, the fitness element looks to "'(1) whether the issue is purely legal, rather than one reliant on agency expertise, (2) whether the challenged action is final, *and* (3) whether the impact upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review.'" *Marcum v. Salazar*, 694 F.3d 123, 129 (D.C. Cir. 2012) (quoting Harry T. Edwards & Linda A. Elliott, *Federal Standards of Review* 119–20 (2007)) (emphasis added; internal quotations and alterations omitted). At this time, it is uncertain whether, or how, the Treasury Department's interpretation of Section 36B will affect the plaintiffs, and any such effects can be addressed in a later proceeding. This case is therefore not fit, because further factual

development could "simplify the factual context and narrow the legal issues at play, allowing for more intelligent resolution of any remaining claims and avoiding inefficient and unnecessary piecemeal review." *Am. Petroleum Inst.*, 683 F.3d at 387 (internal quotations omitted).

Nor can the plaintiffs show hardship. As to the employer plaintiffs, Section 4980H will not take effect until 2015, twenty months after this suit was filed. The employer plaintiffs thus do not face any "immediate and significant" hardship from the deferral of review until such time that Section 4980H might actually apply to them. *Devia v. NRC*, 492 F.3d 421, 427 (D.C. Cir. 2007). The employer plaintiffs contend that their case is nonetheless ripe because, starting in 2015, they "risk prosecution" or "punishment" if they do not provide adequate coverage to their full-time employees. Opp'n 29, 30. This is plainly wrong. Section 4980H is a taxing provision; it does not impose any "punishment" on any employer. *See Nat'l Fed'n of Indep. Bus. v. Sebelius* ("*NFIB*"), 132 S. Ct. 2566, 2596-97 (2012) (distinguishing between taxes and punishments, and holding 26 U.S.C. § 5000A to be the former); *Liberty Univ. v. Lew*, --- F.3d ---, 2013 WL 3470532, at *14 (4th Cir. July 11, 2013) (Section 4980H "does not punish unlawful conduct, and leaves large employers with a choice for complying with the law – provide adequate, affordable health coverage to employees or pay a tax"). Thus, there is no sense in which the employers would be put to the "Hobson's choice," Opp'n 30, of violating the law or forgoing their challenge, if review were to be deferred.

The individual plaintiffs cannot show any hardship, either. Klemencic – who, as noted above, is the only individual who has even attempted to show that his claim is justiciable – contends that, if he does not gain relief now, he will be required to "comply" with the "mandate" of the minimum coverage provision. Again, this argument misstates the law. *See NFIB*, 132

S. Ct. at 2596-97. And in any event, given Klemencic's representations in his declaration (ECF 24-1), the maximum assessment that he would face for 2014, even if he were to remain uninsured for the entire year, would be $150.[7] This hardly makes out a claim for hardship that could justify review at this stage (particularly given that his claimed injury is that he would prefer to pay more than that amount for catastrophic coverage, instead of receiving bronze coverage for free). Moreover, claims like Klemencic's, seeking pre-application review of rules governing the conditions for the award of benefits, are categorically unripe for review. *See Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 57-61 (1993). Neither Klemencic nor any other plaintiff, then, suffers any hardship that could render their claims ripe for review now.

IV. The Plaintiffs Must Proceed Under the Form of Proceeding That Congress Specified

The APA directs that "[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute," unless the statutorily specified review proceeding is "inadequa[te]." 5 U.S.C. § 703; *see also* 5 U.S.C. § 704. Congress has specified the judicial remedy that the plaintiffs must pursue, an action for a tax refund. Such an action provides the plaintiffs with an adequate remedy, and thus the plaintiff must bring their claims in a suit for a tax refund, not in this APA action.

The plaintiffs argue that an action for a tax refund would not be adequate, reiterating their assertions that, to bring such an action, they would be required to "violate the law and seek an after-the-fact remedy." Opp'n 33. Once again, the plaintiffs are plainly wrong in their characterization of Section 5000A and Section 4980H. *See NFIB*, 132 S. Ct. at 2600

[7] For 2014, the assessment under 26 U.S.C. § 5000A will not be greater than 1.0% of the excess of the taxpayer's household income over the statutory exemption and standard deduction amounts. 26 U.S.C. § 5000A(c); 26 C.F.R. § 1.5000A-4(b); *see also* 26 U.S.C. § 6012(a)(1)(D) (defining exemption and deduction amounts).

("imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act"); *Liberty Univ.*, --- F.3d ---, 2013 WL 3470532, at *14. There is no sense, then, in which the plaintiffs would be required to "violate the law" to pursue their tax refund action.[8] And in the field of tax law, it is well established that a refund action provides an adequate remedy at law, and that a taxpayer may not seek pre-enforcement review before a tax is assessed and collected. *See, e.g.*, *Bob Jones Univ. v. Simon*, 416 U.S. 725, 742 (1974); *Alexander v. Americans United Inc*., 416 U.S. 752, 762 (1974). The plaintiffs cite *Investment Annuity, Inc. v. Blumenthal*, 609 F.2d 1 (D.C. Cir. 1979), for the proposition that pre-enforcement review is generally available for tax claims, Opp'n 32, but that case stands for *precisely the opposite rule*. That case *denied* pre-enforcement review, even in a circumstance where the taxpayer alleged that it was uncertain that it would be able to bring a refund suit; the court noted that "[t]he presumption of reviewability of administrative action is subject to exceptions," *id.* at 8, and that one such exception applies to tax cases, because "the tax field is marked by the general preclusion of advance declaratory or injunctive relief," *id.* at 9.

Thus, the employer plaintiffs are wrong to assert that a refund action would not afford them an adequate remedy, simply because they could not seek "to disallow the [employees'] tax credit in the first place" in such an action, *see* 26 U.S.C. § 4980H(d)(3). Opp'n 33 n.6. "[T]he alternative remedy need not provide relief identical to relief under the APA, so long as it offers

[8] The plaintiffs suggest, half-heartedly, that it might violate due process if they were required to bring their claims in a refund action. Opp'n 32. But any inconveniences that the plaintiffs might suffer from a deferral of review "do not rise to the level of constitutional infirmities, in light of the powerful governmental interests in protecting the administration of the tax system from premature judicial interference." *Bob Jones Univ.*, 416 U.S. at 747; *see also Nat'l Taxpayers Union v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995) ("statutory limits on the form of challenges to tax assessments do not deprive litigants of due process").

relief of the 'same genre.'" *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009) (quoting *El Rio Santa Cruz Neighborhood Health Ctr. v. U.S. Dep't of Health & Human Servs.*, 396 F.3d 1265, 1272 (D.C. Cir. 2005)). Congress specified the terms under which taxpayers in the employer plaintiffs' circumstance may bring a refund action, and the relief that is available in such an action, and this Court is obliged to respect Congress's choice in the matter.

As the defendants have noted, Defs.' Mem. 33 n.7, to the extent that the individual plaintiffs assert that they wish to obtain a certificate of exemption for the purpose of obtaining catastrophic coverage, any such plaintiff with standing (and there are none) must, at a minimum, follow the administrative procedures specified by statute, 42 U.S.C. § 18081(f), to present their request for an exemption and to take an administrative appeal from any denial of that request. The administrative process requires an appeal to a Department of Health and Human Services appeals entity, and such an appeal may be taken only after the applicant first exhausts any appeals that may be available in the Exchange. 45 C.F.R. § 155.505(b)(2), (c). The plaintiffs contend that this process would be "futile," because the appeals entity would lack the power to invalidate the Treasury regulation. Opp'n 34. But that entity *would* have the power to grant or deny the request for the certificate of exemption, and that decision could clarify whether the plaintiffs' legal theory has any bearing on the ultimate merits of their request for a certificate of exemption. Thus, the pursuit of administrative appeals would not be futile. "We will excuse exhaustion on grounds of futility only when resort to administrative remedies is clearly useless. Even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context." *Ass'n of Flight Attendants-CWA v. Chao*, 493 F.3d 155,

159 (D.C. Cir. 2007) (internal quotation omitted).

The plaintiffs also argue, oddly, that the existence of the Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421, demonstrates that the limitations of 5 U.S.C. § 703 and 5 U.S.C. § 704 do not apply to tax cases. Opp'n 31. Under their reasoning, Congress would not have enacted the AIA if it had believed that pre-enforcement review was already barred. This is flatly wrong:

> The Anti-Injunction Act was written against the background of general equitable principles disfavoring the issuance of federal injunctions against taxes, absent clear proof that available remedies at law were inadequate. . . . 'If the delay incident to [pursuing remedies at law] justified refusal to pay a tax, the federal rule that a suit in equity will not lie to restrain collection on the sole ground that the tax is illegal, could have little application. For possible delay of that character is the common incident of practically every contest over the validity of a federal tax.' Since equitable principles militating against the issuance of federal injunctions in tax cases existed independently of the Anti-Injunction Act, it is most unlikely that Congress would have chosen the stringent language of the Act if its purpose was merely to restate existing law and not to compel litigants to make use solely of the avenues of review opened by Congress.

Bob Jones Univ., 416 U.S. at 742 n.16 (quoting *California v. Latimer*, 305 U.S. 255, 261-262, (1938) (Brandeis, J.). The AIA did not overrule the background equitable principles prohibiting pre-enforcement tax challenges, then; it *strengthened* those principles by giving them jurisdictional force. *See Levin v. Commerce Energy, Inc*., 130 S. Ct. at 2336 (noting similar relationship between Tax Injunction Act and background principles of comity, and holding that comity continued to bar suit even if TIA were inapplicable).

The APA provides both that a plaintiff must proceed under the form of proceeding that Congress has specified, *see* 5 U.S.C. §§ 703, 704, and that any suit must not run afoul of any limitations on judicial review found in other statutes, *see* 5 U.S.C. §§ 701(a)(1), 702(1). These limitations in the APA apply independently. *See Cohen v. United States*, 650 F.3d 717, 731 (D.C. Cir. 2011) (separately addressing each limitation). For the reasons explained in this

section, the complaint should be dismissed because the plaintiffs are obligated to pursue their claim in the forum that Congress chose, not in this APA action. As will be explained below, the Anti-Injunction Act also independently bars the employer plaintiffs' claims.

V. The Anti-Injunction Act Bars the Employer Plaintiffs' Claims

The employer plaintiffs bring their claims for the purpose of precluding the assessment or collection of the Section 4980H tax against them. Their claims thus are squarely barred by the AIA, which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). Congress expressly characterized the assessment against large employers under Section 4980H as a "tax," *see* 26 U.S.C. § 4980H(b)(2), (c)(7), *see also* 42 U.S.C. § 18081(f)(2), and thus there is no doubt that Congress understood that the ordinary procedural rules in the Internal Revenue Code for "taxes," including the AIA, would apply to the Section 4980H assessment.

The plaintiffs cite *Liberty University*, which held that the AIA does not apply to challenges to the assessment or collection of the Section 4980H tax. Opp'n 35 (citing *Liberty Univ.*, --- F.3d ---, 2013 WL 3470532, at *5). *See also Oklahoma v. Sebelius*, 2013 WL 4052610, at *10 (E.D. Okla. Aug. 12, 2013) (adopting *Liberty*'s AIA holding). But, as the defendants have noted, Defs.' Mem. 37, the Fourth Circuit erred in this respect. It is immaterial that Congress used synonymous terms to describe the amounts to be assessed under Section 4980H, given that Congress also, clearly and expressly, described those amounts as a "tax." The term "tax" has the same meaning in Section 4980H as it does in the AIA. *See* 26 U.S.C. § 7421(a) (barring the restraint of "*any* tax") (emphasis added). *See also Powerex Corp. v.*

Reliant Energy Servs., Inc., 551 U.S. 224, 232 (2007) (it is a "standard principle of statutory construction ... that identical words and phrases within the same statute should normally be given the same meaning"). Moreover, the Fourth Circuit erred in reasoning that it would be "anomalous" to treat the minimum coverage provision (which is not subject to the AIA) and Section 4980H differently. 2013 WL 3470532, at *6. Section 4980H, unlike the minimum coverage provision, is enforceable by levies and by the filing of notices of liens. *Compare* 26 U.S.C. § 5000A(g) (limiting summary collection powers for the minimum coverage provision penalty) *with* 26 U.S.C. § 4980H(d) (imposing no similar limitations). The AIA serves to protect these summary administrative measures from pre-enforcement interference. *See United States v. Am. Friends Serv. Comm.*, 419 U.S. 7, 10 (1974). It was thus perfectly logical for Congress to treat the Section 4980H tax like all other taxes in the Internal Revenue Code for purposes of the AIA, even though it did not intend the AIA to pose a jurisdictional bar against a suit challenging the constitutionality of the minimum coverage provision.

The employer plaintiffs also argue that the relief that they seek is to bar the award of tax credits to other persons, and that they are not asking the Court directly to determine their liabilities under 26 U.S.C. § 4980H; such relief, in the plaintiffs' view, would merely be a "downstream, collateral consequence[]" of the Court's order. Opp'n 34. But the employer plaintiffs' claim of injury is the threat of a Section 4980H tax assessment against them, and their only purpose in bringing this suit is to prevent the assessment or collection of that tax from occurring. In other words, their suit is "*for the purpose*" of restraining the assessment or collection of the Section 4980H tax. 26 U.S.C. § 7421(a) (emphasis added). The employer plaintiffs' careful pleading of the relief they have sought does not change this result. The

employer plaintiffs "would not be interested in obtaining the declaratory and injunctive relief requested" in their complaint if it did not result, in their view, in relief from the Section 4980H tax. *Americans United*, 416 U.S. at 761. Consequently, the AIA bars their suit.[9]

The employer plaintiffs, next, argue that the AIA should not apply to as suit such as theirs that seeks to increase federal tax revenues by prohibiting the payment of federal tax credits. Opp'n 39. But, again, the employers are seeking not only to prevent their employees from receiving federal tax credits, but also to avoid their own liability for a tax assessment. A plaintiff may not avoid the AIA by coupling his request to limit his own tax liability with a request that the difference be made up elsewhere. The plaintiffs rely on authorities under the Tax Injunction Act that permit constitutional challenge to state tax credits in certain circumstances. Opp'n 39. *But see supra*, pp. 11-12. Those authorities, however, extend at most to plaintiffs who "were outsiders to the tax expenditure, 'third parties' whose own tax liability was not a relevant factor." *Levin v. Commerce Energy, Inc.*, 130 S. Ct. at 2335. Suit is not permitted, however, for plaintiffs who "do object to their own tax situation." *Id.*

[9] This case is therefore unlike *Hobby Lobby Stores, Inc. v. Sebelius*, --- F.3d ---, 2013 WL 3216103 (10th Cir. June 27, 2013). That case involved a challenge to regulations that require certain group health plans to provide coverage for recommended preventive health services, including coverage for contraceptive services approved by the FDA as prescribed by a health care provider. The regulations trigger freestanding, non-tax legal obligations; HHS could enforce the regulations with respect to certain insurers. 42 U.S.C. § 300gg‐22. The Secretary of Labor is also authorized to enforce the requirement. 29 U.S.C. § 1132(a)(5). An employer that violates the regulations would also be subject to a tax assessment. *See* 26 U.S.C. § 4980D. The Tenth Circuit held that the AIA did not bar the challenge, because the Section 4980D tax "is just one of many collateral consequences that can result from a failure to comply with the contraceptive-coverage requirement." 2013 WL 3216103, at *7. Here, in contrast, there are no "collateral consequences" that the employer plaintiffs could face; their only claim of injury is the possibility of a tax assessment, and they would not be interested in bringing this suit, absent their claim to prevent the imposition of the Section 4980H tax against them.

The employer plaintiffs also argue that the AIA should not bar this suit because they have represented that, if they do not prevail here, they will provide adequate health insurance coverage to their employees, and that therefore they will not incur the Section 4980H tax and could not bring a refund action to challenge that liability. Opp'n 40. But "[a] taxpayer cannot render an available review procedure an inadequate remedy at law by voluntarily forgoing it." *Americans United*, 416 U.S. at 762 n.13; *see also Inv. Annuity, Inc.*, 609 F.2d at 4-5.

Finally, the employer plaintiffs argue, implausibly, that they fall under the exception to the AIA for cases where, first, "it is clear that under no circumstances could the government ultimately prevail," and, second, "equity jurisdiction otherwise exists." *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7 (1962). They can satisfy neither element of this test. First, Congress has clarified that the federally-facilitated Exchange stands in the shoes of the state-sponsored Exchange. 42 U.S.C. § 18041(c)(1). It thus was perfectly reasonable for the Treasury Department to interpret 26 U.S.C. § 36B to provide for premium tax credits for participants in all of the Exchanges. The *Williams Packing* rule applies "[o]nly if it is … apparent that, under the most liberal view of the law and the facts, the United States cannot [prevail]." *United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 14 (2008). The plaintiffs obviously do not meet this standard. Second, equity jurisdiction does not exist here; the plaintiffs suffer no irreparable injury, and, for the reasons already discussed, there is an adequate remedy at law. The employer plaintiffs' claims accordingly are barred by the AIA.

VI. In the Alternative, the Employer Plaintiffs' Claims Should Be Dismissed for Failure to Join Indispensable Parties

In the alternative, even if the employer plaintiffs could somehow demonstrate that they have alleged a redressable injury-in-fact, their claims should be dismissed under Rule 12(b)(7),

given the absence of their employees from this litigation. The employer plaintiffs seek to extinguish the rights of their employees to receive premium tax credits under 26 U.S.C. § 36B. This suit may not proceed in the absence of the employees, and the employer plaintiffs' claims accordingly should be dismissed for the absence of indispensable parties under Rule 19.

The plaintiffs argue that this case falls under the "public rights" exception to Rule 19. Opp'n 43. Under the plaintiffs' reasoning, this case is like other APA challenges to rules, and the fact that the invalidation of a rule might have an effect on other persons should not prevent this Court from hearing the challenge. But the plaintiffs miss the essential distinction between this case and other suits under the APA. The employer plaintiffs do not seek relief that would *incidentally* affect non-parties. Instead, they seek *directly* to extinguish the rights that the absent employees would otherwise enjoy under the Internal Revenue Code.[10]

This case, accordingly, involves a direct conflict between the rights of a discrete and identifiable group of absent parties – the employees – and the (purported) rights of the employer plaintiffs. Because "the dispute involves rights to federal benefits, or, more expansively, the relationship between two groups and their respective relationships with the federal government," *Cherokee Nation v. Babbitt*, 117 F.3d 1489, 1497 (D.C. Cir. 1997), the "public rights" exception does not apply. Nor would this case "require the joining of an infeasibly large number of parties," *Kickapoo Tribe v. Babbitt*, 43 F.3d 1491, 1500 (D.C. Cir. 1995), as would be the case in a true "public rights" case; the employer plaintiffs have identified only 18 persons, the employees of the Golden Chick quick-service restaurants, whose entitlement to valuable federal tax credits they hope to extinguish.

[10] As discussed above, *supra*, pp. 6-8, the employer plaintiffs cannot gain that relief here, and for that reason they have failed to allege a redressable injury.

The employer plaintiffs also dispute whether their employees are necessary parties under Rule 19(a) or indispensable parties under Rule 19(b). Opp'n 44-45. Their arguments on this score depend, again, on their incorrect assumption that they could gain relief that would preclude their employees from seeking premium tax credits. As shown above, this assumption is plainly wrong. Thus, the court "cannot accord complete relief" in the employees' absence, Fed. R. Civ. P. 19(a)(1)(A), and the defendants would be "subject to a substantial risk of incurring … inconsistent obligations" in those employees' absence, Fed. R. Civ. P. 19(a)(1)(B)(ii).

And for the same reasons, the employees are indispensable parties under Rule 19(b). Contrary to the plaintiffs' claims, counsel for the government does not defend this suit in any "representative capacity" of the employees, *Urban Health Care Coalition*, 853 F. Supp. 2d at 110, and thus the employees do face prejudice from their inability to participate here. Nor could this suit satisfy "'the interest of the courts and the public in complete, consistent, and efficient settlement of controversies,'" Opp'n 45 (quoting *Provident Tradesmen Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968)), given the inevitable conflicting litigation that would arise, should this Court attempt to award relief to the plaintiffs. Finally, the plaintiffs certainly do have an "adequate remedy" for their injury, Fed. R. Civ. P. 19(b)(4), for the reasons already discussed. Each of the four factors identified in Rule 19(b) thus weighs in favor of a finding that the employees are indispensable parties, without whom this action could not proceed. Because those employees could not be joined to this action, the complaint should be dismissed.

Conclusion

For the foregoing reasons, the defendants respectfully request that the complaint be dismissed.

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Respectfully submitted,

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