UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

STATE OF INDIANA, *et al.*	)	
	)	
Plaintiffs,	)	
v.	)	Case No. 1:13-cv-01612-WTL-TAB
	)	
INTERNAL REVENUE SERVICE, *et al.*,	)	
	)	
Defendants.	)	

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

STUART F. DELERY
Assistant Attorney General

JOSEPH H. HOGSETT
United States Attorney

SHELESE WOODS
Assistant United States Attorney

SHEILA LIEBER
Deputy Branch Director

JOEL McELVAIN
Senior Trial Counsel
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, D.C. 20530
(202) 514-2988
Joel.McElvain@usdoj.gov

TABLE OF CONTENTS

Page

Introduction 1

Background 4

I. The Affordable Care Act 4

A. The Health Insurance Exchanges 4

B. Premium Tax Credits and Cost-Sharing Reductions 6

C. The Tax Assessment for Large Employers That Fail to Offer Adequate Coverage 9

II. Procedural History 11

A. Indiana's Prior Challenge to the Constitutionality of the Act 11

B. The Healthy Indiana Plan 12

C. This Litigation 14

Argument 16

I. The Plaintiffs' Challenge to the Treasury Regulation Is Not Justiciable (Count I) 16

A. Indiana Does Not Have Standing as a Sovereign to Seek to Deprive Its Residents of Federal Tax Credits 16

B. The Plaintiffs Lack Standing as Employers to Challenge the Treasury Regulation 18

C. The Plaintiffs Lack Prudential Standing to Seek to Adjudicate the Tax Liabilities of Absent Third Parties 21

D. The Plaintiffs Must Proceed in the Forum that Congress Specified, an Action for a Tax Refund 25

II. The Plaintiffs May Not Relitigate Their Constitutional Challenges to the ACA (Counts II through IV) 28

III. There Is No Case or Controversy with Respect to the Plaintiffs' 2014 Liability for the Large Employer Tax (Count V) 32

Conclusion 34

TABLE OF AUTHORITIES

Cases: **Page**

Alexander v. Americans United, Inc.,
416 U.S. 752 (1974)....27

Alfred L. Snapp & Son, Inc. v. Puerto Rico,
458 U.S. 592 (1982)....17

Apache Bend Apartments, Ltd. v. United States,
987 F.2d 1174 (5th Cir. 1993)....24, 25

Arford v. United States,
934 F.2d 229 (9th Cir. 1991)....23

Barr v. United States,
736 F.2d 1134 (7th Cir. 1984)....27

Bernstein v. Bankert,
733 F.3d 190 (7th Cir. 2013)....28, 29

Board of Elec. Light Comm'rs of City of Burlington v. McCarren,
725 F.2d 176 (2d Cir. 1983)....30

Bob Jones Univ. v. Simon,
416 U.S. 725 (1974)....27

Bowen v. Massachusetts,
487 U.S. 879 (1988)....25

Clapper v. Amnesty Int'l USA,
133 S. Ct. 1138 (2013)....16, 17, 21

Comite de Apoyo a los Trabajadores Agricolas v. U.S. Dep't of Labor,
995 F.2d 510 (4th Cir. 1993)....21

County of Boyd v. US Ecology, Inc.,
48 F.3d 359 (8th Cir. 1995)....30

Crosetto v. State Bar of Wisconsin,
12 F.3d 1396 (7th Cir. 1993)....33

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006)....16

Darby v. Cisneros,
509 U.S. 137 (1993)..26

DH2, Inc. v. SEC,
422 F.3d 591 (7th Cir. 2005) 19

Elk Grove Unified Sch. Dist. v. Newdow,
542 U.S. 1 (2004)..21

First Am. Title Ins. Co. v. United States,
520 F.3d 1051 (9th Cir. 2008) 23

Florida v. U.S. Dep't of Health & Human Servs.,
648 F.3d 1235 (11th Cir. 2011) 12

Florida v. U.S. Dep't of Health & Human Servs.,
716 F. Supp. 2d 1120 (N.D. Fla. 2010)...11

Florida v. U.S. Dep't of Health & Human Servs.,
780 F. Supp. 2d 1256 (N.D. Fla. 2011)...12

Garcia v. San Antonio Metro. Transit Auth.,
469 U.S. 528 (1985)...11, 31

Garcia v. Vilsack,
563 F.3d 519 (D.C. Cir. 2009)..27

General Finance Corp. v. FTC,
700 F.2d 366 (7th Cir. 1983) 26

Grand Traverse Band of Ottawa & Chippewa Indians v. Dir., Mich. Dep't of Nat. Res.,
141 F.3d 635 (6th Cir. 1998) 30

Halbig v. Sebelius,
--- F. Supp. 2d ---, 2014 WL 129023 (D.D.C. Jan. 15, 2014),
appeal docketed, No. 14-5018 (D.C. Cir. Jan. 16, 2014)..............................1, 15, 28

Illinois Dep't of Transp. v. Hinson,
122 F.3d 370 (7th Cir. 1997) 18

Korte v. Sebelius,
735 F.3d 654 (7th Cir. 2013) 28

Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. IRS,
845 F.2d 139 (7th Cir. 1988) 23

Lawson v. Hill,
368 F.3d 955 (7th Cir. 2004) 33

Liberty Univ. v. Lew,
733 F.3d 72 (4th Cir.), *cert. denied*, 134 S. Ct. 683 (2013)..9

Louisiana v. McAdoo,
234 U.S. 627 (1914)..24

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992)..20, 21

Massachusetts v. Mellon,
262 U.S. 447 (1923)..17, 18

Matrix IV, Inc. v. Am. Nat'l Bank & Trust Co.,
649 F.3d 539 (7th Cir. 2011) 31

MedImmune, Inc. v. Genentech, Inc.,
549 U.S. 118 (2007)..33

Monsanto Co. v. Geertson Seed Farms,
130 S. Ct. 2743 (2010)..16

Nash County Bd. of Educ. v. Biltmore Co.,
640 F.2d 484 (4th Cir. 1981) 30

Nat'l Corn Growers Ass'n v. Baker,
840 F.2d 1547 (Fed. Cir. 1988)..22

Nat'l Fed'n of Indep. Business v. Sebelius,
132 S. Ct. 2566 (2012)..12

Nat'l Taxpayers Union v. United States,
68 F.3d 1428 (D.C. Cir. 1995)..22

New Jersey v. Sargent,
269 U.S. 328 (1926)..18

Poe v. Ullman,
367 U.S. 497 (1961)..33

Post v. Hartford Ins. Co.,
501 F.3d 154 (3d Cir. 2007)..30

Raines v. Byrd,
521 U.S. 811 (1997) 16

Reno v. Condon,
528 U.S. 141 (2000) 31

Simon v. E. Ky. Welfare Rights Org.,
426 U.S. 26 (1976) 22

South Carolina v. Baker,
485 U.S. 505 (1988) 32

Texas v. ICC,
258 U.S. 158 (1922) 18

Tice v. American Airlines, Inc.,
162 F.3d 966 (7th Cir. 1998) 29

Tomlinson v. Smith,
128 F.2d 808 (7th Cir. 1942) 28

Travis v. Reno,
163 F.3d 1000 (7th Cir. 1998) 32

United States ex rel. Roberts v. W. Pac. R.R. Co.,
190 F.2d 243 (9th Cir. 1951) 24

United States v. Clintwood Elkhorn Mining Co.,
553 U.S. 1 (2008) 26

United States v. County of Cook,
167 F.3d 381 (7th Cir. 1999) 29

United States v. Dalm,
494 U.S. 596 (1990) 26

United States v. Williams,
514 U.S. 527 (1995) 22

University Med. Ctr. of S. Nevada v. Shalala,
173 F.3d 438 (D.C. Cir. 1999) 21

Virginia v. Sebelius,
656 F.3d 253 (4th Cir. 2011), *cert. denied*, 133 S. Ct. 59 (2012) 17

Wade v. Hopper,
993 F.2d 1246 (7th Cir. 1993) 31

Walsh v. Dep't of Veterans Affairs,
400 F.3d 535 (7th Cir. 2005) 26, 27

Wright v. Regan,
656 F.2d 820 (D.C. Cir. 1981), *rev'd*, 468 U.S. 737 (1984)..22

Zambrano v. Reinert,
291 F.3d 964 (7th Cir. 2002) 22

Statutes:

5 U.S.C. § 703 25
5 U.S.C. § 704..25
26 U.S.C. § 36B .... *passim*
26 U.S.C. § 36B(b) 7
26 U.S.C. § 36B(c)... *passim*
26 U.S.C. § 36B(e)..6
26 U.S.C. § 36B(f) 5
26 U.S.C. § 125(f)..15, 32
26 U.S.C. § 4980H... *passim*
26 U.S.C. § 4980H(a) 10, 19
26 U.S.C. § 4980H(b) 10, 19
26 U.S.C. § 4980H(c) 10
26 U.S.C. § 4980H(d) 10, 27
26 U.S.C. § 5000A..12
26 U.S.C. § 6056.. *passim*
26 U.S.C. § 6056(a) 10
26 U.S.C. § 6056(b) 10
26 U.S.C. § 6402..24
26 U.S.C. § 6404..24
26 U.S.C. § 6406..24
26 U.S.C. § 7121..24
26 U.S.C. § 7122..24
26 U.S.C. § 7401..24
26 U.S.C. § 7421(a) 28
26 U.S.C. § 7426(c) 23
26 U.S.C. § 7805(a) 10
28 U.S.C. § 1346..26
28 U.S.C. § 2201..28
28 U.S.C. § 2410..23
29 U.S.C. § 218a..15, 32

29 U.S.C. § 218b....15, 32
31 U.S.C. § 3729(d)....24
42 U.S.C. § 1315....13
42 U.S.C. § 1396a(a)....12, 13
42 U.S.C. § 18021(a)....5
42 U.S.C. § 18022....7
42 U.S.C. § 18022(d)....5
42 U.S.C. § 18022(e)....5
42 U.S.C. § 18031....4
42 U.S.C. § 18031(b)....5
42 U.S.C. § 18031(d)....5
42 U.S.C. § 18041(c)....1, 6, 14
42 U.S.C. § 18044....4
42 U.S.C. § 18071(c)....6
42 U.S.C. § 18081....7
42 U.S.C. § 18082....7
Patient Protection and Affordable Care Act,
Pub. L. No. 111-148, 124 Stat. 119 (2010)....4
Ind. Code § 12-15-44.2-20....13

Rules and Regulations:

26 C.F.R. § 1.36B-1(k)....9, 14
26 C.F.R. § 1.36B-3(g)....7
26 C.F.R. § 601.601(d)....33
45 C.F.R. § 155.105(f)....6
45 C.F.R. § 155.200....5
45 C.F.R. § 155.305(g)....6
45 C.F.R. § 156.20....5
45 C.F.R. § 156.110....5
45 C.F.R. § 156.155(a)....5
45 C.F.R. § 156.200(b)....5
78 Fed. Reg. 218 (Jan. 2, 2013)....20
78 Fed. Reg. 54,996 (Sept. 9, 2013)....10

Miscellaneous:

Attorney General's Manual on the Administrative Procedure Act (1947)....25

Congressional Budget Office, *An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act* (Nov. 30, 2009)....8

Congressional Budget Office, *Effects on Health Insurance and the Federal Budget for the Insurance Coverage Provisions in the Affordable Care Act: May 2013 Baseline*, (May 14, 2013)........8

H.R. Rep. No. 111-443 (2010)........1, 4, 9

Indiana Family and Social Services Administration, *Healthy Indiana Plan 1115 Waiver Extension Application* (Apr. 12, 2013) 13

Letter from Cindy Mann, Director, Center for Medicaid & CHIP Services, CMS, to Debra F. Minott, Secretary, Indiana Family and Social Services Administration (Sept. 3, 2013) 14

Linda J. Blumberg & John Holahan, *Health Status of Exchange Enrollees: Putting Rate Shock in Perspective* (Urban Institute July 2013)........9

Notice 2013-45, 2013-31 I.R.B. 116........10, 15, 32

Office of the Ass't Sec'y for Planning & Evaluation, U.S. Dep't of Health & Human Servs., *ASPE Issue Brief: Health Insurance Marketplace Premiums for 2014* (Sept. 25, 2013)........8

Introduction

Congress enacted the Patient Protection and Affordable Care Act ("ACA" or "Act") in order to expand the availability of affordable health coverage. The Act creates new health insurance Exchanges, in which the purchasing power of individuals and small businesses are combined so that they can buy more affordable insurance. States establish and operate these Exchanges or, where a state chooses not to do so (or fails to do so) consistent with federal standards, the federal government establishes and operates the Exchange in place of the state. The Act also provides for financial assistance to individuals, in the form of premium tax credits, to help defray the cost of insurance purchased through the Exchanges. 26 U.S.C. § 36B. Congress recognized that the Section 36B tax credits "are key" to its goal of "ensuring people affordable health coverage." H.R. REP. NO. 111-443, pt. I, at 250.

The plaintiffs here, the State of Indiana and several Indiana school districts, seek to interfere with the Treasury Department's administration of these tax credits. They contend that the ACA's tax credits are available only for residents of states that operate their own Exchanges, and not states, such as Indiana, in which the federal government operates the Exchange. The plaintiffs' theory is wrong; in enacting the ACA, Congress made clear that an Exchange operated 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); *Halbig v. Sebelius*, --- F. Supp. 2d ---, 2014 WL 129023, at *18 (D.D.C. Jan. 15, 2014) ("the plain text of the statute, the statutory structure, and the statutory purpose make clear that Congress intended to make premium tax credits available on both state-run and federally-facilitated Exchanges"), *appeal docketed*, No. 14-5018 (D.C. Cir. Jan. 16, 2014). The Treasury Department, accordingly, has reasonably interpreted the Act to

provide for eligibility for the premium tax credits for individuals in every state, regardless of which entity operates the Exchange.

This lawsuit, however, is not the right forum to resolve this question. The plaintiffs are attempting to bring a virtually unheard-of suit: an action under the Administrative Procedure Act ("APA") that seeks to *increase* the tax liabilities of parties not before the court. Their challenge to the Treasury regulation suffers from a host of defects.

First, the plaintiffs lack Article III standing to proceed with that challenge. Indiana asserts that it has standing as a sovereign state to litigate its policy disagreements with the federal government concerning the ACA. Long-standing principles of justiciability, however, prohibit a state from suing the federal government on these grounds. The plaintiffs also claim standing in their capacity as employers. They contend that, because some of their employees might gain the Section 36B tax credit to defray the cost of insurance on the Exchange, and because that tax relief might trigger the employers' liability for the ACA's tax assessment for large employers that fail to offer adequate coverage for their full-time employees, 26 U.S.C. § 4980H, they may dispute their employees' entitlement to the tax credit. The plaintiffs can only offer speculation, however, that they will be subject to an assessment under Section 4980H. In any event, the plaintiffs' employees are not parties to this lawsuit, and thus this lawsuit could not resolve the employees' eligibility for the tax credit. The plaintiffs thus cannot gain redress for their supposed injuries in this action.

Second, the plaintiffs lack prudential standing to proceed in this APA action. Under settled principles of tax law, a plaintiff lacks standing to litigate the federal tax liabilities of a non-party. This principle applies with particular force where, as here, a plaintiff seeks to

increase the non-party's federal tax obligations. This prudential doctrine prevents the State of Indiana from suing here to deprive its residents of the substantial federal tax relief that is available to them under the ACA.

Third, the plaintiffs may not proceed under the APA because Congress has specified a different and adequate form of proceeding for their claims, namely, an action for a tax refund. Congress has declared in unmistakable terms that a plaintiff seeking to litigate matters of federal tax liability must first pay the tax assessed, file an administrative refund claim, and only then proceed to federal court. That remedy is adequate for the claims that the plaintiffs seek to assert here. The plaintiffs therefore may not depart from the exclusive form of review that Congress provided for tax claims by filing a pre-enforcement APA action.

In addition to their challenge to the Treasury regulation, the plaintiffs assert that the Section 4980H large employer tax, as well as a related tax reporting obligation that applies for large employers, 26 U.S.C. § 6056, are unconstitutional, because those provisions violate the Tenth Amendment or the principle of intergovernmental tax immunity. Indiana litigated precisely the same claims in a prior action, however, and lost on the merits. It is barred from relitigating those claims here. The school districts, which derive whatever Tenth Amendment rights they might enjoy from their status as subdivisions of the State of Indiana, stand in privity with Indiana for the purposes of these claims, and thus they are barred from proceeding as well. In any event, these claims would fail on the merits.

The plaintiffs also seek a declaration of judicial estoppel that would bind the federal government to its published statements that Section 4980H and Section 6056 will not be applied in 2014. This claim does not state a case or controversy; the parties are fully in agreement that

these provisions will not be so applied. Federal courts sit only to resolve real disputes, not imagined ones. This claim should be dismissed as well.

Background

I. The Affordable Care Act

Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), to address a crisis in the national health care market, namely, the unavailability of affordable health coverage for many Americans. The claims raised by the plaintiffs in this case primarily involve three features of the Act: (1) the establishment of health insurance Exchanges to facilitate the purchase of insurance by individuals and small groups; (2) the availability of premium tax credits to assist moderate-income individuals with the purchase of insurance on the Exchanges; and (3) the potential imposition of a tax assessment on applicable large employers that do not offer affordable, minimum-value insurance coverage to their full-time employees.

A. The Health Insurance Exchanges

For the individual and small-group health insurance markets, Congress established health insurance Exchanges to serve "as an organized and transparent marketplace for the purchase of health insurance where individuals and employees (phased-in over time) can shop and compare health insurance options." H.R. REP. NO. 111-443, pt. II, at 976 (2010) (internal quotation omitted). The Exchanges allow qualified individuals and qualified employers to use the leverage of collective buying power to obtain prices and benefits that are competitive with those of large-employer health plans. 42 U.S.C. §§ 18031-18044. Among other functions, the Exchanges certify the qualified health plans ("QHPs") that are offered in the Exchanges;

determine the eligibility of "qualified individuals" to enroll in these QHPs; and determine the eligibility of individuals for advance payments of the Act's premium tax credits and cost-sharing reductions (discussed below). 42 U.S.C. § 18031(d)(4); 45 C.F.R. § 155.200 *et seq.* Each Exchange is also directed to report information to the IRS for the purpose of determining whether participants in that Exchange are eligible for premium tax credits. 26 U.S.C. § 36B(f)(3).

The Exchanges offer plans with different levels of coverage, designated as "bronze," "silver," "gold," and "platinum" coverage. 42 U.S.C. § 18022(d). Each plan offered through an Exchange, regardless of its coverage level, must provide coverage of essential health benefits, as defined in regulations promulgated by the Department of Health and Human Services ("HHS"). 42 U.S.C. § 18021(a)(1)(B); *see* 45 C.F.R. §§ 156.20, 156.200(b)(3); *see also* 45 C.F.R. § 156.110 *et seq.* (defining essential health benefits package). A bronze plan offers coverage that is "designed to provide benefits that are actuarially equivalent to 60 percent of the full actuarial value of the benefits provided under the plan." 42 U.S.C. § 18022(d)(1). Silver, gold, and platinum plans are designed to offer benefits equivalent to 70, 80, and 90 percent of the actuarial value of the benefits provided under the plan, respectively. *Id.*[1]

The Act provides that "[a]n Exchange shall be a governmental agency or nonprofit entity that is established by a State." 42 U.S.C § 18031(d)(1); *see also* 42 U.S.C. § 18031(b)(1) ("Each State shall, not later than January 1, 2014, establish [an Exchange] for the State"). The Act does not impose any sanction, however, if a State elects not to establish an Exchange that

[1] The Exchanges may also offer "catastrophic plans" for persons who are under 30 years of age, or who have been certified to be exempt from the Act's minimum coverage provision by reason of hardship or lack of affordable insurance options. 42 U.S.C. § 18022(e); 45 C.F.R. § 156.155(a).

complies with federal standards. Instead, the Act directs that the Secretary of HHS shall "establish and operate such Exchange within the State." 42 U.S.C. § 18041(c)(1); *see* 45 C.F.R. § 155.105(f). The State of Indiana has elected not to operate an Exchange; as a result, HHS operates the Exchange for Indiana residents. Am. Compl., ¶ 3, ECF 22.

B. Premium Tax Credits and Cost-Sharing Reductions

Congress also enacted new premium tax credits and cost-sharing reduction payments in order to help ensure that health insurance is affordable. The Act establishes federal premium tax credits to assist eligible individuals with household incomes from 100% to 400% of the federal poverty level to purchase insurance through the Exchanges. 26 U.S.C. § 36B. These premium tax credits, which are advanceable and fully refundable such that individuals with little or no income tax liability can still benefit, are designed to make health insurance affordable by reducing a taxpayer's net cost of insurance. For eligible individuals with income from 100% to 250% of the federal poverty level, the Act also provides for federal payments to insurers to help cover those individuals' cost-sharing expenses (such as co-payments or deductibles) for insurance obtained through an Exchange. 42 U.S.C. § 18071(c)(2); 45 C.F.R. § 155.305(g).

The statute imposes certain conditions on eligibility for the premium tax credits. If the taxpayer is married, he or she must file a joint return to receive the credit. 26 U.S.C. § 36B(c)(1)(C). The taxpayer may not receive a credit if he or she is eligible to be claimed as a dependent on another taxpayer's return. 26 U.S.C. § 36B(c)(1)(D). The credit is available only for coverage of persons lawfully present in the United States. 26 U.S.C. § 36B(e). And the taxpayer may not receive a premium tax credit if he or she is eligible for any other form of coverage that qualifies as "minimum essential coverage" under the ACA, such as Medicare or

Medicaid. 26 U.S.C. § 36B(c)(2)(B).

Employer-sponsored coverage is defined as minimum essential coverage for this purpose. Section 36B nonetheless permits an employee who is eligible for, but does not enroll in, employer-sponsored health coverage to receive premium tax credits or cost-sharing reductions, if that coverage is unaffordable, meaning that the employee is required to pay more than 9.5% of his household income for that coverage, or if the plan does not offer minimum value, meaning that it fails to cover at least 60% of the total allowed costs of benefits under the plan. 26 U.S.C. § 36B(c)(2)(C).

The amount of the premium tax credit available to a taxpayer under Section 36B varies depending on the taxpayer's household income and family size. The amount of the premium tax credit is defined as the difference between the cost of the "applicable second lowest cost silver plan" available on the Exchange to the taxpayer and a defined percentage of the taxpayer's household income. 26 U.S.C. § 36B(b)(2), (b)(3). For example, a taxpayer with income at 200% of the federal poverty level could receive a credit that is equal to the cost of the second lowest cost silver plan available on the Exchange, less 6.3% of the taxpayer's household income. 26 U.S.C. § 36B(b)(3); 26 C.F.R. § 1.36B-3(g). A taxpayer need not purchase a silver plan to receive the premium tax credit. He or she may receive a credit in the same amount (subject to a cap equal to the amount of the premiums for the plan he or she purchases) for a cheaper bronze plan, or for a more expensive gold or platinum plan. 26 U.S.C. § 36B(c)(3)(A). Premium tax credits are not available for the purchase of catastrophic plans, however. *Id.*

The Exchanges also administer a program for the advance payments of the premium tax credits for eligible individuals. 42 U.S.C. §§ 18022, 18081-18082. Under this program, the

Exchange determines a taxpayer's anticipated eligibility for the premium tax credit at the time that the taxpayer or a family member applies for coverage under a plan offered on the Exchange. *Id.* If the Exchange approves advance payments of the premium tax credit, the payments are made directly to the insurer offering the plan in which the individual is enrolled, and the individual will be responsible to pay only the net cost of the premium after those payments are applied. *Id.*

The Congressional Budget Office ("CBO") has projected that, by 2018, twenty million people, or 80% of people who buy non-group insurance policies through the Exchanges, will receive premium tax credits. CBO, *Effects on Health Insurance and the Federal Budget for the Insurance Coverage Provisions in the Affordable Care Act: May 2013 Baseline*, tbl. 3 (May 14, 2013). It has also projected that the average subsidy, for each person who receives subsidized coverage through the Exchanges, will amount to $5,290 per person in 2014, rising to $7,900 in 2023. *Id.*, tbl. 1. Those credits, on average, will cover nearly two-thirds of the premiums for policies purchased through the Exchanges. CBO, *An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act*, at 6 (Nov. 30, 2009). After taking tax credits into account, 56% of uninsured Americans may qualify for health coverage for less than $100 per person per month. Office of the Ass't Sec'y for Planning & Evaluation, U.S. Dep't of Health & Human Servs., *ASPE Issue Brief: Health Insurance Marketplace Premiums for 2014* at 3-4 (Sept. 25, 2013).

Premiums for plans on the Exchanges are substantially lower than previous projections. The cost of a silver plan is, on average, 16% lower than what was contemplated under the CBO's original projections, even before tax credits are considered. *Id.* at 2-3. The Act's success in

lowering premiums is attributable in large part to the availability of the Section 36B tax credit. The Act's financial assistance encourages individuals with lower expected health care costs to participate in the Exchanges, resulting in an expansion of the risk pool, and a decrease in the expected costs of plans offered on the Exchanges. *See* Linda J. Blumberg & John Holahan, *Health Status of Exchange Enrollees: Putting Rate Shock in Perspective* at 2, 8 (Urban Institute July 2013). Because of this economic effect, then, Congress recognized that the Section 36B tax credits "are *key* to ensuring people affordable health coverage." H.R. REP. NO. 111-443, pt. I, at 250 (emphasis added).

The Treasury Department has promulgated a regulation that clarifies that participants in both state-operated and federally-facilitated Exchanges may be eligible for premium tax credits. 26 C.F.R. § 1.36B-1(k). In this suit, the plaintiffs seek to challenge the validity of this regulation.

C. The Tax Assessment for Large Employers That Fail to Offer Adequate Coverage

The Affordable Care Act prescribes a tax assessment under specified circumstances for certain large employers that do not offer affordable, minimum value coverage to full-time employees and their dependents, 26 U.S.C. § 4980H. (This provision is sometimes, but inaccurately, referred to as the "employer mandate"; Section 4980H does not impose any legal obligation on employers to provide health coverage for their employees. It instead provides large employers with a choice between providing coverage and the possibility of being subject to a tax assessment. *See Liberty Univ. v. Lew*, 733 F.3d 72, 97-98 (4th Cir.), *cert. denied*, 134 S. Ct. 683 (2013).) Under this provision, an applicable large employer that offers health coverage to its full-time employees and their dependents will be subject to a "tax," 26 U.S.C.

§ 4980H(b)(2), *see also* 26 U.S.C. § 4980H(c)(7), if one or more of its full-time employees "has been certified to the employer under [42 U.S.C. § 18081] as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee." 26 U.S.C. § 4980H(b)(1)(B); *see also* 26 U.S.C. § 4980H(a)(2) (same condition applies for assessment against applicable large employer that offers no coverage to its full-time employees and their dependents). As noted, an employee who is eligible for employer-sponsored health coverage is eligible to receive these subsidies only if the coverage offered by the employer fails to meet certain standards for affordable, minimum value coverage. *See* 26 U.S.C. § 36B(c)(2)(C). Accordingly, an applicable large employer that offers coverage to its full-time employees and their dependents meeting these standards will not be subject to the Section 4980H tax.

To facilitate the enforcement of Section 4980H, the Affordable Care Act requires applicable large employers to submit returns to the IRS that report on the coverage that they offer to their employees. 26 U.S.C. § 6056. The Act also empowers Treasury to prescribe rules to implement and enforce these provisions. 26 U.S.C. §§ 4980H(d); 6056(a), (b)(1), (b)(2)(F), (d); 7805(a). Treasury has not yet issued final regulations with respect to these provisions. In July 2013, Treasury announced that, as a transitional measure while the agency completes its rulemaking process, the reporting provision under Section 6056 will not be applied for 2014, and no Section 4980H tax assessments will be made for 2014. This notice has been published in the Internal Revenue Bulletin. *See* Notice 2013-45, 2013-31 I.R.B. 116; *see also* 78 Fed. Reg. 54,996, 55,009 (Sept. 9, 2013) (proposing rules relating to Section 6056 reporting requirement to apply beginning in 2015).

II. Procedural History

A. Indiana's Prior Challenge to the Constitutionality of the Act

The State of Indiana, along with several other state plaintiffs, brought suit in 2010 to challenge the constitutionality of the ACA. Am. Compl., *State of Florida, et al. v. U.S. Dep't of Health & Human Servs., et al.*, No. 3:10-cv-00091-RV-EMT (N.D. Fla. filed May 14, 2010). Among other claims, the states alleged that the ACA violated the Tenth Amendment by potentially subjecting them, as employers, to the Section 4980H tax with respect to the health coverage that they provide to their employees. *Id.*, ¶ 90. The states sought the invalidation of the Section 4980H tax as applied to them, as well as the invalidation of the remainder of the Act on the theory that the ACA was non-severable in its entirety. *Id.*, pp. 30-31. In support of this claim, the states argued that the ACA's regulation of them in their capacity as employers violated the Tenth Amendment, and argued that Supreme Court precedent to the contrary should be overruled. Pls.' Mem. in Opp. to Mot. to Dismiss at 57, *State of Florida, et al. v. U.S. Dep't of Health & Human Servs., et al.*, No. 3:10-cv-00091-RV-EMT (N.D. Fla. filed Aug. 6, 2010) (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)). The states also argued that the Section 4980H tax violated the principle of intergovernmental tax immunity. *Id.* at 58-60.

The district court rejected the states' challenge to Section 4980H, holding that *Garcia* remained good law. *Florida v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1153-54 (N.D. Fla. 2010). The court also rejected the states' attempt to reframe the same challenge as one arising under the doctrine of intergovernmental tax immunity, holding that the states had waived that challenge and, alternatively, that the challenge failed as a matter of law.

Id. at 1154 n.14. The district court subsequently, however, invalidated the ACA's minimum coverage provision, 26 U.S.C. § 5000A, and invalidated the remainder of the Act as non-severable. *Florida v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011). On appeal, the states attempted to preserve their *Garcia* challenge in a footnote to their brief, but did not pursue that challenge further. The court of appeals partially reversed the district court's judgment, holding Section 5000A to be unconstitutional but severing that provision from the rest of the Act; the court of appeals did not expressly address the *Garcia* challenge. *Florida v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011).

Indiana and the other state plaintiffs sought certiorari with respect to their *Garcia* challenge, among other issues. Petition for Writ of Certiorari at i, *State of Florida, et al. v. U.S. Dep't of Health & Human Servs, et al.*., No. 11-400 (U.S. filed Sept. 27, 2011) (Question Two). The Supreme Court partially granted the states' petition, but denied certiorari with respect to the *Garcia* challenge. 132 S. Ct. 604 (2011). On the merits, the Supreme Court sustained the minimum coverage provision as a valid exercise of Congress's taxing power, and sustained the ACA's expansion of the scope of eligibility for the Medicaid program, but held that HHS may not withdraw existing Medicaid funds for a state's failure to comply with that expansion provision. *Nat'l Fed'n of Indep. Business v. Sebelius* ("*NFIB*"), 132 S. Ct. 2566 (2012).

B. The Healthy Indiana Plan

The Medicaid program authorizes federal financial assistance to states that choose to reimburse certain costs of medical treatment for persons deemed to be categorically eligible for Medicaid coverage. *See* 42 U.S.C. § 1396a(a)(10)(A).[2] States may also receive federal funds

[2] Beginning in 2014, the ACA extends this categorical eligibility to individuals under

to provide health care benefits to individuals outside the State Medicaid Plan through a demonstration project under Section 1115 of the Social Security Act. *See* 42 U.S.C. § 1315. Indiana participates in the Medicaid program. Since 2008, Indiana has received Section 1115 funds to provide health coverage through a demonstration project, known as the "Healthy Indiana Plan," to certain persons with incomes up to 200% of the federal poverty level. *See* Ind. Code § 12-15-44.2-20.

Starting in 2014 (the year that the ACA's Exchanges become operational, and the Act's premium tax credits go into effect), Indiana law reduces the income cap for eligibility for the Healthy Indiana Plan to 138% of the federal poverty level ("FPL"). Ind. Code § 12-15-44.2-20. In April 2013, Indiana submitted an application to HHS to extend Section 1115 funding for the Health Indiana Plan through 2014. Indiana Family and Social Services Administration, *Healthy Indiana Plan 1115 Waiver Extension Application* (Apr. 12, 2013), available at http://www.in.gov/aca/files/April122013HIPWaiverExtensionApp.pdf. Indiana recited the reduction in the income cap for the Plan, and noted in its application that "[t]his will assure there is limited overlap with the tax credits available through the Exchanges." *Id.* at 29; *see also id.* at 44 ("Individuals with MAGI income between above [*sic*] 100% FPL will become eligible for Exchange subsidies beginning January 1, 2014"; former plan participants "over 138% FPL will be enrolled in a Qualified Health Plan with tax subsidies").

On September 3, 2013, HHS, through the Centers for Medicare & Medicaid Services ("CMS"), approved Indiana's application for a one-year extension of Section 1115 funds through

---

age 65 who are not receiving Medicare and who have incomes up to 138% of the federal poverty level. 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII). As noted above, in *NFIB*, the Supreme Court held that HHS may not withdraw existing Medicaid funds for a state's failure to comply with this expansion provision.

2014.[3] CMS's letter recited that it had approved the request to modify the Healthy Indiana Plan "in light of the coverage options that will be available to residents of Indiana beginning in January 2014." *Id.* at 1. CMS's approval recites that the parties had agreed that the project "will be limited to certain adults with incomes under 100 percent of the federal poverty level, and the state will develop a transition plan to facilitate a seamless transfer of coverage for those currently enrolled in the demonstration with incomes above that level." *Id.*

C. This Litigation

On October 8, 2013, five weeks after gaining CMS's approval for an extension of federal funding for its Healthy Indiana Plan that was premised on its agreement to transition former participants in the plan to subsidized health coverage through the Exchange, the State of Indiana filed this suit, which seeks to deprive state residents of the benefit of the federal tax credits extended to them under the ACA. Compl., ECF 1. The complaint, as amended, asserts five counts on behalf of the State of Indiana and thirty-nine Indiana school corporations.

In Count I, the plaintiffs seek to challenge the validity of 26 C.F.R. § 1.36B-1(k), the Treasury Department regulation that clarifies that participants in both state-operated and federally-facilitated Exchanges may be eligible for federal premium tax credits. Am. Compl., ¶¶ 197-204 (Count I). They contend that these tax credits are available only for participants in state-operated Exchanges and, thus, as residents of a state with a federally-operated Exchange, Indiana residents may not receive these tax credits. *But see* 42 U.S.C. § 18041(c)(1) (clarifying that the federally-facilitated Exchange stands in the shoes of the Exchange that a state chooses

[3] Letter from Cindy Mann, Director, Center for Medicaid & CHIP Services, to Debra F. Minott, Secretary, Indiana Family and Social Services Administration (Sept. 3, 2013), available at http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/in/in-healthy-indiana-plan-ca.pdf.

not to establish); *Halbig v. Sebelius*, --- F. Supp. 2d ---, 2014 WL 129023, at *18 (D.D.C. Jan. 15, 2014) (holding that the "plain text of the statute, the statutory structure, and the statutory purpose make clear that Congress intended to make premium tax credits available on both state-run and federally-facilitated Exchanges"). Indiana asserts that it has standing "as a sovereign" to dispute its residents' eligibility for federal tax credits. Am. Compl., ¶ 18. Indiana and the school districts also assert that they would be "expose[d]" to the Section 4980H large employer tax assessment if their employees are eligible for the tax credits. *Id.*, ¶ 179.

In Counts II and III, the plaintiffs contend that the Section 4980H large employer tax and the Section 6056 tax reporting requirement for large employers violate the Tenth Amendment and the principle of intergovernmental tax immunity, to the extent that these provisions are applied to governmental employers. Am. Compl., ¶¶ 208-216 (Counts II and III). In Count IV, the plaintiffs argue that, if they prevail on their as-applied challenge to Section 6056, additional provisions of the ACA could not be severed from Section 6056 and would therefore also be invalid as applied to the plaintiffs. Am. Compl., ¶¶ 219-220 (Count IV, reciting challenges to 29 U.S.C. §§ 218a, 218b, and 26 U.S.C. § 125(f)).[4]

In Count V, the plaintiffs seek a declaration of "judicial estoppel" that would bind the government to its announcement, set forth in Notice 2013-45, 2013-31 I.R.B. 116, that Section

[4] The challenged provisions: (1) require some large employers that offer health coverage to their employees to provide automatic enrollment for their full-time employees in their plan, 29 U.S.C. § 218a; (2) require some employers to notify their employees of the existence of an Exchange and of the employees' potential eligibility for Section 36B premium tax credits for the purchase of insurance through the Exchange, 29 U.S.C. § 218b; and (3) exclude from an employee's gross income the cost of health coverage provided by an employer, as part of a cafeteria plan, through a QHP offered on an Exchange, 26 U.S.C. § 125(f).

4980H will not be applied with respect to the 2014 tax year. Am. Compl., ¶¶ 221-226 (Count V).

Argument

I. The Plaintiffs' Challenge to the Treasury Regulation Is Not Justiciable (Count I)

A. Indiana Does Not Have Standing as a Sovereign to Seek to Deprive Its Residents of Federal Tax Credits

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (internal quotation omitted). "One element of the case-or-controversy requirement" is that plaintiffs "must establish that they have standing to sue." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013).

To establish Article III standing, an injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010). A plaintiff may not establish standing by speculating that he may be subject to some injury in the future. "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending. Thus, [the Supreme Court has] repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that

allegations of *possible* future injury are not sufficient." *Clapper*, 133 S. Ct. at 1147 (Supreme Court's emphasis; internal quotations omitted).

Indiana asserts that it has standing as a sovereign to dispute its residents' eligibility for federal tax credits. Am. Compl., ¶ 18. Longstanding principles governing *parens patriae* standing, however, prohibit Indiana from suing the federal government to adjudicate its residents' rights and obligations under federal law. The Supreme Court has long held that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982) (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923)). As the Court explained in *Mellon*, the citizens of a state "are also citizens of the United States," and "[i]t cannot be conceded that a state, as parens patriae, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof." *Mellon*, 262 U.S. at 485. The Court stressed that "it is no part of [a State's] duty or power to enforce [its citizens'] rights in respect of their relations with the federal government." *Id.* at 485-86. "In that field it is the United States, and not the state, which represents them as parens patriae." *Id.* at 486; *see also Virginia v. Sebelius*, 656 F.3d 253, 271 (4th Cir. 2011), *cert. denied*, 133 S. Ct. 59 (2012) (dismissing challenge brought by a state, purportedly on behalf of its citizens, to a provision of the ACA because "a state may not litigate in federal court to protect its residents from the operation of a federal statute").

These principles control here. Indiana, insofar as it bases its claim of standing on a policy disagreement with the federal government, asks this Court "to adjudicate, not rights of person or property, not rights of dominion over physical domain, not quasi sovereign rights

actually invaded or threatened, but abstract questions of political power, of sovereignty, of government." *Mellon*, 262 U.S. at 484-85. Such abstract questions do not present a justiciable issue. Indiana's suit falls squarely within the rule that "a state may not bring a *parens patriae* suit against the federal government." *Illinois Dep't of Transp. v. Hinson*, 122 F.3d 370, 373 (7th Cir. 1997); *see also Texas v. ICC*, 258 U.S. 158, 162 (1922) (state's claim of infringement upon state sovereignty was merely "an abstract question of legislative power," not a justiciable case or controversy); *New Jersey v. Sargent*, 269 U.S. 328, 337 (1926) (allegations that provisions of federal law "go beyond the power of Congress and impinge on that of the state … do not suffice as a basis for invoking an exercise of judicial power").

The prohibition against *parens patriae* standing applies with particular force here. As the Seventh Circuit has noted, this rule serves to prevent "bureaucrats … from wresting control of litigation from the people directly affected." *Illinois Dep't of Transp.*, 122 F.3d at 373. The people who are most "directly affected" by Section 36B are the Indiana residents who are eligible to receive tax credits for the purchase of insurance through the Exchange – including Indianans whose coverage under the Healthy Indiana Plan was discontinued on the premise that federally-subsidized coverage would be available for them. Their interest in receiving the Section 36B tax credit is directly adverse to the claim that Indiana seeks to bring here. Indiana may not seek to litigate its residents' eligibility for federal tax credits, then.

B. The Plaintiffs Lack Standing as Employers to Challenge the Treasury Regulation

Indiana and the school districts fare no better in their claim of standing in their capacity as employers. They contend that they are "exposed" to the possibility of a tax assessment under Section 4980H if their employees are eligible to receive the premium tax credit. Am. Compl.,

¶ 179. In particular, the plaintiffs allege that they offer qualifying health coverage to their full-time employees, but that they do not offer such coverage to some part-time or temporary employees working over 30 hours a week. The plaintiffs contend further that those part-time or temporary employees may gain premium tax credits for the purchase of insurance on the Exchange, triggering the employers' tax assessments. *E.g.*, Am. Compl., ¶ 178. This allegation of "exposure" to a future tax assessment in 2015 or later years, however, does not satisfy the plaintiffs' burden to show that an injury is certainly impending. Whether these plaintiffs will in fact incur a Section 4980H tax assessment turns on facts that are not pled in the complaint. In particular, the likelihood of a Section 4980H assessment will turn in part on the future actions of these plaintiffs' employees, namely, whether those employees obtain coverage under a plan offered in the Exchange, and whether those employees receive premium tax credits to assist with the purchase of that coverage. *See* 26 U.S.C. § 4980H(a), (b). The complaint is entirely devoid of any allegations as to whether any of the employer plaintiffs' employees will obtain such coverage on the Exchanges. If those employees do obtain such coverage, their eligibility for premium tax credits would turn on a variety of circumstances, such as their income, 26 U.S.C. § 36B(c)(1)(A), their tax filing status, 26 U.S.C. 36B(c)(1)(C), (D), and their eligibility for other qualifying coverage, such as eligibility for affordable coverage offered by the taxpayer's spouse's employer, *see* 26 U.S.C. § 36B(c)(2)(B).

Because the plaintiffs' allegation of an injury in fact depends on speculation as to the acts of third parties not before the court, they have failed to allege an Article III injury that is fairly traceable to the challenged government action. "'[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily

substantially more difficult to establish.'" *DH2, Inc. v. SEC*, 422 F.3d 591, 596 (7th Cir. 2005) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (internal quotation omitted)). In such a case, "'causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction – and perhaps on the response of others as well.'" *Id.* (quoting *Lujan*, 504 U.S. at 562). "In this situation 'much more is needed' to establish standing, and 'it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such a manner as to produce causation and permit redressability of injury.'" *Id.* (quoting *Lujan*, 504 U.S. at 562).

The plaintiffs have not met their heightened burden to demonstrate standing under this test. The plaintiffs assert that they may face a Section 4980H tax assessment if part-time, variable-hour, or seasonal employees receive tax credits for the purchase of insurance through the Exchanges. Whether those employees will receive those credits, however, turns on facts that are not adduced in the complaint. Those persons might not purchase a plan through the Exchange. They may be eligible for coverage from a different source, such a spouse's employer's plan, or the Healthy Indiana Plan. *See* 26 U.S.C. § 36B(c)(2)(B). Moreover, if those persons do receive tax credits, it is speculative whether this would result in a tax assessment against the employers. The question of the treatment of such employees for purposes of the Section 4980H tax assessment is an open one, and is the subject of ongoing rulemaking proceedings before Treasury. The plaintiffs cite to a *proposed* regulation addressing the treatment of intermittent employees for purposes of Section 4980H. Am Compl., ¶ 171 (citing 78 Fed. Reg. 218 (Jan. 2, 2013)). No final regulation has been issued, however, and the plaintiffs can only offer speculation that they would actually incur liability

under Section 4980H. They thus do not show that an injury is “certainly impending” against them. *Clapper*, 133 S. Ct. at 1147.

The plaintiffs also lack standing for a more fundamental reason. Their asserted injury would not be redressable through their challenge to the Treasury regulation. No judgment in this action could bind the parties who are not present here, namely, the employees who the plaintiffs contend may receive federal tax credits. Thus, even if this Court were to accept the plaintiffs’ reading of the Internal Revenue Code and attempt to award relief in their favor, the employees could still bring their own claim seeking the award of the tax credit. The plaintiffs thus could not gain redress from the injury that they claim results from their “exposure” to the possibility that their employees’ receipt of the tax credit would result in a tax assessment against them. *See Lujan*, 504 U.S. at 569 (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). The plaintiffs, then, cannot carry their burden to show that it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision,” *Lujan*, 504 U.S. at 561 (internal quotation omitted), and consequently they lack standing to pursue this action.

C. The Plaintiffs Lack Prudential Standing to Seek to Adjudicate the Tax Liabilities of Absent Third Parties

In addition to the requirement of Article III standing, a plaintiff must also demonstrate that he or she has prudential standing to invoke the jurisdiction of a federal court. The doctrine of prudential standing “embodies judicially self-imposed limits on the exercise of federal jurisdiction.” *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (internal quotation omitted). “Without such limitations – closely related to Art. III concerns but

essentially matters of judicial self-governance – the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Id.* at 12 (internal quotation omitted). The plaintiffs' claims violate one such limitation, namely, "the principle that a party may not challenge the tax liability of another." *United States v. Williams*, 514 U.S. 527, 539 (1995).

"It is well-recognized that the standing inquiry in tax cases is more restrictive than in other cases." *Nat'l Taxpayers Union v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995). The standing inquiry becomes particularly "restrictive" where a plaintiff seeks to litigate the tax liabilities of third parties who are not before the court. In that context, the courts have recognized "the principle that a party may not challenge the tax liability of another," apart from circumstances where the party stands in the shoes of the absent taxpayer. *Williams*, 514 U.S. at 539. Accordingly, the Supreme Court has expressed doubt (without directly deciding) "whether a third party ever may challenge IRS treatment of another." *Simon v. E. Ky. Welfare Rights Org*., 426 U.S. 26, 37 (1976). At most, the door is "barely ajar" for third party challenges in tax litigation. *Wright v. Regan*, 656 F.2d 820, 828 (D.C. Cir. 1981), *rev'd sub nom. Allen v. Wright*, 468 U.S. 737, 748-49 (1984) (closing the door). Indeed, the "general rule" is "that no one can have standing to litigate the application of a tax to another." *Nat'l Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1551 (Fed. Cir. 1988). *See also Zambrano v. Reinert*, 291 F.3d 964, 975 (7th Cir. 2002) (Easterbrook, J., concurring) ("people lack standing to litigate about strangers' taxes").

Congress has consistently legislated with this understanding. For example, a person who is subject to a levy by the IRS to satisfy a third party's tax debt may bring a wrongful levy action to challenge the procedural validity of the IRS's action. In such a proceeding, however, "the assessment of tax upon which the interest or lien of the United Sates is based shall be conclusively presumed to be valid." 26 U.S.C. § 7426(c). Similarly, a person who owns property subject to a tax lien arising from a third party's tax debt may bring a quiet title action under 28 U.S.C. § 2410 to litigate the validity of the tax lien; the validity of the underlying tax assessment may not be questioned in that proceeding. *See, e.g., Arford v. United States*, 934 F.2d 229, 232 (9th Cir. 1991). And, in limited circumstances, a person who owns property subject to the federal tax lien may pay a third party's tax debt and bring a refund action to litigate the validity of the lien. The limitations of 26 U.S.C. § 7426(c) apply to such a suit, and consequently the plaintiff is "bound by the assessment on the property." *First Am. Title Ins. Co. v. United States*, 520 F.3d 1051, 1054 (9th Cir. 2008). *See also Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. IRS*, 845 F.2d 139, 144 (7th Cir. 1988) (precluding third-party challenge to federal tax assessment).

This principle applies with special force where, as here, a plaintiff seeks to *increase* the tax liabilities of third parties who are not before the court. Even if the door is "barely ajar" for plaintiffs to seek to decrease a third party's tax liability, the door should remain firmly shut for those plaintiffs who ask a federal court to impose *additional* federal tax obligations on absent parties. A court could not award such relief to a plaintiff in an APA action without inserting itself inappropriately into the process of tax administration:

> Congress has erected a complex structure to govern the administration and enforcement of the tax laws, and has established precise standards and procedures

> for judicial review of tax matters. Even if the plaintiffs succeeded in gaining the relief they seek [to prohibit favorable tax treatment for third parties] … the affected taxpayers, who are not parties, would remain free to challenge any deficiencies asserted. … It is obvious that the relief the plaintiffs seek, if granted, would seriously disrupt the entire revenue collection process.

Apache Bend Apartments, Ltd. v. United States, 987 F.2d 1174, 1177 (5th Cir. 1993). *See also Louisiana v. McAdoo*, 234 U.S. 627, 632 (1914) (declining to adjudicate third-party challenge to favorable tax treatment for another taxpayer, because the maintenance of such actions "would operate to disturb the whole revenue system of the government").[5]

The plaintiffs, therefore, may not bring an action under the APA to seek to increase the federal tax liabilities of their employees. Their claims would impose the same logistical challenges on the federal courts as did the claim at issue in *Apache Bend Apartments*. This Court could adjudicate the plaintiffs' claims only by taking jurisdiction over absent parties (the employees who are potentially eligible for premium tax credits) and by adjusting the Treasury Department's treatment of those parties on a wholesale basis. Any such effort would "seriously disrupt the entire revenue collection process," 987 F.2d at 1177, and thus prudential principles dictate that this Court should decline to permit an APA action to proceed in this manner. Indeed, if the plaintiffs could bring an action under the APA to litigate their employees' tax

[5] The Internal Revenue Code expressly directs that only the Secretary of the Treasury (with the approval of the Attorney General) may institute a "civil action for the collection or recovery of taxes." 26 U.S.C. § 7401. *See also* 26 U.S.C. §§ 6402 (refund authority), 6404 (authority to abate assessments), 6406 (rendering Secretary's treatment of assessment to be final); 7121 (closing agreement authority), 7122 (compromise authority). The Code thus demonstrates a textual commitment that matters concerning the validity or amount of a taxpayer's tax assessment are reserved for litigation between that particular taxpayer and the government, without interposition by third parties. Applying this principle, for example, the courts have prohibited plaintiffs from bringing *qui tam* actions to litigate other parties' tax liabilities to the federal government. *See United States ex rel. Roberts v. W. Pac. R.R. Co.,* 190 F.2d 243, 247 (9th Cir. 1951); *see also* 31 U.S.C. § 3729(d).

liabilities under the theory that they seek to pursue here, there would be no reason that they could not bring a similar action to litigate other issues related to their employees' eligibility for Section 36B premium tax credits, such as the employees' potential eligibility for coverage under a spouse's employer-sponsored plan, 26 U.S.C. § 36B(c)(2)(B), their status as the dependent of another taxpayer, 26 U.S.C. § 36B(c)(1)(D), or any other reason. The APA does not contemplate such interference with the "administration and enforcement of the tax laws," *Apache Bend Apartments*, 987 F.2d at 1177, and consequently the employer plaintiffs lack prudential standing to seek to litigate the tax liabilities of parties not before this Court.

D. The Plaintiffs Must Proceed in the Forum that Congress Specified, an Action for a Tax Refund

Although the APA generally provides for judicial review of agency action, it does not create a cause of action in cases where Congress has specified other judicial review procedures. In such cases, "[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. Similarly, under 5 U.S.C. § 704, "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. Congress has specified the judicial remedy that is available for the plaintiffs here – an action for a tax refund. That remedy is adequate, and, as a result, the plaintiffs must bring their claims in that proceeding, and not in this APA action.

The APA "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) (quoting Attorney General's Manual on the Administrative Procedure Act 101

(1947)). "When Congress enacted the APA to provide a general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies." *Id.*; *see also Darby v. Cisneros*, 509 U.S. 137, 146 (1993). Simply put, "[y]ou may not bypass the specific method that Congress has provided for reviewing adverse agency action by suing the agency in federal district court under [28 U.S.C. §§] 1331 or 1337; the specific statutory method, if adequate, is exclusive." *General Finance Corp. v. FTC*, 700 F.2d 366, 368 (7th Cir. 1983); *see also Walsh v. Dep't of Veterans Affairs*, 400 F.3d 535, 537-38 (7th Cir. 2005).

The plaintiffs here seek to adjudicate their potential liability for a tax assessment under Section 4980H of the Internal Revenue Code. Congress has specified that a tax refund suit is the form of proceeding that a plaintiff must follow for such a claim. The district courts have jurisdiction to hear "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws." 28 U.S.C. § 1346. Before bringing such a suit, the taxpayer "must comply with the tax refund scheme established in the Code," *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 4 (2008), including the requirements that the tax has been assessed, that the taxpayer has made payment in full, and that he or she has filed an administrative claim for a refund before bringing suit. *See United States v. Dalm*, 494 U.S. 596, 609-10 (1990). Congress thus has specified the form of proceeding that the taxpayer must follow "in an unusually emphatic form." *Clintwood Elkhorn Mining Co.*, 553 U.S. at 7 (internal quotation omitted). Indeed, the Supreme Court has

observed that "we cannot imagine what language could more clearly state that taxpayers seeking refunds of unlawfully assessed taxes must comply with the Code's refund scheme before bringing suit[.]" *Id*. at 8.

Congress took particular care to specify that claims like those that the plaintiffs seek to advance here should be brought instead in the context of a refund action. "The Secretary shall prescribe rules … for the *repayment* of any assessable payment (including interest) if such payment is based on the allowance or payment of an applicable premium tax credit or cost-sharing reduction with respect to an employee, such allowance or payment is subsequently disallowed, and the assessable payment would not have been required to be made but for such allowance or payment." 26 U.S.C. § 4980H(d)(3) (emphasis added). The statute thus directly contemplates that the employer's remedy, in a case where its employee's Section 36B premium tax credit is disallowed, will arise after the employer's *payment* of the tax owed. That is, the employer must proceed in a refund action, as would any other taxpayer.

Moreover, a tax refund action plainly would afford the plaintiffs here adequate relief – payment in full, with interest, of any overpayment of their federal tax obligations, if they ultimately prevail. "[T]he alternative remedy need not provide relief identical to relief under the APA, so long as it offers relief of the same genre." *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009) (internal quotation omitted); *see also Walsh*, 400 F.3d at 538. It is well-settled that a tax refund action provides an adequate remedy at law, even though the tax must first be imposed before the suit is brought. *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); *see also Barr v. United States*, 736 F.2d 1134, 1135 (7th Cir. 1984). Because the APA does not duplicate the adequate

remedy that Congress provided in the form of a refund action, the plaintiffs must raise their claims in that forum, and not in this pre-enforcement action.[6]

II. The Plaintiffs May Not Relitigate Their Constitutional Challenges to the ACA (Counts II through IV)

In prior litigation, the State of Indiana, along with other plaintiffs, sought the total invalidation of the ACA. In particular, it sought to immunize itself from the ACA's regulation of the health coverage that it offers to its employees, on the theory that any such regulation of the state or its agencies would violate the Tenth Amendment and the principle of intergovernmental tax immunity. It lost this claim, in a final judgment, on the merits. *See supra*, pp. 11-12. Under principles of claim preclusion and issue preclusion, then, it may not seek to relitigate its claim here. Moreover, the school districts are in privity with Indiana with respect to these claims, and they too are barred from relitigating those claims here.

The doctrine of claim preclusion applies to bar a second suit in federal court if three elements exist: "(1) an identity of the causes of actions; (2) an identity of the parties or their privies; and (3) a final judgment on the merits." *Bernstein v. Bankert*, 733 F.3d 190, 226 (7th

---

[6] The Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421(a), offers a separate and independent ground for the dismissal of these claims. The AIA deprives this Court of jurisdiction over the plaintiffs' challenge to their potential assessment for the Section 4980H tax. The defendants acknowledge, however, that the Seventh Circuit recently held that the AIA does not pose a jurisdictional barrier to a challenge to the Section 4980H tax. *Korte v. Sebelius*, 735 F.3d 654, 669-71 (7th Cir. 2013). The defendants contend that this holding is in error, however, because Section 4980H expressly refers to the assessment that it imposed as a "tax." *See Halbig*, --- F. Supp. 2d ---, 2014 WL 129023, at *10 n.9 (expressly disagreeing with the reasoning of *Korte*). The defendants accordingly contend that the AIA bars the plaintiffs' attempt to restrain the potential assessment of the Section 4980H tax against them, but recognize that this Court is constrained by Circuit precedent on this point. The defendants likewise contend that the tax exception to the Declaratory Judgment Act, 28 U.S.C. § 2201, bars the plaintiffs' claims here, but acknowledge that the Seventh Circuit's holding that the tax exception is co-extensive with the AIA, *Tomlinson v. Smith*, 128 F.2d 808, 811 (7th Cir. 1942), likely binds this Court to rule otherwise.

Cir. 2013). Under the first element, "a claim is deemed to have 'identity' with a previously litigated matter if it is based on the same, or nearly the same, factual allegations arising from the same transaction or occurrence." *Id.* As to the second element, "whether there is privity between a party against whom claim preclusion is asserted and a party to prior litigation is a functional inquiry in which the formalities of legal relationships provide clues but not solutions." *Tice v. American Airlines, Inc*., 162 F.3d 966, 971 (7th Cir. 1998). This question involves a "fact-specific analysis." *Bernstein*, 733 F.3d at 226. As to the final element, "a judgment on the merits is one which is based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction, or form." *Id.* (quotation omitted).

All three elements are met here with respect to the plaintiffs' constitutional claims. First, Indiana is pursuing precisely the same claim that it did in the *Florida* litigation: it seeks to invalidate any application of the Section 4980H tax assessment against it. It cannot defeat claim preclusion by also challenging the constitutionality of the Section 6056 reporting provision, or by raising new theories for the invalidation of either provision. "[C]laim preclusion … cannot be defeated by raising new arguments; judgments are conclusive not only with respect to arguments actually made, but also with respect to arguments that could have been made." *United States v. County of Cook*, 167 F.3d 381, 382 (7th Cir. 1999). In the *Florida* case, Indiana and the other state plaintiffs asserted that any regulation of them under the ACA in their capacity as employers would be unconstitutional. Claim preclusion bars it from advancing the same claim again here.

Second, there is an identity of the parties. Indiana, of course, is the same entity that was a plaintiff in the *Florida* litigation. The school districts are also in privity with Indiana for the

purposes of these claims. The school districts, like the state, argue that the Tenth Amendment and principles of federalism should prohibit the federal government from regulating state-created entities such as themselves. The school districts' Tenth Amendment "rights, if any, derive from those of the [state]," and so they "also [are] bound by the prior determination." *Board of Elec. Light Comm'rs of City of Burlington v. McCarren*, 725 F.2d 176, 178 (2d Cir. 1983) (binding municipality to judgment against state agency). *See also County of Boyd v. US Ecology, Inc.*, 48 F.3d 359, 361-62 (8th Cir. 1995) (county bound by judgment on same claim raised by state in prior case); *Grand Traverse Band of Ottawa & Chippewa Indians v. Director, Mich. Dep't of Nat. Res.*, 141 F.3d 635, 642 (6th Cir. 1998) (municipalities bound by judgment against state); *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 493-94 (4th Cir. 1981) (school districts bound by judgment against state). Thus, the political subdivisions of the State of Indiana may not sue to raise the same Tenth Amendment claim that their own state government may no longer raise.

Third, there was a final judgment on the merits. The district court in the *Florida* litigation dismissed Indiana's Tenth Amendment claim for failure to state a claim; with respect to Indiana's intergovernmental tax immunity argument, the district court held that that argument was waived, and, in the alternative, that it failed as a matter of law. The court of appeals affirmed this aspect of the district court's judgment without further discussion, and the Supreme Court denied Indiana's petition for a writ of certiorari with respect to this question. Indiana's claim of Tenth Amendment immunity from regulation under the ACA thus has been finally resolved against it. *See, e.g.*, *Post v. Hartford Ins. Co.*, 501 F.3d 154, 169 (3d Cir. 2007) ("Dismissal for failure to state a claim is a final judgment on the merits for res judicata

purposes."); *Wade v. Hopper*, 993 F.2d 1246, 1251-52 (7th Cir. 1993).

The plaintiffs are also barred from bringing their Tenth Amendment or intergovernmental tax immunity claims under principles of issue preclusion. Issue preclusion applies if four elements are met: "(1) the issue sought to be precluded must be the same as that involved in the prior litigation, (2) the issue must have been actually litigated, (3) the determination of the issue must have been essential to the final judgment, and (4) the party against whom estoppel is invoked must be fully represented in the prior action." *Matrix IV, Inc. v. Am. Nat'l Bank & Trust Co.*, 649 F.3d 539, 547 (7th Cir. 2011). Each element is met here. Indiana actually litigated, and lost, the same issue that it seeks to litigate here – its claim that, as a state employer, it is immune from the ACA's regulation of its relationship with its employees. It lost on that issue on the merits, and that determination was essential to the dismissal of its complaint with respect to that issue. And, of course, Indiana was "fully represented" by experienced counsel in the first action, and the school districts stand in privity with Indiana for purposes of issue preclusion for the same reasons that they do for purposes of claim preclusion. The plaintiffs' challenges to the application of Section 4980H or Section 6056 against them, under either Tenth Amendment or intergovernmental tax immunity theories, are therefore barred under both claim preclusion and issue preclusion.

In any event, those theories fail on the merits. The Tenth Amendment is not offended when Congress regulate the states' own activities as employers, at least where, as here, the regulation is one of general applicability. *See Garcia*, 469 U.S. at 554; *see also Reno v. Condon*, 528 U.S. 141, 150 (2000). "Neutrality between governmental and private spheres is a principal ground on which the Supreme Court has held that States may be subjected to regulation

when they participate in the economic marketplace – for example, by hiring workers covered by the Fair Labor Standards Act." *Travis v. Reno*, 163 F.3d 1000, 1002 (7th Cir. 1998). Likewise, the intergovernmental tax immunity doctrine is not implicated where Congress subjects state employers to a nondiscriminatory tax. *See South Carolina v. Baker*, 485 U.S. 505, 525 n.15 (1988) ("[T]he best safeguard against excessive taxation (and the most judicially manageable) is the requirement that the government tax in a nondiscriminatory fashion."). Section 4980H applies a tax on nondiscriminatory terms to both private and public employers, and both public and private employers are subject to the same reporting obligations under Section 6056. State employers may be subject to this taxing provision, then, in the same manner as they are subject to other well-established employment taxes, such as the FICA taxes that fund Social Security and Medicare.[7]

III. There Is No Case or Controversy with Respect to the Plaintiffs' 2014 Liability for the Large Employer Tax (Count V)

Last, the plaintiffs seek a declaration of "judicial estoppel" that would bind the defendants to the representation, already formally published in the Internal Revenue Bulletin, that the Section 4980H tax assessment and the Section 6056 reporting requirement will not begin to be applied until 2015. *See* Notice 2013-45, 2013-31 I.R.B. 116. This claim does not state a case or controversy under Article III of the Constitution. The plaintiffs and the defendants are both in agreement that neither Section 4980H nor Section 6056 will be applied for 2014. This

[7] Counts II and III thus fail, both for reasons of claim and issue preclusion, and on the merits. Count IV thus necessarily fails as well, as the plaintiffs expressly acknowledge that their claims under this count would arise only if they were first to prevail on Count III. Am. Compl., ¶¶ 219-20. In any event, it is not apparent from the complaint why the plaintiffs believe that 29 U.S.C. §§ 218a and 218b and 26 U.S.C. § 125(f) are not severable from the separate tax reporting provision of 26 U.S.C. § 6056. Nor is it apparent why the plaintiffs seek this result.

Court sits only to resolve real disputes between the parties, not to address imagined disputes that have no real likelihood of coming to fruition.

"Article III of the Constitution bars a federal court from enjoining threatened action that the plaintiff has no reason to suppose even remotely likely ever to materialize; there must be a real dispute in the sense that its resolution is likely to have tangible consequences for the plaintiff." *Lawson v. Hill*, 368 F.3d 955, 957 (7th Cir. 2004) (citing *Poe v. Ullman*, 367 U.S. 497 (1961)). Because "federal courts lack the power to give advisory opinions in hypothetical cases," a plaintiff does not state a case or controversy by alleging that a defendant "might someday enforce" a rule against him. *Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396, 1403 (7th Cir. 1993); *see also MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (requiring "substantial controversy, between parties having adverse legal interests" before declaratory judgment may issue).

Under these principles, there is no genuine dispute between the parties as to the application of Sections 4980H or 6056 for this year. As noted, the IRS has determined that these provisions will not be applied until 2015, and has published a notice to that effect in the Internal Revenue Bulletin, which serves as "the authoritative instrument of the Commissioner for the announcement of official rulings, decisions, opinions, and procedures, and for the publication of Treasury decisions, ... and other items pertaining to internal revenue matters." 26 C.F.R. § 601.601(d)(1). The plaintiffs do not state a claim for relief by speculating, without basis, that the defendants will change course. Count V, accordingly, should be dismissed for the absence of a case or controversy.

Conclusion

For the foregoing reasons, the defendants respectfully request that the complaint be dismissed for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rule of Civil Procedure and for failure to state a claim pursuant to Rule 12(b)(6) of those rules.

Dated: January 31, 2014

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General

JOSEPH H. HOGSETT
United States Attorney
SHELESE WOODS
Assistant United States Attorney

/s/ Joel McElvain
SHEILA LIEBER
Deputy Branch Director
JOEL McELVAIN
Senior Trial Counsel
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, D.C. 20530
(202) 514-2988
Joel.McElvain@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2014, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Ashley Tatman Harwel
ashley.harwel@atg.in.gov

Heather Hagan McVeigh
heather.mcveigh@atg.in.gov

Thomas M. Fisher
tom.fisher@atg.in.gov

Kenneth Alan Klukowski
kenklukowski@gmail.com

Andrew M. McNeil
amcneil@boselaw.com

John Zhi Huang
jhuang@boselaw.com

Winthrop James Hamilton
jhamilton@boselaw.com

/s/ Joel McElvain
JOEL McELVAIN
Senior Trial Counsel
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, D.C. 20530
(202) 514-2988
Joel.McElvain@usdoj.gov