UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

STATE OF INDIANA, et al.,	)	
	)	
The Schools,	)	
	)	
v.	)	
	)	
	)	CASE NO. 1:13-cv-1612-WTL-TAB
INTERNAL REVENUE SERVICE, et al.,	)	
	)	
	)	
	)	
Defendants.	)	

PLAINTIFF SCHOOL CORPORATIONS' RESPONSE TO MOTION TO DISMISS AMENDED COMPLAINT

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INTRODUCTION[1]

Although much surrounding the Patient Protection and Affordable Care Act ("ACA") has been controversial, the specific ACA controversy underlying this lawsuit arises from an IRS regulation that materially changes the meaning and structure of the ACA provisions that extend tax credits to qualifying individuals to offset the premium costs and certain cost-sharing obligations (e.g., copays and deductibles). Specifically, the ACA provides that each of the 50 states "shall" establish an "Exchange" through which individuals may shop for, compare, and purchase health insurance, and that the Secretary for the Department of Health & Human Services shall establish the Exchange in any state that elects not to establish one. Importantly, in a provision added to the Internal Revenue Code by the ACA, premium assistance credits and cost-sharing reductions are available only for insurance purchased through "an Exchange established by the State" under a certain section of the ACA (section 1311).

Even so, the Internal Revenue Service adopted a rule that makes the premium assistance credits and cost-sharing reductions available to any taxpayer who purchases insurance through any Exchange, whether state-established or federally-facilitated (generally, the "IRS Rule"). The effect of this IRS Rule is to expand liability under the ACA's employer mandate to employers in those states that did not establish their own Exchanges. Under the law, an employer of 50 or more full-time equivalent employees that fails to offer affordable, minimum value coverage and has at least one full-time employee (defined as 30-plus hours of service a week on average) who receives a premium assistance tax credit or a cost-sharing reduction (which eligibility is determined through an income-based formula) is subject to the employer mandate penalties,

[1] Throughout this brief, the 39 plaintiff public school corporations shall be referred to collectively as the "Schools."

which are fines that, depending on the number of full-time employees, could amount to millions of dollars.

But for the IRS Rule, the plaintiffs, as employers, would not be subject to the employer mandate penalties, because Indiana (along with 33 other states) elected not to establish its own Exchange. Instead, its citizens and residents may choose from plans offered through the federally-facilitated Exchange (which is found at www.healthcare.gov). Given the IRS Rule, the Schools face the specter of substantial penalties under the employer mandate because historically job classifications such as instructional aides, substitute teachers, and cafeteria workers (1) were considered part-time; (2) were not eligible for health insurance; and (3) involved more than 30-hours per week on average. The Schools, in response to the IRS Rule, were forced to either provide more coverage while absorbing the increased costs or make changes in how they delivered their constitutionally-required educational services.

The plaintiffs, including the 39 public school corporations, have brought this action to invalidate the IRS Rule under the Administrative Procedures Act and to challenge the constitutionality of the employer mandate and specific reporting requirements under the Tenth Amendment. For the reasons set forth herein and in the brief filed by the State of Indiana, the Schools respectfully request that the court deny the defendants' motion to dismiss.[2] Contrary to the Federal Government's contentions, the Schools (1) have Article III standing based on the increased compliance costs and administrative burdens they have already suffered as a direct result of the IRS Rule and the employer mandate; (2) have standing to pursue a pre-enforcement action to challenge the IRS Rule and its implications for the employer mandate, rather than having to pursue an action for a tax refund; and (3) are not estopped from pursuing their Tenth

[2] Throughout this brief, the defendants collectively shall be referred to as the "Federal Government."

Amendment claim because they were not parties to any prior litigation of this claim and they are not in privity with any parties that have already litigated this claim.

ARGUMENT

I. The Schools Have Suffered Direct Injury as a Result of the IRS Rule Because that Rule Has Imposed Compliance Costs Realized Through Altered Workforce Policies

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), dictates that in order to establish Article III standing, a "plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical[.]" *Id.* at 560 (internal quotes and citations omitted). Next, "there must be a causal connection between the injury and the conduct complained of[.]" *Id.* Finally, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (internal quotes and citations omitted). Here, the Schools easily satisfy "the irreducible constitutional minimum of standing" established by the Supreme Court. *Id.* at 560.

At the outset, it is important to note that the Federal Government's standing argument ignores the real, concrete, and particularized injury-in-fact incurred by the Schools as a result of the IRS Rule. The Federal Government argues that it is speculative whether any of the Schools' employees will purchase health insurance on an Exchange, receive a subsidy, and therefore trigger the Schools' payment of the large employer tax penalty. *See* MTD Br. 18-20. In making this argument, the Federal Government fails to recognize the harm to the Schools that is repeatedly addressed in the Amended Complaint. There, the Schools, in modest detail, outlined the immediate and direct impact on them in the delivery of their core educational services, their education policies, and their fiscal health. This is sufficient to establish standing at this stage. *See Lujan*, 504 U.S. at 561 ("At the pleading stage, general factual allegations of injury resulting

from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'").

Federal courts throughout the nation have held that increased compliance costs as a result of a statute or regulation constitute injury in fact sufficient to confer Article III standing. In addressing a pre-enforcement challenge concerning the constitutionality of the ACA's employer mandate, the court in *Liberty University, Inc. v. Lew*, 733 F.3d 72 (4th Cir.), *cert. den.*, 134 S. Ct. 683 (2013) held that "to establish standing, Liberty need not prove that the employer mandate will increase its costs of providing health coverage; it only need *plausibly* allege that it will. Liberty's allegation to this effect is *plausible*." *Id.* at 90 (emphases added). In addition, the court explicitly rejected the standing argument that the Federal Government raises here and held that "Liberty need not show that it will be subject to an assessment payment to establish standing" because "it *may well* incur additional costs because of the administrative burden of assuring compliance with the employer mandate, or due to an increase in the cost of care." *Id.* at 89-90 (emphasis added). In deciding that Liberty University had standing to challenge the employer mandate, the Fourth Circuit cited decisions from the D.C. Circuit, Second Circuit, and Sixth Circuit which also held that increased compliance costs and administrative burdens constituted injury in fact sufficient to confer Article III standing. *Id*. at 90[3]; *see also Oklahoma ex rel. Pruitt v. Sebelius*, No. CIV-11-30-RAW, 2013 WL 4052610, at *6-*9 (E.D. Okla. Aug. 12, 2013) (holding that the State of Oklahoma had standing to challenge the IRS Rule in its capacity as an

[3] *See Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 457-58 (D.C. Cir. 2012) (increased compliance costs constitute injury in fact sufficient to confer standing); *N.Y. Civil Liberties Union v. Grandeau*, 528 F.3d 122, 131 (2d Cir. 2008) (administrative burden constitutes injury in fact for standing purposes); *Frank v. United States*, 78 F.3d 815, 823-24 (2d Cir. 1996) (same), *vacated on other grounds*, 521 U.S. 1114 (1997); *see also State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 480 (D.C. Cir. 1986), *cert. den.*, 480 U.S. 951 (1987); *Nat'l Rifle Ass'n v. Magaw*, 132 F.3d 272, 287 (6th Cir. 1997).

employer based on allegations in the Complaint that referenced "obligations," "actions," and "expenses" that the State incurred as a result of the Rule).

Here, several of the Schools alleged in the Amended Complaint that the IRS Rule and its attendant employer mandate have already imposed increased compliance costs and administrative burdens that constitute injuries in fact sufficient to confer standing on the Schools. For example, East Porter County School Corporation ("East Porter") will be sponsoring health insurance for bus drivers, secretaries, school treasurers, technology aides, and full-time custodians that will cost East Porter approximately $96,000, coverage that but for the IRS Rule it would not offer and an expense it would not incur. (Am. Compl. at ¶ 41; Declaration of Rod Gardin.[4]) Similarly, North Putnam Community School Corporation plans to "offer health insurance coverage to new classes of employees eligible for health insurance under the ACA." Am. Compl. at ¶ 79. More examples abound: Northwestern Consolidated School District of Shelby County has "revised the job classifications of 14 other positions to allow for participation in open enrollment during the fall of 2014" and "was not able to increase the wages of the employees whose hours were reduced because of the need to offset the increased benefits costs imposed by the ACA," *id*. at ¶ 82; for three positions for which Perry Central Community Schools ("Perry Central") was not able to split or reduce responsibilities, Perry Central converted these positions to full-time status and began providing health insurance benefits at the cost of approximately $10,000 per employee," *id*. at ¶ 94; South Gibson School Corporation has "changed its group health insurance plan to a high deductible plan in order to accommodate

[4] Although the allegations in the Amended Complaint are sufficient at this stage, the Schools are offering several declarations to demonstrate the injury-in-fact caused by the IRS Rule. By offering these declarations at this phase, the Schools do not concede that they are required to do so; nor do they suggest that these declarations are the extent of proof they could or would offer at later stages of the case.

potential new classes of employees eligible for health insurance under the ACA," *id*. at ¶ 106; and Union School Corporation "has expanded health insurance coverage to employees who were not previously eligible, and will be making contributions towards the cost of coverage," *id*. at ¶ 124.

The Schools here have been forced to incur other compliance and administrative costs as well. East Porter purchased a new time management tracking system to closely monitor employees' hours to ensure that they do not work more than 30 hours per week, at a cost of $30,000 and is spending an additional $2,400 per year under its software agreement. *Id*. at ¶ 41; Declaration of Rod Gardin. Western School Corporation has "created a position devoted exclusively to tracking the hours of employees to ensure that they do not exceed 30 hours per week," *id*. at ¶ 130. As another example, Monroe-Gregg School District has "budgeted for certain costs of compliance with the ACA, which limits the amount of money available to spend on staff and programs." *Id*. at ¶ 65. Based on the additional administrative costs imposed on the Schools in an effort to comply with, and solely because of, the IRS Rule and the employer mandate of the ACA, the Schools have the required injury-in-fact for Article III standing.

Regardless, even if the Federal Government's focus on the risk of assessable payments for noncompliance with the employer mandate (rather than the increased cost of compliance) were the appropriate, and only, inquiry, the threat of that liability has already caused injury-in-fact to all of the Schools because that risk forced the Schools' governing bodies and administrations to alter the manner in which they deliver educational services and make decisions that impact their fiscal strength and financial planning.[5] Following binding precedent,

[5] *See* Declarations of Rod Gardin, W. James Hamilton, Dr. Shane Robbins, Dr. Carrie Milner, Lora Busch, Greg Parsley, Tracy Albertson, and Gary Conner submitted in a separately bound appendix with this response.

the court in *Liberty University* held that the measures Liberty University would have to take to ensure compliance with the employer mandate constitute "imminent" injury and confer standing, "as Liberty must take measures to ensure compliance in advance of that date [January 1, 2015, the effective date of the mandate, based on the administration's unilateral, extra-statutory extension of its effective date by one year]." 733 F.3d at 90, citing *Virginia v. Am. Booksellers Ass'n.*, 484 U.S. 383, 392-93 (1988).[6]

Other federal courts interpreting the mandates under the ACA have held that pre-enforcement measures taken to comply with them constitute an injury-in-fact sufficient to confer standing. *See Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 623 (W.D. Va. 2010)[7] ("The present or near-future costs of complying with a statute that has not yet gone into effect can be an injury in fact sufficient to confer standing."); *Goudy-Bachman v. Dep't of Health & Human Servs*., 764 F. Supp. 2d 684, 692 (M.D. Pa. 2011) ("[Plaintiffs] must engage in financial preparation . . . in light of the impending effective date of the individual mandate," and thus suffer "an injury-in-fact that is imminent and the direct result of the individual mandate.")

Each of the 39 Schools meets this test and has already suffered injury-in-fact that confers Article III standing. *See Liberty Univ.*, 733 F.3d at 90; *Geithner*, 753 F. Supp. 2d at 623; *Goudy-Bachman*, 764 F. Supp. 2d at 692. In point of fact, each of the 39 Schools "wishes not to provide in 2014 and beyond minimum essential coverage to part-time employees who may be classified

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[6] *American Booksellers Association* held that booksellers had standing though the challenged law had not yet been enforced because they "w[ould] have to take significant and costly compliance measures" beforehand "if their interpretation of the statute [wa]s correct."

[7] *Reversed on other grounds* by *Liberty University, Inc. v. Geithner*, 671 F.3d 391 (4th Cir. 2011), *vacated on other grounds and remanded for further consideration* by *Liberty University Inc. v. Geithner*, 133 S.Ct. 679 (2012).

as 'full time' by the ACA."[8] However, in order to ensure compliance with the employer mandate and to prevent the fiscal burden associated with noncompliance, all of the Schools have made the necessary policy decisions to (1) eliminate positions altogether, *see* Declaration of Dr. Shane Robbins; (2) reduce the hours of several essential positions to fewer than 30 hours per week so those employees are considered part-time under the ACA, *see* Declaration of Dr. Carrie Milner; *see also* Declaration of W. James Hamilton, Ex. 1 (South Henry School Corporation Resolution); or (3) remain at fewer than 50 employees, *see* Declaration of Lora Busch.[9] All 39 of these Schools have determined that these changes were required because they would otherwise not be able to afford to provide health insurance for these employees if they were considered full-time employees under the ACA.[10] In addition, several Schools have been forced to limit which individuals can coach or serve in extracurricular activities, because they cannot afford to allow these part-time employees to be classified as full-time for ACA purposes as a result of the additional hours incurred in the extracurricular events.[11] *See* Declaration of Greg Parsley; Declaration of Tracy Albertson. All of these policy changes as a result of the IRS Rule and the employer mandate directly and adversely impact each of the 39 Schools' ability to deliver educational services to thousands of their students, especially students with learning disabilities,

[8] *See* Am. Compl. ¶¶ 20, 22, 25, 28, 31, 34, 37, 40, 43, 46, 49, 52, 55, 58, 61, 64, 67, 70, 73, 76, 79, 81, 84, 87, 90, 93, 96, 99, 102, 105, 108, 111, 114, 117, 120, 123, 126, 129, and 132.

[9] *See* Am. Compl. ¶¶ 20, 23, 26, 29, 32, 35, 38, 41, 44, 47, 50, 53, 56, 59, 62, 65, 68, 71, 74, 77, 82, 85, 88, 91, 94, 97, 100, 103, 109, 112, 115, 118, 121, 124, 127, 130, and 133.

[10] *See* Am. Compl. ¶¶ 20, 23, 26, 29, 32, 35, 38, 41, 44, 47, 50,53, 56, 59, 62, 65, 68, 71, 74, 77, 85, 88, 91, 94, 97, 100, 103, 109, 112, 115, 118, 121, 124, 127, 130, and 133.

[11] *See* Am. Compl. ¶¶ 23, 103, 109, and 127.

and therefore constitute classic examples of the injury-in-fact sufficient to confer standing on all of the Schools.[12] *See* Declaration of Gary Conner.

Moreover, the Federal Government's standing argument fails because it applies the wrong standard for Article III standing: absolute certainty; instead, the Schools need only to show a "substantial probability" or a "substantial risk" of injury. While the Federal Government cites *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), for the proposition that standing requires a "certainly impending" injury, MTD Br. at 20-21, the Court in *Clapper* clarified that plaintiffs' showing of "'substantial risk' that the harm will occur" suffices to establish Article III standing. *Id*. at 1150 n.5. Specifically, the Court declared, "Our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about. In some instances, we have found standing based on a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm." *Id.* (citations omitted). Under this standard, the Schools have demonstrated more than plausible injuries; indeed, they have shown that they have all already incurred substantial injuries, and that there is a "substantial risk" or "substantial probability" that they will incur additional injuries in the near future as result of the IRS Rule and the employer mandate.

Finally, contrary to the Federal Government's contention, the Schools' injuries, namely their increased compliance costs, administrative burdens, and pre-enforcement employment policy changes, would be fully redressed if the Court ruled in the Schools' favor and invalidated the IRS Rule. In point of fact, several of the Schools joined this lawsuit "to have the PPACA as it is now interpreted to be adjudicated not to be applicable" to them. *See* Declaration of W. James Hamilton, Ex. 2. The IRS Rule purports to extend premium assistance credits to all eligible

[12] *See* Am. Compl. ¶¶ 20, 23, 26, 29, 32, 35, 38, 41, 44, 47, 50, 53, 56, 59, 62, 65, 68, 71, 74, 77, 79, 85, 88, 91, 94, 97, 100, 103, 109, 112, 115, 118, 121, 124, 127, 130, and 133.

taxpayers regardless of through which Exchange they purchase that coverage. The ACA, on its face, limits those credits to qualifying coverage purchased through an "Exchange established by the state." The IRS Rule extends those credits to coverage purchased through an Exchange established by the Federal Government. The employer mandate penalties apply only to coverage for which the premium assistance credits are available. If the IRS Rule, and therefore the premium assistance credits, are limited in scope to coverage purchased through state-established Exchanges, the employer mandate penalties would be similarly limited. Indiana elected not to establish its own Exchange, which means, absent the IRS Rule, there would be no specter of employer mandate penalties. Without the threat of those penalties dangling over the Schools, the Schools never would have cut or restructured positions or incurred the additional costs associated with the other changes outlined above. In other words, if this Court were to ultimately conclude that the IRS Rule is invalid, the Schools' purpose for joining this lawsuit will have been validated and they would receive complete and immediate redress for the harm alleged.

Throughout its brief, the Federal Government ignored the Schools' well-established injuries-in-fact, and instead sought to reframe the plaintiffs' challenge to the IRS Rule and the attendant employer mandate as an action to increase the tax liabilities of their employees by depriving them of premium tax credits. *See* MTD Br. at 2, 3, 21-25. This allegation is fallacious and misguided because it wrongly assumes that just because the plaintiffs oppose the IRS Rule that expands the possible availability of premium tax credits to their employees, the plaintiffs must therefore have brought this action to deprive them of these tax credits. To the contrary, the plaintiffs brought this action under the APA and the Tenth Amendment to hold the Federal Government accountable to the rule of law, specifically the plain language and meaning of the ACA.

The Federal Government continues its fallacious argument by contending that even if the plaintiffs' challenge was successful, it would not provide complete redress because "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 . . . the employees could still bring their own claim seeking the award of the tax credit." MTD Br. at 21. This contention is simply untrue. If the plaintiffs prevail, the IRS Rule will be invalidated and the plain language of the ACA will control, as it rightly should. Under that language, the employer mandate penalties do not burden Indiana employers and there is no one who could "bring their own claim seeking the award of the tax credit."

In sum, the Schools have alleged concrete and particularized injuries in fact that are directly traceable to the IRS Rule and the employer mandate, and their injuries will be redressed by a favorable decision of the Court. *See Lujan*, 504 U.S. at 560-62 (If "the plaintiff is himself an object of the action (or forgone action) at issue, . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.") The Schools, therefore, easily satisfy "the irreducible constitutional minimum of standing" established by the Supreme Court. *Id.* at 560.[13]

II. The Schools are Not Required to Violate the Law, Incur Penalties and Seek a Refund in Order to Bring Their Challenge

The Federal Government argues that the Schools cannot use the APA to challenge the final IRS Rule because they purportedly have an alternative remedy—"an action for a tax refund." MTD Br. at 25. That is, the Schools should violate the employer mandate, pay the

[13] The Federal Government also contends that the plaintiffs, including the Schools, lack "prudential standing to seek to adjudicate the tax liabilities of absent third parties." *See* MTD Br. at 21-25. The Schools incorporate the arguments of the State of Indiana rebutting this contention. *See* State of Indiana's Resp. to Mot. to Dismiss Amended Compl. at Section II.

penalties, and then sue for refunds of those penalties. This argument contradicts the general rule that, unless a statute specifically provides otherwise, parties may challenge ripe agency regulations before enforcement, even where a post-enforcement remedy is available.

Indeed, the Seventh Circuit has already held in the context of challenging ACA tax penalties that "[t]he threat of financial penalty and other enforcement action is easily sufficient to establish standing to challenge the mandate prior to its enforcement. The [plaintiffs] need not violate the mandate and risk enforcement of the regulatory scheme before bringing suit." *Korte v. Sebelius*, 735 F.3d 654, 667 (7th Cir. 2013). If the plaintiffs in *Korte* could lodge a pre-enforcement challenge to tax penalties arising from the ACA contraception mandate, so too can the Schools (and the State) bring a pre-enforcement challenge here.

The Federal Government concedes that Seventh Circuit precedent forecloses application of the Anti-Injunction Act ("AIA") here, MTD Br. at 28 n.6, but fails to recognize how the very existence of the AIA— which specifically and expressly forbids pre-enforcement suits to enjoin tax collection or assessment—rebuts the theory that pre-enforcement challenges are generally unavailable. 26 U.S.C. § 7421(a). The whole point of the AIA is to foreclose pre-enforcement review that would otherwise be available, such that "the legal right to the disputed sums be determined in a suit for refund." *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7 (1962). The AIA would be completely unnecessary if a refund suit is always an adequate remedy precluding pre-enforcement relief. And, if the Federal Government were correct, suits falling within *exceptions* to the AIA would *still* not be justiciable because a refund action would still be available, but this is clearly not the law. *See, e.g., id.*

Furthermore, numerous federal courts—including the Supreme Court—have recently adjudicated pre-enforcement challenges to provisions of the ACA, including direct challenges to

the individual and employer mandates. *See, e.g.*, *Nat'l Fed'n of Indp. Business v. Sebelius*, 132 S. Ct. 2566 (2012) ("*NFIB*") (both mandates); *Liberty Univ.*, 733 F.3d 72 (employer mandate); *Ass'n of Am. Physicians & Surgeons, Inc. v. Sebelius*, 901 F. Supp. 2d 19 (D.D.C. 2012) (both mandates). If the Schools may directly challenge these statutory mandates without first having to violate them and then seeking refunds, then *a fortiori* the Schools may challenge the administrative IRS Rule, which authorizes the subsidies that trigger those mandates. The very Seventh Circuit decision that forecloses application of the AIA in this case also explicitly rejects the argument against pre-enforcement challenges. *Korte***,** 735 F.3d at 667 ("The threat of financial penalty and other enforcement action is easily sufficient to establish standing to challenge the mandate prior to its enforcement.")**;** *see also Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir.) (en banc), *cert. granted*, 134 S. Ct. 678 (2013) (allowing pre-enforcement challenge to HHS regulation on contraception enforced through tax penalties).

Furthermore, post-enforcement remedies are not an "adequate" substitute for pre-enforcement litigation because they require the party to bear the risk of suffering penalties simply to obtain judicial review. Pre-enforcement review under the APA is designed precisely to free parties from such a Hobson's choice. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967) (review where parties faced "dilemma" of complying or "risk[ing] prosecution"); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007) ("Our analysis must begin with the recognition that, where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat[.]") (emphasis in original); *Metro. Milwaukee Ass'n of Commerce v. Milwaukee Cnty.*, 325 F.3d 879, 883 (7th Cir. 2003) ("When a party is faced with the choice between the disadvantages of complying with an ordinance or risking the harms that come with noncompliance, we are

satisfied that an actual 'case or controversy' exists that allows a court to act."); *Ciba-Geigy Corp. v. U.S. EPA*, 801 F.2d 430, 434 (D.C. Cir. 1986) (review where party must choose "between disadvantageous compliance or risking imposition of serious penalties").

Indeed, precluding pre-enforcement review may even violate the Constitution. *Ex parte Young*, 209 U.S. 123, 148 (1908) ("[T]o impose upon a party … the burden of obtaining a judicial decision . . . only upon the condition that if unsuccessful he must suffer imprisonment and pay fines . . ., is, in effect, to close up all approaches to the courts . . . and therefore invalid.").

Perhaps most fundamentally, the cases that the Federal Government cites are simply administrative exhaustion cases, holding that if the judicial relief sought could first be sought from the agency, such remedies must be exhausted. *E.g.*, *Darby v. Cisneros*, 509 U.S. 137 (1993) (sanction could not be reviewed by court until administrative appeal exhausted). But here invalidation of the IRS Rule *cannot* be sought from an agency. None of the Federal Government's cited cases holds that pre-enforcement review in an otherwise ripe case is barred if—as is always true—the party could violate the law and seek an after-the fact remedy. In fact, *Bowen v. Massachusetts* rejected as "unprecedented" the Federal Government's argument here that a damages action was "an adequate substitute for prospective relief." 487 U.S. 879, 904-05 (1988); *see also Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012) (unanimously finding alternative remedy inadequate where party was forced to accrue "potential liability" in the interim). A potential tax refund in 2015 or 2016 is not an adequate remedy, particularly when the substantive question is an APA challenge to the legality of the IRS Rule.

Based on the foregoing reasons, the plaintiffs here have chosen the correct judicial remedy for their claims, namely a pre-enforcement action under the APA, and are not limited to pursuing their claims in an action for a tax refund.

III. The Schools Are Not Collaterally Estopped from Bringing This Lawsuit

The Schools are not estopped from bringing this challenge based on the State of Indiana's participation in a previous lawsuit—*Florida ex rel. McCollum v. United States Department of Health & Human Services*, 716 F. Supp. 2d 1120 (N.D. Fla. 2010). The Schools were not a party in *Florida v. HHS*, and the Supreme Court "has repeatedly recognized . . . that the concept of [preclusion] cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." *Allen v. McCurry*, 449 U.S. 90, 95 (1980); *see also Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971) ("Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. . . . Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position."); *Tice v. Am. Airlines, Inc.*, 162 F.3d 966, 972-73 (7th Cir. 1998), *cert. den.*, 527 U.S. 1036 (1999) (same).

The Federal Government argues that here the Schools are barred from litigating the Tenth Amendment claim because they are "in privity" with the State of Indiana, relying on the broad proposition that the Schools' "rights . . . derive from those of [Indiana], and so they also [are] bound by the prior determination." *See* MTD Br. at 29-30. Of course, whatever the merits of this privity argument, and there are none, that argument does not apply to the Schools' challenge to the IRS Rule, *see supra*, because the IRS Rule was not adopted until 2012, two years after the *Florida v. HHS* litigation.

"Privity between parties is established where those parties' interests are so closely aligned that they represent the same legal interests." *Sec'y of Labor v. Fitzsimmons*, 805 F.2d 682, 688 (7th Cir. 1986). Privity is an "elusive concept" that "reveals very little about the kinds of relationships that result in [claim preclusion]." *Matter of L & S Industries, Inc.*, 989 F.2d 929, 932-33 (7th Cir. 1993). Determinations of "privity" are characterized as either factual or legal in nature. *Id.* Consequently, the "legal authority of a party to act on behalf of a non-party in previous litigation" requires a consideration of the particular circumstances of that case and frequently cannot be easily determined. *Id*; *see also Tice*, 162 F.3d at 971 (stating that "'the formalities of legal relationships provide clues, not solutions'" and that the privity inquiry should not be "overly formalistic") (citations omitted). Here the factual and legal background of the relationship between the Schools and the State conclusively demonstrate a lack of privity.

First, the Federal Government fails to account for the independence afforded public school corporations under Indiana law since the time of the State's founding. Since the adoption of Indiana's Constitution, the Indiana General Assembly has embraced its duty to "provide, by law," for a system of independent public school corporations, Ind. Const. Art. 8 § 1, and granted independent legal authority to public school corporations.

In Indiana, "[s]chool corporations are political subdivisions with locally elected school board members and superintendents; as such, they are local government units." *Parker v. Franklin Cnty. Cmty. Sch. Corp.*, 667 F.3d 910, 926 (7th Cir. 2012); *see also* IND. CODE § 32-34-1-16 ("As used in section 47 of this chapter, "political subdivision" includes any Indiana . . . public school corporation, state educational institution, or any other territorial subdivision of the state recognized or designated in any law . . . .").[14] Subject to certain statutory limitations, the

[14] *See also* IND. CODE § 5-19-1-4; IND. CODE § 32-34-1-16; IND. CODE § 9-13-2-128.

State's policy "is to grant to each school corporation all the powers needed for the effective operation of the school corporation." IND. CODE § 20-26-3-1; *see also* IND. CODE § 20-26-3-4 ("A school corporation may exercise any power the school corporation possesses to the extent that the power: (1) is not expressly denied by the Constitution of the State of Indiana, by statute, or by rule of the state board; and (2) is not expressly granted to another entity."). "Any doubt as to the existence of a power of a school corporation must be resolved in favor of the existence of the power" even if "a statute granting the power has been repealed." IND. CODE § 20-26-3-2(b).

A school corporation can "sue and be sued," "enter into contracts in matters permitted by applicable law," "[a]cquire, construct, . . . [and] maintain . . . real estate . . . as the governing body considers necessary for school purposes," and "acquire personal property . . . necessary for school purposes." IND. CODE § 20-26-5-4(1)-(5). It can use the power of eminent domain to acquire real estate necessary for school purposes and it can demolish or dispose of property that it no longer thinks is necessary. IND. CODE § 20-26-5-4(5)-(6). It can employ and fire its own superintendents, teachers and other workers. IND. CODE § 20-26-5-4(8). It can also make budgets, appropriate funds, and "borrow money against current tax collections." IND. CODE § 20-26-5-4(15). Likewise, it can purchase insurance or self-insure. IND. CODE § 20-26-5-4(15)(A). The Schools as independent entities are not beholden to the State and its prior litigation decisions.

Second, as the Court will note, the Schools are separately represented in this case. That is because here, the governing bodies of these public school corporations have exercised their statutory authority to bring suit separately from the State of Indiana. *See* IND. CODE § 20-26-5-4(1) (the governing body of a school corporation can, on behalf of the school corporation, "sue

and be sued.");[15] *see also* Declaration of W. James Hamilton, Ex. 2 (explicitly citing IND. CODE § 20-26-5-4(1) as authority to bring this lawsuit separately from the State of Indiana). There are sound reasons for this arrangement going to the very lack of privity that refutes the Federal Government's theories. Indeed, at times state law contemplates adverse interests between the State and its public school corporations.[16] At the most general level, public school corporations can enter into contracts with the State. IND. CODE § 20-26-5-4(16) (stating that a school corporation has the power "[t]o make all applications, to enter into all contracts, and to sign all documents necessary for the receipt of aid, money, or property from the state, the federal government, or from any other source.").

More specifically, in the past four years, the State of Indiana and its public school corporations have been adverse parties with adverse interests in several high-profile lawsuits. In 2010, Hamilton Southeastern School District, Franklin Township Community School Corporation, and Middlebury Community Schools sued the State and contended that its funding formula for public school corporations unfairly penalized districts with growing enrollments. *See Hamilton Southeastern Schools v. Daniels*, No. 29D01-1002-PL-198 (Hamilton Sup. Ct. 2010). In 2012, the Indiana Department of Education sued the Gary Community School Corporation regarding its lack of cooperation with the State-contracted private turnaround school operator which was tasked with operating a public school in that school corporation. *See State of Ind. ex rel. Edison Learning, Inc. v. Gary Comm. School Corp.*, No. 49D11-1207-PL-029036 (Marion

[15] *See also* IND. CODE § 5-10-9-1 ("'Municipal corporation' means . . . school corporation . . . or other separate local governmental entity that may sue or be sued."); IND. CODE § 34-6-2-86 (same); IND. CODE § 36-1-2-10 (same); IND. CODE § 5-11-10.5-1 ("'Political subdivision' means . . . school corporation . . . or other separate local governmental entity that may sue and be sued.").

[16] In point of fact, the Federal Government has acknowledged that Indiana residents' "interest in receiving the [premium assistance] tax credit is directly adverse to the claim that Indiana seeks to bring here." MTD Br. at 18.

Sup. Ct. 2012). Also in 2012, Indianapolis Public Schools ("IPS") sued the Indiana Department of Education and the Indiana State Board of Education over their interpretation of a statute regarding how much State tuition support would be withheld from IPS and given to privately operated turnaround academies located within IPS's boundaries. *See Bd. of School Comm'rs of the City of Indianapolis v. Ind. State Bd. of Education*, 49D03-1206-MI-023257 (Marion Cir. Court, 2012).[17]

The foregoing demonstrates that the State of Indiana and its public school corporations' legal interests are not "so closely aligned that they represent the same legal interests," *Fitzsimmons*, 805 F.2d at 688, and therefore the Schools here are not "in privity" with the State. Contrary to the Federal Government's contention, the Schools' rights here do not derive from those of the State and therefore the Schools are not estopped from pursuing any of their claims by any prior legal determinations as to the State.

Finally, in terms of privity doctrine, the Federal Government cites no Seventh Circuit cases, but instead relies on a hodge-podge of cases from other circuits. MTD Br. at 30 *(*quoting *Bd. Elec. Light Comm'rs of City of Burlington v. McCarren*, 725 F.2d 176, 178 (2d Cir. 1983) (internal citations omitted); *see also Cnty. of Boyd v. US Ecology, Inc.*, 48 F.3d 359, 361-62 (8th Cir. 1995); *Grand Traverse Band of Ottawa & Chippewa Indians v. Director, Mich. Dep't of Nat. Res.*, 141 F.3d 635, 642 (6th Cir. 1988); *Nash Cnty. Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 493-94 (4th Cir. 1981)).

These cases, however, do not stand for the proposition that political subdivisions are in privity with States on Tenth Amendment issues. Aside from the fact that the Tenth Amendment

[17] In addition, in 2009, a group of Indiana public school students sued the Governor, State Superintendent of Public Instruction, and the State Board of Education, seeking a declaration that Indiana's public school finance formula violated the students' constitutional right to a quality education. *See Bonner ex rel. Bonner v. Daniels*, 907 N.E.2d 516 (Ind. 2009).

was not at issue in any of the cited cases, the underlying facts giving rise to privity on the issues actually raised were far different. In each case, the State took an *affirmative* step to subordinate the local government's rights or ability to represent itself, which in no way has happened here.

In two of the Federal Government's cases, the State's attorney general took an affirmative step to represent the interests of the local government organization in the initial litigation. In *County of Boyd*, the Attorney General of Nebraska invoked standing under *parens patriae* doctrine. *See Nebraska v. Central Interstate Low-Level Radioactive Waste Comm'n*, 834 F. Supp. 1205, 1210-11 (D. Neb. 1993). In later litigation, the district dourt cited the earlier *parens* standing to preclude the County from raising the same arguments on the theory that with *parens patriae* standing, the State represents the interests of *all* citizens, including the County's. *See County of Boyd v. US Ecology, Inc.*, 858 F. Supp. 960 971-73 (D. Neb. 1994), *aff'd County of Boyd*, 48 F.3d at 361-62 (adopting the reasoning of the district court). In *Florida v. HHS*, Indiana did not invoke *parens patriae* standing—nor could it have in a case against the United States, as the Federal Government readily acknowledges here. MTD Br. at 17-18. Accordingly, *County of Boyd* has no bearing here.

In *Nash*, similarly, the Fourth Circuit declared a local Board of Education estopped from raising claims asserted in an earlier antitrust suit filed by the Attorney General of North Carolina. *Nash Cnty. Bd. of Educ.*, 640 F.2d at 485-86. In the prior case, the Attorney General had specifically "declared himself the legal representative . . . of 'each public school system in this state which received tax revenue directly or indirectly from . . . North Carolina.'" *Id.* at 494-97. The Attorney General of Indiana made no such declaration in the *Florida* case, and indeed has no authority to do so. *See* Ind. Code § 4-6-3-2(a) (providing no authorization for the Attorney General to represent political subdivisions generally as "[t]he attorney general shall have charge

of and direct the prosecution of all civil actions that are brought in the name of the state of Indiana or any state agency."); *see State ex rel. Young v. Niblack*, 99 N.E.2d 839, 842 (Ind. 1951) ("The legislature did not intend that the Attorney General be authorized or required to undertake the impossible task of representing every political subdivision of the state. The office of Attorney General is also one of delegated powers.") (internal citations omitted). *Nash* is therefore distinguishable from the case at bar.

In *McCarren*, the subject of the prior and precluded litigation was a state board's order disallowing construction of a hydroelectric dam already approved by FERC. *McCarren*, 725 F.2d at 177. Since the state board was precluded from defending its own order that it was already enjoined from enforcing, it would have made no sense to permit defense by a local government, whose independent victory would have been pyrrhic. The local government's rights were "derive[d] from those of the [state]" in the far more direct sense that the state government action that was the subject of preclusion was needed for the local government even to assert a claim.

Here, the Schools may assert Tenth Amendment claims without any proximate action by the State because the Schools are the "State" for Tenth Amendment purposes,[18] and consequently *McCarren* has no application here. In order for sovereign states to function effectively at the statewide level, in areas of state concern such as education, each State delegates sovereign authority to its political subdivisions. In Indiana, the State's political subdivisions include public

[18] *See New Hampshire Dep't of Employment. Sec. v. Marshall*, 616 F.2d 240, 245 at n.6 (1st Cir. 1980) ("For purposes of this discussion, we include public school employees as employees of political subdivisions of the state. We are aware, of course, that in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), the Supreme Court held that a local school board was not an arm of the state and, therefore, not entitled to invoke the bar of the eleventh amendment. We do not think, however, that this limitation applies to the tenth amendment." (internal citations omitted). *See also Printz v. United States*, 521 U.S. 898, 921-22 (1997) (Portion of the Brady Act that required county sheriffs to undertake background checks on handgun purchasers invalid under Tenth Amendment; "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.").

school corporations. Indiana Code section 5-19-1-4 states: "[T]he term 'political subdivision' shall mean and include any county of Indiana, any civil township of Indiana, any civil incorporated city or town of Indiana, *any school corporation of any township, city, or town of Indiana, or any other territorial subdivision of the state* recognized or designated in any law . . . ." (emphases supplied). IND. CODE § 5-19-1-4. Similarly, Indiana Code section 32-34-1-16 states: "'political subdivision' includes any Indiana municipality, county, civil township, civil incorporated city or town, *public school corporation*, state educational institution, *or any other territorial subdivision of the state* recognized or designated in any law . . . ." IND. CODE § 32-34-1-16 (emphases supplied).

In addition, Indiana Code section 9-13-2-128 defines "political subdivision" as a "county, a township, a city, a town, *a public school corporation, or any other subdivision of the state* recognized in any law, including any special taxing district or entity and any public improvement district authority or entity authorized to levy taxes or assessments." IND. CODE § 9-13-2-128 (emphasis supplied). Finally, Indiana Code section 5-14-1.5-2 includes "school corporation" in the definition of "public agency" because the school corporation "exercises in a limited geographical area the executive, administrative, or legislative power of *the state* or a delegated local governmental power." IND. CODE § 5-14-1.5-2(a)(2) (emphasis supplied).

In the Federal Government's final case, the decision in *Grand Traverse* is irrelevant as to privity between local and state governments, but has to do with a far more specialized "common public rights" rule. "Common public rights" are those that all citizens, corporations, and government entities hold in common, including, for example, interests in navigable waters and submerged sovereign lands. Such public rights are of necessity governed by a state's litigation of them in trust for the public. *Grand Traverse Band of Ottawa & Chippewa Indians*, 141 F.3d at

641-42. *Grand Traverse* relied on *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), which enforced a state's litigation of fishing rights allocation as secured by an Indian treaty against various commercial fishing associations. *Id.* at 670. The Supreme Court held that the associations, "in their common public rights as citizens of [Washington], were represented by [Washington] in the [allocation] proceeding[], and . . . were bound by the judgment." *Id.* (quoting *Tacoma v. Taxpayers*, 357 U.S. 320, 340-41 (1958)). *Tacoma* concerned another form of public rights, namely the interest in authorized use of public lands. *Grand Traverse*, like *Washington*, concerned public rights in navigable waters. 141 F.3d at 642.

The logic of these cases works only with respect to water and other public trust rights and cannot be extended to this case. States as sovereigns hold title to public lands and the beds and banks of rivers, lakes and streams within their borders, including tidal and submerged lands in coastal states (up to a distance of three miles from shore). *See, e.g., Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892); *see also* Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-05. Under public trust doctrine, states hold these lands in trust for all the public to use for recreation, commerce, fishing, and other uses compatible with public enjoyment. *Illinois Central Railroad*, 146 U.S. at 459. In *Washington* and *Grand Traverse*, the state had litigated those rights against Indian treaty obligations, and in so doing effectively litigated on behalf of all who might enjoy the use of its sovereign lands. *See Washington*, 443 U.S. at 692 n.32; *Grand Traverse*, F.3d at 642.

The same *parens*-like representation does not occur with Tenth Amendment litigation. Political subdivisions are permitted to bring their own Tenth Amendment claims, and even the Federal Government concedes that the citizens of Indiana could at the very least sue for a refund

of taxes levied by the employer mandate, once the Federal Government assesses those taxes. *See* MTD Br. at 25. Under the *Washington/Grand Traverse* logic, those citizens would be *barred* from suing because of the *Florida v. HHS* litigation. Given the role of public trust and public common rights doctrine and the Federal Government's concession that individual citizens still have litigation rights notwithstanding *Florida v. HHS*, *Grand Traverse* is entirely inapplicable.

The foregoing analysis shows that here the Schools are not barred by the doctrines of claim preclusion and issue preclusion from litigating their Tenth Amendment claim because they were not parties to the *Florida v. HHS* litigation, and they are not "in privity" with the State of Indiana.[19]

CONCLUSION

For the foregoing reasons, the Schools respectfully request that this Court deny Defendants' Motion to Dismiss the Amended Complaint.

Respectfully submitted,

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[19] The Federal Government contends that the plaintiffs' request for a declaration of judicial estoppel that the ACA Section 4980H tax assessment and ACA Section 6056 reporting requirements are inapplicable in 2014 fails to "state a case or controversy under Article III of the Constitution." MTD Br. at 32. The Schools incorporate the arguments of the State of Indiana rebutting this contention. *See* State's MTD Resp. at Section IV.

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2014, a copy of the foregoing "Plaintiff School Corporations' Response to Motion to Dismiss Amended Complaint" 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.

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