**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

TEXAS, KANSAS, LOUISIANA, INDIANA, WISCONSIN, and NEBRASKA, *Plaintiffs,* v. UNITED STATES OF AMERICA, UNITED STATES INTERNAL REVENUE SERVICE, AND DAVID J. KAUTTER, in his official capacity as ACTING COMMISSIONER OF INTERNAL REVENUE, *Defendants.*	§ § § § § § § § § § § § § § § §	Civil Action No. 4:18-cv-00779-Y

MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

This time-sensitive motion regards the knowing and unlawful imposition of liability for the 2018 Health Insurance Providers Fee ("HIPF") on Plaintiffs by the Internal Revenue Service ("IRS"). Payments for the 2018 HIPF are due to the IRS on October 1, 2018. Absent injunctive relief by the Court days before that deadline, 2018 HIPF payments will be made by Plaintiffs' Medicaid and Children's Health Insurance Program ("CHIP") Managed Care Organizations ("MCOs"), thereby burdening Plaintiffs with 2018 HIPF liability—a liability from which Congress expressly exempted Plaintiffs.

When Congress passed and the President signed into law the Patient Protection and Affordable Care Act ("ACA"), they expressly exempted States from paying the HIPF. But since 1981, Congress has required that Medicaid and CHIP contracts between States and MCOs be "actuarially sound" to qualify for Medicaid and CHIP funding. These two Congressional mandates must be read together, *in pari materia*, giving effect to each.

In response to the requirement regarding actuarial soundness, the U.S. Department of Health and Human Services ("HHS") issued a final rule (the "Certification Rule"), delegating control over the meaning of actuarial soundness to a private entity, paying no attention to Congress's exemption of the States from HIPF liability. The Certification Rule defined actuarially sound as meeting the actuarial standards set by a private association of actuaries. Those actuaries, in turn, determined that for MCO contracts to be actuarially sound, the HIPF *must* be included in capitation rates (insurance premiums) States pay MCOs for their services. In other words, actuaries had no discretion regarding the HIPF—it was added to the capitation rates no matter what. This determination was also made without regard to Congress's exemption of the States from HIPF liability.

Accordingly, in a related matter, the Court declared that the Certification Rule delegated legislative power to a private entity in violation of the Constitution and Administrative Procedure Act. *Texas v. United States*, 300 F. Supp. 3d 810, 843–44 (N.D. Tex. 2018).

Now, even though the Court declared the Certification Rule unlawful, the IRS is applying the law in a way that requires Medicaid and CHIP MCOs to pay the 2018 HIPF, necessitating that the HIPF liability is passed to States in order to satisfy Congress's requirement that Medicaid and CHIP contracts be actuarially sound. Just days ago, the IRS sent Plaintiffs' Medicaid and CHIP MCOs final bills for the 2018 HIPF. The IRS failed to adjust any of the bills for the 2018 HIPF to remove from consideration the premiums for Medicaid and CHIP for Plaintiffs' MCO contracts. The IRS undertook these actions (or inactions), despite Plaintiffs' formal protestations of the preliminary bills. As a result, in a matter of days—on October 1, 2018—Plaintiffs' Medicaid and CHIP MCOs must remit to the IRS payments for the 2018 HIPF—payments that will then be passed onto Plaintiffs.

Given that Congress expressly exempted the States from paying the HIPF, Plaintiffs urgently need a temporary restraining order and a preliminarily injunction, by September 24, 2018, enjoining the IRS and Acting Commissioner Kautter from collecting and receiving the HIPF for fee year 2018 from Plaintiffs' Medicaid and CHIP MCOs. Plaintiffs are likely to succeed on the merits of their claims because the imposition of the 2018 HIPF on Plaintiffs is a clear violation of the ACA. Plaintiffs also face the threat of irreparably injury absent injunctive relief. Without a temporary restraining order and subsequent injunction, Plaintiffs will incur liability for the HIPF for fee year 2018.

Even though the Court ordered the disgorgement of past HIPF payments made by Plaintiffs in the related case, Defendants have already filed a notice of appeal, and an appellate decision reversing the Court's order will leave Plaintiff's without a remedy for Defendants' unlawful imposition of the 2018 HIPF. Unlike the MCOs that Plaintiffs contract with for Medicaid and CHIP managed care, the Court ruled that Plaintiffs may not seek a refund. This is a financial injury, but irreparable because the money spent for the HIPF will be forever lost if an appellate decision invalidates the Court's order of equitable disgorgement.

The equities and public interest also strongly favor an injunction. The United States has no legitimate interest in collecting the HIPF from Plaintiffs when Congress exempted Plaintiffs from paying it. The public interest is better served if Plaintiffs retain the hundreds of millions of dollars[1] they are unlawfully being required to pay to satisfy the 2018 HIPF and use that money to meet the needs of their citizens. Thus, Plaintiffs respectfully request that the Court hold a hearing immediately and issue an injunction against the IRS preventing it from collecting the 2018 HIPF from Plaintiffs' Medicaid and CHIP MCOs until such time as the IRS can recalculate liability for the 2018 HIPF and collect the 2018 HIPF in a manner that does not run afoul of the language of Congress.

STATEMENT OF FACTS

Congress created Medicaid in 1965. *See* Social Security Amendments Act of 1965, Pub. L. No. 89–97, 79 Stat. 286 (1965). The Medicaid program provides healthcare to individuals with insufficient income and resources. *See generally* 42 U.S.C. §§ 1396–1396w. Congress created CHIP in 1997. *See* Balanced Budget Act of

[1] If the Court does not grant injunctive relief, it is estimated that Plaintiffs' Medicaid and CHIP MCOs will pay over $675 million in 2018 HIPF liability, thereby imposing upon Plaintiffs a burden to repay that money and incur 2018 HIPF liability. Estimated liability for Texas is $300 million. App. 62, Ex. K (Wilkes Report); App. 56–57, Ex. J (Butler Declaration). Estimated liability for Kansas is $68.8 million. App. 35–36, Ex. G ¶17 (Proffitt Declaration). Estimated liability for Louisiana is $191.1 million. App. 42, Ex. H ¶12 (Ogborne Declaration). Estimated liability for Nebraska is $32.8 million. App. 49, Ex. I ¶12 (Brunssen Declaration). Estimated liability for Wisconsin is $30.8 million. App. 72, Ex. L ¶16 (Smith Declaration). Indiana has not yet estimated the threatened liability for the 2018 HIPF, but it may be fair to assume that it will exceed or approximate its $51.8 million from the 2016 HIPF. *See* ECF No. 96 at 49 (A1226).

1997, Pub. L. 105–33, Title IV, Subtitle J, 111 Stat. 251 (1997). CHIP covers children in families who have too much income to qualify for Medicaid, but cannot afford to buy private insurance, and provides basic primary health care services to children, as well as other medically necessary services, including dental care. *See generally* 42 U.S.C. § 1397aa *et seq*.

All Plaintiffs participate in Medicaid and CHIP, and Plaintiffs provide a substantial portion of their Medicaid and CHIP services through MCOs. By so doing, Plaintiffs save hundreds of millions of dollars. *Texas*, 300 F. Supp. 3d at 823.

The ACA became law in 2010. The ACA requires "covered entities" to pay the HIPF. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 865–866 (2010) ("ACA"). Generally, covered entities are to pay a portion of the HIPF proportionate to each entity's share of net premiums for the previous calendar year. *Id*. However, the ACA specifically excludes "any governmental entity" (and thus Plaintiffs) from HIPF liability. ACA § 9010(c)(2)(B) (2010); *see* 26 C.F.R. § 57.2(b)(2)(ii)(B).

In 1981, Congress determined that MCO capitation rates (insurance premiums) for Medicaid and CHIP must be "actuarially sound." 42 U.S.C. § 1396b(m)(2)(A)(iii). Through its Certification Rule, HHS interprets the meaning of "actuarially sound" as capitation rates certified by actuaries following the practices of the Actuarial Standards Board, a private entity. *See* 42 C.F.R. § 438.6(c)(i)(1)(A)–(C) (2002). The Certification Rule, currently codified at 42 C.F.R. §§ 438.2–438.4, was declared unlawful by the Court on March 5, 2018. *Texas*, 300 F. Supp. 3d at 848.

With the Certification Rule no longer applicable, what remains is the plain text of Congress. According to Congress, federal monies for Medicaid and CHIP services administered by an MCO shall not flow to Plaintiffs unless payments made by Plaintiffs to MCOs under Medicaid and CHIP contracts "are made on an actuarially sound basis." 42 U.S.C. § 1396b(m)(2)(A)(iii). In other words, notwithstanding the unlawfulness of the Certification Rule, and its delegation of legislative power to a private entity, the general Congressional requirement of "actuarial soundness" for Medicaid and CHIP contracts remains.

Congress stated in the ACA that Plaintiffs (States) are exempt from HIPF liability. *Texas*, 300 F. Supp. 3d at 821 (citing ACA § 9010(c)(2)(B); 26 C.F.R. § 57.2(b)(2)(ii)(B)). Because Plaintiffs are exempt from HIPF liability, and their Medicaid and CHIP contracts with MCOs must be "actuarially sound," 42 U.S.C. § 1396b(m)(2)(A)(iii), the only way to honor both of these Congressional requirements (now untouched by the Certification Rule) is for the IRS to *not* include Plaintiffs' MCOs' Medicaid and CHIP capitation rates in distributing the $14,300,000,000 HIPF liability for 2018. In other words, if Plaintiffs' Medicaid and CHIP MCO capitation rates are not included in the IRS's calculations, then Plaintiffs both (1) maintain their exemption from HIPF liability, and (2) can establish "actuarially sound" contracts with their Medicaid and CHIP MCOs.

The IRS was a Defendant in the related matter and is well aware of both Congress's exemption and the Court's March 5, 2018 ruling. Yet, instead of choosing a path that ensures compliance with federal law, the IRS is including Plaintiffs' Medicaid and CHIP capitation rates in distributing the $14,300,000,000 HIPF liability for 2018. IRS regulations, and its current methods for calculating the ratio-based distribution of the 2018 HIPF liability, produce an unlawful result by levying the 2018 HIPF, in part, upon the capitation rates that provide Medicaid and CHIP for Plaintiffs' citizens. This levy then requires Plaintiffs, who are exempt from HIPF liability, to incur HIPF liability and reimburse the MCOs for the HIPF in order to meet Congress's standard of "actuarial[] sound[ness]" for Medicaid and CHIP contracts with MCOs. *See* 42 U.S.C. § 1396b(m)(2)(A)(iii).

The IRS began collecting the HIPF in 2014, and each year since then it has collected a predetermined amount. 26 C.F.R. § 57.4(a)(3). For 2014, the IRS collected

$8,000,000,000 in total for the HIPF. *Id.* In 2015, the IRS collected $11,300,000,000 in total for the HIPF. *Id.* In 2016, the IRS collected $11,300,000,000 in total for the HIPF. *Id.* For 2017 and 2019, Congress enacted, and the President signed into law, a one-year moratorium on the HIPF. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. P, Title II, § 201, 129 Stat. 2242, 3037–38 (Dec. 18, 2015); H.R. 195, Division D – Suspension of Certain Health-Related Taxes, § 4003, 115th Cong. (Jan. 22, 2018). But there is no moratorium on the HIPF for 2018.

<u>The 2018 HIPF</u>

For 2018, the IRS is directed to collect $14,300,000,000 in total for the HIPF. 26 C.F.R. § 57.4(a)(3). Covered entities must pay a portion of the HIPF proportionate to each entity's share of net premiums for the previous year. *See* ACA § 9010.

On or before April 17, 2018, all Medicaid and CHIP MCOs for Plaintiffs filed a completed Form 8963 with the IRS. On this form, as per the IRS regulations, the MCOs reported all net premiums (capitation rates) for the prior calendar year (Jan. 1, 2017 – Dec. 31, 2017), even those that may be exempt from HIPF liability. 26 C.F.R. § 57.3. Per its regulations, the IRS assumes responsibility for excluding from its calculations premiums that should not result in HIPF liability. 26 C.F.R. § 57.4.

On or before June 15, 2018, all Medicaid and CHIP MCOs for Plaintiffs received a Letter 5066C, which is the IRS's notice of its preliminary calculations of the 2018 HIPF liability. Upon inspection of these Letters 5066C, Plaintiffs were able to discern that the IRS did not exclude from its 2018 HIPF liability calculations the premiums (capitation rates) for Medicaid and CHIP for Plaintiffs.

Plaintiffs then wrote to the IRS to contest its calculations of the 2018 HIPF liability. Plaintiffs explained their exemption from HIPF liability in the ACA, provided a copy of the Court's March 5, 2018 Order, and identified with specificity the premiums (capitation rates) that should be removed from the IRS's calculations because "Congress expressly exempted states from paying the HIPF." *See Texas*, 300

F. Supp. 3d at 821. *See* App. 6–30, Exs. A–F.[2] To date, Plaintiffs have received no substantive response to their protests.

On or about August 31, 2018, Plaintiffs' Medicaid and CHIP MCOs began receiving from the IRS its final calculations for the 2018 HIPF liability via Letters 5067C. *None* of the final calculations reviewed for Plaintiffs' Medicaid and CHIP MCOs were adjusted to remove from consideration premiums (capitation rates) for Medicaid and CHIP for Plaintiffs. Nor did the IRS provide any form of substantive response or explanation as to why *none* of the final calculations for Plaintiffs' Medicaid and CHIP MCOs were adjusted to remove from consideration premiums for Medicaid and CHIP for Plaintiffs. Each Letter 5067C sent to Plaintiffs' Medicaid and CHIP MCOs demanded payment of the assessed HIPF liability no later than October 1, 2018. *See* App. 57, Ex. J ¶¶13–15 (Butler Declaration); App. 36, Ex. G ¶¶18–20 (Proffitt Declaration); App. 42, Ex. H ¶¶13–15 (Ogborne Declaration); App. 50–51, Ex. I ¶18 (Brunssen Declaration); App. 70–71, Ex. L ¶9–13 (Smith Declaration); App. 491, Ex. M ¶10 (Taylor Declaration).

STANDARD FOR GRANTING INJUNCTIVE RELIEF

A plaintiff seeking a preliminary injunction must make four showings: (1) "he is likely to succeed on the merits," (2) "he is likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tips in his favor," and (4) "an injunction is in the public interest." *Glossip v. Gross*, 135 S. Ct. 2726, 2736–37 (2015) (plurality op.) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). The Court may employ a "sliding scale" approach, issuing the injunction upon

[2] Regarding MCOs that contract with Texas, for example, the IRS included in its calculations and distribution of the 2018 HIPF liability approximately $11,794,848,747.00 in Medicaid and CHIP premiums (capitation rates). *See* App. 25–26, Ex. A (Texas protest letter to the IRS). Because the IRS included these Medicaid and CHIP premiums in its formula for calculating and distributing 2018 HIPF liability, the IRS assessed approximately $300,000,000 in 2018 HIPF liability to Texas. *See* App. 62, Ex. K (Wilkes Report); App. 56–57, Ex. J (Butler Declaration). This pattern and circumstance by the IRS also occurred with the other Plaintiffs, Kansas, Indiana, Louisiana, Nebraska, and Wisconsin. *See supra* n.1; App. 6–30, Exs. A–F.

a lesser showing of harm when the likelihood of success on the merits is especially high. *Fla. Med. Ass'n, Inc. v. U.S. Dep't of Health, Educ. & Welfare*, 601 F.2d 199, 203 n.2 (5th Cir. 1979); *see also Korte v. Sebelius*, 735 F.3d 654, 665 (7th Cir. 2013).

ARGUMENT

I. The Court Possesses Subject Matter Jurisdiction Over Plaintiffs' Claims.

A. Plaintiffs have Article III standing.

Article III of the Constitution limits the jurisdiction of the federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. The reason for a case-or-controversy limitation is to restrain the federal courts from enmeshing themselves in deciding abstract and advisory questions of law. Accordingly, any federal court plaintiff must have case-or-controversy "standing" to assert a claim—specifically, "a plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation marks and brackets omitted)). During the related litigation over the previously assessed 2014, 2015, and 2016 HIPF liability, the Court held that the same Plaintiffs satisfied each of the elements for Article III standing. Nothing has changed that would alter that analysis.

1. Plaintiffs are suffering an injury in fact.

The first standing requirement—that a plaintiff has sustained an injury-in-fact— "helps to ensure that the plaintiff has a personal stake in the outcome of the controversy." *Susan B. Anthony List*, 134 S. Ct. at 2341 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (internal quotation marks omitted)). An injury-in-fact must be "concrete and particularized and actual or imminent, not conjectural or hypothetical." *Id*. (quoting *Lujan*, 504 U.S. at 560) (internal quotation marks omitted).

Based on the Letters 5067C received by Plaintiffs' Medicaid and CHIP MCOs, the IRS intends to collect portions of the 2018 HIPF from Plaintiffs' Medicaid and CHIP MCOs for the premiums that they are charging for Medicaid and CHIP services. The IRS deadline for Plaintiffs' Medicaid and CHIP MCOs to pay their assessed 2018 HIPF liability is October 1, 2018.[3] As soon as the Plaintiffs' MCOs make their 2018 HIPF payments, Plaintiffs immediately become responsible for reimbursing their Medicaid and CHIP MCOs for the HIPF. In total, as currently estimated, Plaintiffs will be required to pay approximately $675 million for the 2018 HIPF. *See supra* n.1.

If Plaintiffs refuse to reimburse their MCOs for the HIPF, their managed care premium rates will not be actuarially sound. *See, e.g.*, App. 60–66, Ex. K (Wilkes Report). If the managed care premium rates are not actuarially sound, then Plaintiffs will not qualify for federal Medicaid funding, *see* 42 U.S.C. § 1396b(m)(2)(A)(iii), and their Medicaid programs will collapse. Thus, Plaintiffs face one of two choices: pay the 2018 HIPF or lose Medicaid and CHIP. Plaintiffs choose neither. As the Court recognized, this choice is a "Hobson's choice," constituting real injuries that affect each Plaintiff and their taxpayers. *Texas*, 300 F. Supp. 3d at 827. As a result, Plaintiffs face an actual, imminent, and concrete injury.

2. Plaintiffs' injuries are fairly traceable to Defendants' challenged conduct.

Plaintiffs' injuries are also "fairly . . . trace[able]" to Defendants' challenged conduct. *Lujan*, 504 U.S. at 560. Plaintiffs' injuries arise from Defendants' calculation of and efforts to collect the HIPF for fee year 2018. If Defendants do not assess and

[3] The IRS maintains that "each covered entity . . . must pay [its final] fee by September 30th of each fee year." *See Health Ins. Providers Fee; Procedural & Admin. Guidance*, Notice 2013-76 (IRS ANN), 2013-51 I.R.B. 769, 2013 WL 6182798 (Nov. 27, 2013); Internal Revenue Service, *Affordable Care Act Provision 9010 – Health Insurance Providers Fee* (Sept. 4, 2018), https://www.irs.gov/businesses/corporations/affordable-care-act-provision-9010. However, because September 30 falls on a Sunday in 2018, the IRS has extended the 2018 HIPF payment deadline to October 1, 2018.

collect parts of the 2018 HIPF premised upon Plaintiffs' Medicaid and CHIP MCO contracts, then Plaintiffs will not be injured. Based on the Letters 5067s (the IRS's final HIPF bills to MCOs), however, Defendants are not altering their calculations and intend to collect the HIPF for fee year 2018 from Plaintiffs' Medicaid and CHIP MCOs for their Medicaid and CHIP contracts. The IRS has directed Plaintiffs' Medicaid and CHIP MCOs to make their HIPF payments no later than October 1, 2018. Upon Defendants' collection of the 2018 HIPF from the MCOs, Plaintiffs will immediately become liable for reimbursing the MCOs for the portion of the HIPF attributable to Plaintiffs' Medicaid and CHIP contracts. As actuarial experts have demonstrated regarding the 2018 HIPF liability, to satisfy Congress's actuarial soundness requirement, 42 U.S.C. § 1396b, 2018 HIPF payments must be added to each negotiated capitation rate for Plaintiffs' Medicaid and CHIP contracts with their MCOs to be considered actuarially sound and, thus, be approved by the Medicaid program. As a result, "[t]here is therefore no genuine dispute of material fact that the HIPF . . . injures the Plaintiffs." *Texas*, 300 F. Supp. 3d at 831. Thus, Plaintiffs' injuries are a direct result of Defendants' conduct.

3. An injunction will redress Plaintiffs' injuries.

A plaintiff must show that that his injury will likely "be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (citation and internal quotation marks omitted). To meet the well-established redressability requirement, a plaintiff must benefit personally and "in a tangible way from the court's intervention." *Warth*, 422 U.S. at 508 (footnote omitted). Plaintiffs will benefit personally and in a tangible way by a favorable decision. Specifically, if the Court enjoins Defendants from collecting the HIPF for fee year 2018, Plaintiffs' coffers will be safe from having to pay approximately $675 million, *see supra* n.1, to cover 2018 HIPF liability and maintain Medicaid and CHIP for the citizens that rely upon those programs. In other words, an injunction prevents Defendants from unlawfully imposing the 2018 HIPF on Plaintiffs (through their Medicaid and CHIP MCOs) as a precondition for Medicaid and CHIP funding. Thus, an injunction from the Court will redress Plaintiffs' injuries. *Texas*, 300 F. Supp. 3d at 831.

B. Plaintiffs satisfy the prudential standing requirements.

The Supreme Court "interpreted § 10(a) of the APA to impose a prudential standing requirement in addition to the requirement, imposed by Article III of the Constitution, that a plaintiff have suffered a sufficient injury in fact." *Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 488 (1998). Prudential standing is generally satisfied when an injury "arguably falls within the zone of interests to be protected or regulated by" the statutory provision in question. *FEC v. Akins*, 524 U.S. 11, 20 (1998) (internal brackets, quotation marks, and citation omitted). When a "plaintiff is not itself the subject of the contested regulatory action, the [zone of interests] test [only] denies a right of review if the plaintiff's interests are . . . marginally related to or inconsistent with the purposes implicit in the statute." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987). The test is not intended to be particularly demanding, and courts apply it "in keeping with Congress's 'evident intent' . . . 'to make agency action presumptively reviewable.'" *Texas. v. United States*, 809 F.3d 134, 162 (5th Cir. 2015) (footnote omitted) (quoting *Clarke*, 479 U.S. at 399).

Here, Plaintiffs bring APA claims challenging Defendants' calculations and collection of the HIPF for fee year 2018. Defendants are attempting to collect part of the 2018 $14.3 billion HIPF from Plaintiffs, using their Medicaid and CHIP MCOs as a conduit, even though the ACA specifically exempts Plaintiffs from HIPF liability. ACA § 9010(c)(2)(B); *see* 26 C.F.R. § 57.2(b)(2)(ii)(B). Thus, Plaintiffs' interest in being exempt from the HIPF for 2018 is within the zone of interests Congress meant to protect because the ACA specifically exempts States from responsibility for the HIPF.

C. The Anti–Injunction Act does not divest the Court of jurisdiction.

The Anti-Injunction Act ("AIA") prohibits suits that are brought "for the purpose of restraining the assessment or collection of any tax . . . in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). The AIA is jurisdictional and generally divests a court from exercising jurisdiction over any claim that would affect the IRS's assessment and collection of taxes. *See Alexander v. Americans United Inc.*, 416 U.S. 752, 759 & n.10 (1974). The Court has ruled that the HIPF is a "tax" for purposes of the AIA, *Texas v. United States*, No. 7:15-CV-00151-O, 2018 WL 4271450, at *4 (N.D. Tex. Aug. 21, 2018), and that Plaintiffs are a "person" for purposes of the AIA, *Texas*, 300 F. Supp. 3d at 835.

However, as the Court recognized, the AIA does not preclude the injunctive relief Plaintiffs seek here because they do not have a refund remedy. *Texas*, 300 F. Supp. 3d at 836; *see* 26 C.F.R. § 57.9 ("Any claim for a refund of the fee must be made by the entity that paid the fee to the government and must be made on Form 843, 'Claim for Refund and Request for Abatement,' in accordance with the instructions for that form."). Plaintiffs' request for a refund was dismissed by the Court. *Texas v. United States*, No. 7:15-CV-00151-O, 2016 WL 4138632, at *9–12 (N.D. Tex. Aug. 4, 2016). Because Plaintiffs do not have a refund avenue available to them, the AIA does not prevent the Court from exercising jurisdiction over Plaintiffs' claims.

II. Plaintiffs Are Likely to Succeed on the Merits of Their Claims Because Defendants' Actions and Inaction Will Result in the Unlawful Imposition of the 2018 HIPF on Plaintiffs.

The Administrative Procedure Act requires the Court to hold unlawful and set aside any agency action that is "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A)–(C). If the use, implementation, or enforcement of any part or all of Defendants' regulations results in 2018 HIPF liability upon Plaintiffs, then the regulations themselves, and their application, are arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, contrary to constitutional right, power, privilege, or immunity, in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

The IRS promulgates, interprets, and uses regulations regarding the HIPF. *See* 26 C.F.R. Part 57. For the liability to be distributed for the 2018 HIPF, the application of these regulations creates an unlawful result—that Plaintiffs incur 2018 HIPF liability, notwithstanding Congress's explicit statement that Plaintiffs are exempt from that liability.

A. The Court held that where federal regulations function to require States to pay the HIPF, those regulations are unlawful.

In prior rulings, the Court concluded (1) that "the ACA explicitly exempts Plaintiffs from paying the HIPF," *Texas*, 300 F. Supp. 3d at 853 (citing ACA § 9010(c)(2)(B)), and (2) that federal regulations which function to create a different result than what Congress declared are unlawful. *Id.* at 850.

Prior to the Court declaring HHS's Certification Rule unlawful, HHS required a private entity—the Actuarial Standards Board ("ASB")—to discern what did and did not qualify as actuarially sound in Plaintiffs' MCO contracts. *Texas*, 300 F. Supp. 3d at 848. In response to this delegation of power, the ASB enacted Actuarial Standard of Practice Number 49 ("ASOP 49"). *See* Actuarial Standards Board, *Actuarial Standard of Practice No. 49: Medicaid Managed Care Capitation Rate Development and Certification* (Mar. 2015), http://www.actuarialstandardsboard.org/wp-content/uploads/2015/03/asop049_179.pdf. ASOP 49 forbade actuaries from certifying any Medicaid contract between a state and an MCO *unless* the contract *required* the state to pay the full amount of HIPF liability to the MCO in addition to the capitation rate (insurance premium). ASOP 49 § 3.2.12(d). In other words, ASOP 49 removed from actuaries any discretion as to how to treat the HIPF in assessing Medicaid and CHIP contracts for Congress's actuarial soundness requirement. *See* 42 U.S.C. § 1396b(m)(2)(A)(iii).

The Court ruled on March 5, 2018 that the Certification Rule was an unlawful delegation of legislative power, functionally removing ASOP 49 as a legal requirement regarding Congress's condition that capitation rates for Medicaid and CHIP contracts be actuarially sound. *See* 42 U.S.C. § 1396b(m)(2)(A)(iii). In reaching this conclusion, the Court determined "that the ASB's private definition of 'actuarial soundness' is, by virtue of the Certification Rule's legislative delegation, the baseline legal standard and regulatory floor that all MCO contracts must first clear" to be approved. *Texas*, 300 F. Supp. 3d at 847.

Regarding liability for the 2018 HIPF, that "the ACA explicitly exempts Plaintiffs from paying the HIPF" is unchanged. Now that the Certification Rule may no longer function to remove actuarial discretion, another problem with the federal regulatory scheme regarding the HIPF is exposed—how the IRS calculates and distributes HIPF liability. Whether the regulations that work to defy Congress's exemption are by HHS or the IRS is irrelevant. Therefore, Plaintiffs are likely to prevail on the merits.

B. The application of the IRS's regulations to the distribution of the 2018 HIPF liability violates the ACA as those regulations function to impose liability for the 2018 HIPF on Plaintiffs.

Congress exempted the States from paying the HIPF. *Texas*, 300 F. Supp. 3d at 853 (citing ACA § 9010(c)(2)(B)); *see* 26 C.F.R. § 57.2(b)(2)(ii)(B). In calculating the 2018 HIPF liability, the IRS regulations fail to recognize or apply this exemption. The IRS recognizes other exemptions, but not the one that applies to Plaintiffs. 26 C.F.R.

§ 57.4(a)(4)(ii)–(iii).

In direct contrast to the ACA, Defendants are assessing and seeking to collect the 2018 HIPF in a manner that will (if not enjoined) impose the 2018 HIPF on Plaintiffs. *See* App. 32–492.

C. Defendants have unlawfully withheld and unreasonably delayed agency action to remedy both the deficiencies in the IRS's regulations and the application of the IRS's regulations to the distribution of the 2018 HIPF liability.

The Administrative Procedure Act also requires the Court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Since Plaintiffs initially filed this case, or even since the Court's ruling on March 5, 2018, Defendants have not sought to remedy the deficiencies in the regulations regarding the HIPF. *See* 26 C.F.R. Part 57. Defendants have also not responded to Plaintiffs' protests regarding Defendants' calculations. *See* App. 6–30, Exs. A–F. This agency action, both unlawfully withheld and unreasonably delayed, is compelled by the text of the ACA and the clear inconsistencies of Part 57 with the ACA.

At bottom, regarding the 2018 HIPF, Defendants have failed to make any effort to appropriately harmonize and implement Congress's actuarial soundness requirement, 42 U.S.C. § 1396b(m)(2)(A)(iii), with Plaintiffs' exemption from HIPF liability, ACA § 9010(c)(2)(B). The related-statutes canon, also known as the doctrine of *in pari materia*, dictates that statutes are to be construed together, so that inconsistencies in one statute may be resolved by looking another statute on the same subject. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 252 (2012); *see also* Black's Law Dictionary 862 (9th ed. 2009) (defining *in pari materia* in similar terms); *Little v. Shell Expl. & Prod. Co.*, 690 F.3d 282, 289 (5th Cir. 2012) ("The justification for the *in pari materia* canon is that Congress should be assumed to have legislated with reference to the other provision."). Reading the actuarial soundness requirement and the HIPF exemption *in pari materia* demands that MCO premiums for Plaintiffs' Medicaid and CHIP services be exempted from Defendants' calculations and distribution of the HIPF liability.

Whatever interpretation is being employed by Defendants renders Plaintiffs' exemption from the HIPF superfluous, void, or insignificant. Yet, "[i]t is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotations omitted). An alternative statutory interpretation leads to an absurd result, at odds with the expressed legislative intent. *See Helvering v. Hammel*, 311 U.S. 504, 510–511 (1941) ("[C]ourts in the interpretation of a statute have some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results or would thwart the obvious purpose of the statute.") (internal citations omitted). But, as per Congress, Plaintiffs are entitled to maintain their exemption from HIPF liability while simultaneously engaging in Medicaid and CHIP contracts that are actuarially sound.

Notwithstanding Defendants' clear notice of the problems with their methodologies of statutory interpretation over the last few years of this dispute, there is no effort to fix the problem. Yet in the last several years, Defendants have issued multiple notices and decisions, as well as amended regulations, regarding the HIPF, none of which have sought to address, much less discuss, Plaintiffs' exemption from the HIPF. For example, Defendants addressed the definition of a "covered entity" and exemptions from the HIPF, but failed to address Plaintiffs' exemption from the HIPF. *See* Health Insurance Providers Fee, 83 Fed. Reg. 8173–8175 (Feb. 26, 2018) (to be codified at 25 C.F.R. part 57).

And, of course, Defendants failed to respond in any regard to the petitions of Plaintiffs to remedy their initial calculations regarding the distribution of the liability for the 2018 HIPF, and to properly exempt from its calculations MCO premiums for

Medicaid and CHIP programs for Plaintiffs. *See* App. 6–30, Exs. A–F. Defendants also failed to properly assess the distribution of the liability for the 2018 HIPF and exempt from its calculations MCO premiums (capitation rates) for Medicaid and CHIP programs for Plaintiffs.

At bottom, Congress exempted the States from paying the HIPF. *Texas*, 300 F. Supp. 3d at 853 (citing ACA § 9010(c)(2)(B)). Defendants continue to ignore this exemption and fail, where opportunities exist, to take any action to avoid the unlawful result of 2018 HIPF liability ultimately resting with Plaintiffs. Therefore, Plaintiffs are likely to prevail on the merits of their claim.

III. The Harm Threatening Plaintiffs Is Irreparable.

Spending money to comply with a law constitutes irreparable harm when there is no established avenue through which that money can later be recovered. *See Paulsson Geophysical Servs., Inc. v. Sigmar*, 529 F.3d 303, 312 (5th Cir. 2008) (per curiam) ("The absence of an available remedy by which the movant can later recover monetary damages . . . may . . . be sufficient to show irreparable injury.") (citation omitted)); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring) ("[A] regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs."). If Defendants are not enjoined from collecting the 2018 HIPF (as currently calculated) from Plaintiffs' Medicaid and CHIP MCOs, the harm that Plaintiffs will experience if the Court's order of disgorgement is reversed by the Fifth Circuit is irreparable since Plaintiffs will incur 2018 HIPF liability with no way of getting their money back.[4] Without a temporary restraining order and subsequent injunction, Plaintiffs will be required to incur HIPF liability for fee year 2018 with no clear path for its recoupment.

To be sure, the Court ordered the disgorgement of past HIPF payments made

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[4] These irreparable harms also provide Plaintiffs' standing to sue. *See Lujan*, 504 U.S. at 560–61.

by Plaintiffs for 2014, 2015, and 2016. *Texas v. United States*, No. 7:15-CV-00151-O, 2018 WL 4271450, at *4–8 (N.D. Tex. Aug. 21, 2018). The Court also noted this path as an option for future relief. *Id.* at *9 n.8. However, Defendants already filed their notice of appeal with the intention of contesting this order. ECF No. 92; *see also* ECF No. 101. An appellate decision reversing the Court's remedial path not only removes Plaintiffs' only existing remedial path for the recapture of HIPF payments for 2014, 2015, and 2016, but such a ruling also leaves Plaintiffs without a means to obtain relief from future HIPF liability, including what is imminent—Defendants' collection of the 2018 HIPF by October 1, 2018. Because Plaintiffs must await the decision of the Fifth Circuit before they will know whether they have an avenue for relief (other than injunctive relief), preserving the *status quo* is essential. However, in the event of a reversal, Plaintiffs' harm will be irreparable.

The circumstances presented here are analogous to the entry of a stay pending appeal. One of the factors for issuance of a stay pending appeal is "whether the applicant will be irreparably injured absent a stay." *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013). And the inability to later recover monies owed can constitute an irreparable injury. When there is no mechanism for the State "to recover the compliance costs they will incur if the [equitable relief] is invalidated on the merits," an injury is irreparable. *Texas v. EPA*, 829 F.3d 405, 434 (5th Cir. 2016).

Here, the purpose of the temporary restraining order and preliminary injunction are to prevent the IRS from collecting the 2018 HIPF from Plaintiffs' Medicaid and CHIP MCOs pending further adjudication on appeal. Absent an injunction, the IRS will collect the 2018 HIPF from Plaintiffs' Medicaid and CHIP MCOs, Plaintiffs will be required to reimburse that 2018 HIPF liability to those MCOs to maintain actuarially sound Medicaid and CHIP contracts, 42 U.S.C. § 1396b(m)(2)(A)(iii), and Plaintiffs' only recourse will be disgorgement of those unlawfully collected funds. But this assumes the Fifth Circuit (and perhaps even the Supreme Court) will uphold disgorgement as a proper remedy. While they should, if an injunction is denied regarding the 2018 HIPF, and if those appellate courts reject disgorgement as an available remedy, Plaintiffs will be irreparably harmed, having no remedy to recover the coerced payment of monies from which they should be exempt from paying.

Therefore, because the Court's rulings and disgorgement order could be affirmed or reversed on appeal, Plaintiffs' ability to seek relief from 2018 HIPF liability through equitable disgorgement is, at present, uncertain. Thus, Plaintiffs ask the Court to maintain the *status quo*—a circumstance where Plaintiffs maintain their exemption from 2018 HIPF liability and the implementation of federal regulations that will alter that circumstance. Maintaining the *status quo* ensures that the harm facing Plaintiffs will not be irreparable. Thus, the Court is asked to suspend the collection of the 2018 HIPF from Plaintiffs' Medicaid and CHIP MCOs on or before September 24, 2018 so that Plaintiffs are not irreversibly saddled with irreparable harm in the event of an unfavorable appellate result.

Lastly, even if disgorgement is a clear, established, and available path for Plaintiffs, irreparable harm still exists as Plaintiffs are unable to access a right to interest from the IRS regarding the HIPF liability that they pay. If Plaintiffs are able to access the refund remedy, 26 U.S.C. § 7422, Plaintiffs are also entitled to interest on their refunds. 26 U.S.C. § 6611. However, as matters presently stand, Plaintiffs are only entitled to have returned to them the thing that was seized, without compensation for the loss of use in the interim. This harm is irreparable, regardless of the outcome of the forthcoming appeal.

IV. The Balance of the Equities Favors Injunctive Relief.

This motion regards the imposition of liability for the 2018 HIPF on Plaintiffs.

The equities of enjoining the collection of the HIPF for fee year 2018 tips decisively in Plaintiffs' favor. The United States has no cognizable interest in collecting the HIPF from entities that Congress expressly exempted from paying it. "The prejudice to the I.R.S. of not permitting the I.R.S. to collect an unlawfully assessed penalty is insignificant compared to the injustice that would be wreaked by forcing an individual taxpayer to pay an unlawful penalty." *Teal v. United States*, A-91-CA-863, 1992 WL 465446, at *4 (W.D. Tex. Dec. 23, 1992), *rev'd on other grounds*, *Matter of Teal*, 16 F.3d 619 (5th Cir. 1994). Thus, Plaintiffs have a significant interest in enjoining Defendants from collecting the 2018 HIPF from their Medicaid and CHIP MCOs, because it will prevent them from being forced to incur and pay 2018 HIPF liability in violation of the ACA.

Monetarily, the HIPF represents a substantial portion of Plaintiffs' budgets. *See* Pls.' Br. in Supp. of Mot. for Summ. J. at 23–24, ECF No. 54, in *Texas v. United States*, No. 7:15-CV-00151-O (N.D. Tex.). Conversely, the HIPF comprises a mere 0.3% of the federal budget. The federal government's budget for fiscal year 2018 is $4.1 trillion. *See, e.g.*, *Budget*, Cong. Budget Office, https://www.cbo.gov/topics/budget. Even if the IRS were somehow unable to collect *any* of the HIPF premised upon Plaintiffs' Medicaid and CHIP MCO contracts for 2018, that loss comprises but a fraction of the 0.3% of the federal budget that the 2018 HIPF represents—substantially less than one-tenth of one percent of the federal budget.

The balance of equities also favors a prompt injunction. An injunction issued, for example, after the HIPF payment is due on October 1, 2018, will not be effective in preventing irreparable harm and the unlawful collection of the 2018 HIPF from Plaintiffs. Moreover, Plaintiffs respectfully request that an injunction be issued on no later than Monday, September 24, 2018 so that the parties (both Plaintiffs and Defendants) have adequate time to notify the relevant MCOs about the injunction and what should not be remitted to or collected by the IRS.[5] In short, if the Court issues an injunction, the parties need time to disseminate the Court's ruling and procure cooperation by interested third parties (mainly Plaintiffs' MCOs).

V. The Public Interest Favors a Temporary Restraining Order and Preliminary Injunction Against Defendants' Collection of the HIPF.

Just as the Plaintiffs have a strong interest in enjoining Defendants from collecting the HIPF for fee year 2018, so too does the public. Indeed, it should always be thought to be in the public interest to uphold the law. *Cf. Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012) (quoting *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)).

Here, Defendants' intent to assess and collect the 2018 HIPF from Plaintiffs' Medicaid and CHIP MCOs represents unlawful agency action and the continued agency rejection of a clear Congressional mandate. As the Court acknowledged, "[t]he vesting of legislative power in [Congress] is a stumbling block to modern intellectuals and a stone rejected by the builders of the federal bureaucracy, but it has been and remains a cornerstone in the constitutional architecture of free government." *Texas*, 300 F. Supp. 3d at 841. It is *always* in the public interest to preserve this principle.

Therefore, what Congress said must prevail—Plaintiffs are exempt from HIPF liability. Requiring the Plaintiffs to pay the full amount of the 2018 HIPF (dollar-for-dollar) imposed upon their Medicaid and CHIP MCOs violates ACA § 9010 and goes beyond the power of Defendants. Enjoining the collection of the HIPF for fee year 2018 from Plaintiffs' Medicaid and CHIP MCOs is in the public interest.

VI. The Court Should Waive the Bond Requirement of Rule 65.

Should the Court issue a temporary restraining order or preliminary

[5] The need for clarity by September 24, 2018 is enhanced by the circumstances of Plaintiff, Wisconsin, who is contractually obligated to pay its Medicaid and CHIP MCOs' 2018 HIPF liability up front—by September 25, 2018. *See* App. 71–72, Ex. L ¶14 (Smith Declaration).

injunction, Plaintiffs request that the Court waive the posting of a bond. *See Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996) (amount of security required "is a matter for the discretion of the trial court," and district courts have discretion to "require no security at all" (footnote omitted)). Plaintiffs' request represents no financial risk or harm to Defendants as Plaintiffs do not seek to limit the amount of the HIPF that the IRS collects for 2018; Plaintiffs only challenge the distribution of that liability.

Even if Plaintiffs' injunctive request posed a financial threat to Defendants, as mentioned *supra*, the portion of the HIPF assessed to Plaintiffs represents a miniscule amount of the federal budget and there is no evidence that Defendants will suffer any financial loss requiring Plaintiffs to post security. Defendants will suffer virtually no financial or pecuniary loss absent a bond.

Moreover, unlike a normal litigant that Rule 65 is designed to protect through the posting of security on the issuance of an injunction, the federal government will not become insolvent if Plaintiffs are not required to pay the 2018 HIPF.

CONCLUSION

Plaintiffs respectfully request the Court to issue a temporary restraining order on or before September 24, 2018, followed by a preliminary injunction, that specifically orders the following:

A. Direct Defendants to immediately, and no later than 48 hours following the issuance of the Court's order, to notify Plaintiffs' Medicaid and CHIP MCOs of Defendants' intent to issue new, amended final fee calculations (Letters 5067C) for 2018 HIPF liability to Plaintiffs' Medicaid and CHIP MCOs which properly exempt from its calculations MCO premiums for Medicaid and CHIP programs for Plaintiffs.

B. Direct Defendants to immediately, and no later than 48 hours following the issuance of the Court's order, extend indefinitely the October 1, 2018 payment deadline for 2018 HIPF liability for Plaintiffs' Medicaid and CHIP MCOs in light of Defendants' intent to issue new, amended final fee calculations (Letters 5067C) for 2018 HIPF liability.

C. Direct Defendants to issue new, amended final fee calculations (Letters 5067C) for 2018 HIPF liability to Plaintiffs' Medicaid and CHIP MCOs which properly exempt from its calculations MCO premiums for Medicaid and CHIP programs for Plaintiffs.

D. Enjoin Defendants from receiving or collecting, from Plaintiffs' Medicaid and CHIP MCOs, any and all payments, or portions of payments, for the 2018 HIPF that are based, in part or in whole, upon Defendants' calculations for 2018 HIPF liability involving premiums (capitation rates) for Plaintiffs' Medicaid and CHIP services.

E. Direct that Defendants deposit into the registry of the Court, in accordance with Rule 67 of the Federal Rules of Civil Procedure and other applicable law, any monies received or collected from Plaintiffs' Medicaid and CHIP MCOs for 2018 HIPF liability that are based, in part or in whole, upon Defendants' calculations for 2018 HIPF liability involving premiums (capitation rates) for Plaintiffs' Medicaid and CHIP services.

F. Grant such other and further relief as the Court may deem just, proper, and equitable.

Respectfully submitted this the 21st day of September, 2018.

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CERTIFICATE OF CONFERENCE

I hereby certify that, on September 14, 2018, Plaintiffs' counsel conferred with Defendants' counsel concerning this motion. Defendants advised Plaintiffs that they are opposed to this motion.

/s/ David J. Hacker
DAVID J. HACKER

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2018, I electronically filed the foregoing document through the Court's ECF system, and will serve a copy of this document with the summons and complaint.

/s/ David J. Hacker
DAVID J. HACKER