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 THE INTERNAL REVENUE SERVICE

Defendants.

Civ. No. 4:18-cv-00779-O

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 2

LEGAL STANDARD 4

ARGUMENT 5

I. PLAINTIFFS CANNOT SHOW THAT EMERGENCY RELIEF IS NECESSARY TO PREVENT IRREPARABLE HARM 5

II. PLAINTIFFS HAVE NOT SHOWN THAT THE BALANCE OF EQUITIES TIPS IN THEIR FAVOR OR THAT AN INJUNCTION IS IN THE PUBLIC INTEREST 8

III. PLAINTIFFS CLAIMS ARE NOT LIKELY TO SUCCEED 10

A. The Anti-Injunction Act Bars Plaintiffs' Claims 11

B. Plaintiffs Lack Standing Because the IRS Regulations Are Not the Cause of Plaintiffs' Alleged Injury 12

C. Plaintiffs' Claims Are Not Likely To Succeed On The Merits 13

IV. IF THE COURT GRANTS PRELIMINARY RELIEF, IT SHOULD NOT ENTER THE PROPOSED ORDER REQUESTED BY PLAINTIFFS 18

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Alexander v. Americans United Inc.,
416 U.S. 752 (1974) 11

American Hosp. Ass'n v. Price,
867 F.3d 160 (D.C. Cir. 2017) 19, 20

Bob Jones Univ. v. Simon,
416 U.S. 725 (1974) 11

Boire v. Pilot Freight Carriers, Inc.,
515 F.2d 1185 (5th Cir. 1975) 7

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,
467 U.S. 837 (1984) 16

Cornish v. Dudas,
540 F. Supp. 2d 61 (D.D.C. 2008) 9

Davis v. Fed. Election Comm'n,
554 U.S. 724 (2008) 12

Dennis Melancon, Inc. v. City of New Orleans,
703 F.3d 262 (5th Cir. 2012) 5, 6

Enochs v. Williams Packing & Nav. Co.,
370 U.S. 1 (1962) 9

Enrique Bernat F., S.A. v. Guadalajara, Inc.,
210 F.3d 439 (5th Cir. 2000) 4

Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana,
762 F.2d 464 (5th Cir. 1985) 5

Gonannies, Inc. v. Goupair.Com, Inc.,
464 F. Supp. 2d 603 (N.D. Tex. 2006) 7

Hart v. Wells Fargo Bank, N.A.,
No. 3:14-CV-1111-B, 2014 WL 12531172 (N.D. Tex. Mar. 31, 2014) 4

House the Homeless, Inc. v. Widnall,
94 F.3d 176 (5th Cir. 1996) 5

Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357 (5th Cir. 2003) 4

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 12

Nken v. Holder,
556 U.S. 418 (2009) 8

Norton v. S. Utah Wilderness, All., 542 U.S. 55 (2004) 18

Russello v. United States,
464 U.S. 16 (1983) 17

Sierra Club v. FDIC,
992 F.2d 545 (5th Cir. 1993) 10

South Carolina v. Regan,
465 U.S. 367 (1984) 11

Texas Marine & Brokerage, Inc. v. Bennington Marine, LLC,
No. 1:12-CV-397, 2012 WL 12888827 (E.D. Tex. Oct. 17, 2012),
report and recommendation adopted, No. 1:12-CV-397,
2012 WL 12892168 (E.D. Tex. Nov. 9, 2012). 10

Texas v. United States,
300 F. Supp. 3d 810 (N.D. Tex. 2018) 3, 4, 11, 13

Texas v. United States,
No. 7:15-CV-00151-O, 2018 WL 4271450 (N.D. Tex. Aug. 21, 2018) 5, 6

United States ex rel. Bernardin v. Duell,
172 U.S. 576 (1899) 18

United States v. Oakland Cannabis Buyers' Coop.,
532 U.S. 483 (2001) 9

Winter v. NRDC, Inc.,
555 U.S. 7 (2008) 4

Statutes

5 U.S.C. § 706(1) 17

5 U.S.C. § 706(2) 3

26 U.S.C. § 6103(e) 18

26 U.S.C. § 7421(a) 11

ACA § 6301(e) 16, 17

ACA § 9010 ... passim

ACA § 9010(a) ... 2, 9

ACA § 9010(b) ... 3

ACA § 9010(c) ... passim

ACA § 9010(d) ... 2

ACA § 9010(e) ... 3, 9

ACA § 9010(f) ... 11

ACA § 9010(h) ... 2, 16

Rules

Fed. R. Civ. P. 65(b)(2) ... 19

Regulations

26 C.F.R. Pt. 57 ... 3

26 C.F.R. § 57.2 ... passim

26 C.F.R. § 57.3 ... 14

26 C.F.R. § 57.4 ... 12, 13

26 C.F.R. § 57.5 ... 14

26 C.F.R. § 57.6 ... 13

26 C.F.R. § 57.7 ... 14

78 Fed. Reg. 71,476 ... 3

80 Fed. Reg. 10,333 ... 7

83 Fed. Reg. 8,173 ... 7

INTRODUCTION

At the eleventh hour, Plaintiffs ask the Court to enjoin the Internal Revenue Service (IRS) from assessing and collecting a tax, imposed on third parties, that Plaintiffs have known about for years. Delay on Plaintiffs' part should not constitute an emergency for the Court (or Defendants). Plaintiffs, moreover, have not established any of the four requirements for obtaining a preliminary injunction, much less all of them. Their motion should be denied.

First, Plaintiffs have not shown that they will be irreparably harmed absent an injunction. An alleged injury is not irreparable if it can be undone through monetary remedies, which is the case here under the logic of this Court's prior determination that Plaintiffs may obtain equitable disgorgement of any unlawfully imposed Health Insurance Provider Fee (HIPF) payments. Plaintiffs' extreme delay in seeking "emergency" relief also negates any claim that they will suffer irreparable injury without it.

Second, Plaintiffs cannot show that an injunction is in the public interest. The United States has a strong interest in its ability to collect taxes alleged to be due without judicial interference. That is particularly true where Congress has instructed the IRS to collect $14.3 billion in HIPFs by September 30, 2018. Interference with this collection also may harm the interests of the more than 500 covered entities that are not before this Court. If the IRS is prohibited from collecting some fees from the MCOs with which Plaintiffs contract, other covered entities would be required to pay more. For this reason and others, the injunctive order Plaintiffs propose is unworkable.

Finally, Plaintiffs are not likely to succeed on the merits. Their claims, which seek to restrain the IRS from collecting a tax, are clearly barred by the Anti-Injunction Act (AIA). Plaintiffs also lack standing to assert their claims. They admit that the Medicaid Act's requirement that capitation rates be actuarially sound—which Plaintiffs do not challenge—is the cause of their

alleged injury, not the IRS regulations they seek to challenge here. Finally, Plaintiffs' claims are meritless. They are based on a fundamental misunderstanding of the scope of the exclusion for governmental entities provided by section 9010(c)(2)(B) of the Affordable Care Act (ACA). That exclusion—like any tax exemption—does not protect Plaintiffs from any and all possible downstream consequences of the HIPF. Moreover, the IRS regulations are entirely consistent with, and in most instances, merely parrot, the ACA's requirements.

For these reasons, Plaintiffs' last-minute effort to enjoin collection of the HIPF for 2018 should be rejected.

BACKGROUND

The HIPF is a fee assessed on certain providers of health insurance. Specifically, § 9010(a)(1) of the ACA provides that "[e]ach covered entity engaged in the business of providing health insurance shall pay to the Secretary not later than the annual payment date of each calendar year beginning after 2013 a fee in an amount determined under [a statutory formula]." The statute defines "covered entity" as "any entity which provides health insurance for any United States health risk during the calendar year in which the fee . . . is due." *Id.* § 9010(c)(1). "United States health risk," in turn, is defined as "the health risk of any individual who is" a United States citizen, a resident of the United States, or located in the United States. *Id.* § 9010(d). The statute also specifies that "health insurance" does not include, among other things, "any medicare supplemental health insurance" or "any insurance for long-term care." *Id.* § 9010(h)(3). Coverage provided under Medicaid and CHIP, however, are not excluded from the definition of "health insurance." *See id.*

The statute contains two exclusions from the term "covered entity" that are relevant here. These exclusions identify entities that otherwise "provide[] health insurance for any United States

health risk" but are nonetheless excused from paying HIPFs based on their provision of such coverage. *Id.* § 9010(c)(1). First, the statute provides that "any governmental entity" is excluded from the definition of "covered entity." *Id.* § 9010(c)(2)(B). Second, the statute excludes certain nonprofit entities that, among other things, receive "more than 80 percent of [their] gross revenues . . . from government programs that target low-income, elderly, or disabled populations under [Medicare, Medicaid, and CHIP]." *Id.* § 9010(c)(2)(C)(iii).

Congress directed that, for calendar year 2018, the Secretary of the Treasury shall collect a total of $14.3 billion in HIPF payments. *Id.* § 9010(e)(i)(1). The statute prescribes the formula by which this amount is to be apportioned across all "covered entities" based on the ratio of an entity's net premiums written to all net premiums written for United States health risks in the prior calendar year. *Id.* § 9010(b).

In November 2013, the IRS promulgated regulations to implement these statutory requirements. *See* Health Insurance Providers Fee, 78 Fed. Reg. 71,476 (Nov. 29, 2013); 26 C.F.R. Pt. 57. The regulations largely parrot the statutory requirements. As relevant here, like the statute, the IRS regulations provide that "governmental entit[ies]," including "State[s]," are not "covered entit[ies]." 26 C.F.R. § 57.2(b)(2)(ii). The IRS has consistently relied on these regulations (and on section 9010 of the ACA) to calculate the HIPF since 2014.

In the related case, *Texas v. United States*, 7:15-cv-151-O (N.D. Tex., filed Oct. 22, 2015) (*Texas I*), the Plaintiff States challenged Congress's enactment of the HIPF as well as a regulation promulgated by the Secretary of Health and Human Services (HHS) establishing the standard for actuarial soundness in Medicaid managed care contracts (Certification Rule). This Court determined that the Certification Rule "delegated legislative power to private entities in violation of Article I's Vesting Clause," and "set [it] aside as 'contrary to constitutional right, power, privilege, or immunity.'" *Texas v. United States*, 300 F. Supp. 3d 810, 848 (N.D. Tex. 2018) (quoting 5 U.S.C.

§ 706(2)(B)). The Court rejected Plaintiffs' challenges to the HIPF itself, leaving the Congressional text untouched. *Id*. at 856. Although the IRS was named as a defendant in *Texas I*, Plaintiffs did not challenge any specific action or regulation of the IRS in that case. And, in its decision, the Court did not direct the IRS to act or refrain from acting in any way. *See id*. at 856-57.

On September 7, 2018, Plaintiffs moved for leave to amend the operative complaint in *Texas I* to assert the same claims brought in the instant action. *Texas I*, ECF No. 105. The Court denied the motion, concluding that Plaintiffs had "failed to show good cause" for their "significant delay" in bringing the new claims. *Texas I*, Order at 2, ECF No. 113. Plaintiffs then filed this action. On September 21, they moved for a temporary restraining order and preliminary injunction to "enjoin[] the IRS . . . from collecting and receiving the HIPF for fee year 2018 from Plaintiffs' Medicaid and CHIP MCOs." Mem. in Supp. of Mot. for TRO & Prelim. Inj. ("Pls.' Mot.") at 2, ECF No. 8.

LEGAL STANDARD

The standard for obtaining a temporary restraining order is the same as that for a preliminary injunction. *See Hart v. Wells Fargo Bank, N.A.*, No. 3:14-CV-1111-B, 2014 WL 12531172, at *1 (N.D. Tex. Mar. 31, 2014). A plaintiff seeking a preliminary injunction must establish "(1) a substantial likelihood of success on the merits; (2) a substantial threat that it will suffer irreparable injury absent the injunction; (3) that the threatened injury outweighs any harm the injunction might cause the defendants; and (4) that the injunction will not impair the public interest." *Enrique Bernat F., S.A. v. Guadalajara, Inc.*, 210 F.3d 439, 442 (5th Cir. 2000); *see Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). "[A] preliminary injunction is 'an extraordinary remedy' which should only be granted if the party seeking the injunction has 'clearly carried the burden of persuasion' on all four requirements." *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 363 (5th Cir. 2003). Indeed, the Fifth Circuit "frequently caution[s]" that "the decision to grant a preliminary injunction is to be treated as the

exception rather than the rule." *House the Homeless, Inc. v. Widnall*, 94 F.3d 176, 180 (5th Cir. 1996). "[I]f the movant does not succeed in carrying its burden on any one of the four prerequisites, a preliminary injunction may not issue . . . ." *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985).

ARGUMENT

I. PLAINTIFFS CANNOT SHOW THAT EMERGENCY RELIEF IS NECESSARY TO PREVENT IRREPARABLE HARM.

Plaintiffs cannot establish that they are likely to suffer irreparable harm in the absence of a preliminary injunction for two independent reasons. First, this Court has held that Plaintiffs may obtain "equitable disgorgement of any unlawfully coerced HIPF payments" accounted for in their Medicaid and CHIP capitation rates. *Texas v. United States*, No. 7:15-CV-00151-O, 2018 WL 4271450, at *9 n.8 (N.D. Tex. Aug. 21, 2018). This after-the-fact monetary remedy negates any claim that Plaintiffs' alleged injury is irreparable. Second, Plaintiffs waited years to bring their claims against the IRS regulations and to seek "emergency" relief, despite knowing that "future imposition of the HIPF was always a factual possibility." *Texas I*, Order at 2, ECF No. 113. Plaintiffs' lack of urgency entirely undermines their claim of irreparable harm.

It is "well-established" that an injury is not irreparable if it can be "undone through monetary remedies." *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012). That is the case here. Plaintiffs' claim of harm rests solely on their assertion that, absent an injunction, they will be required to "[s]pend[] money" to reimburse their Medicaid and CHIP MCOs for the HIPF. Pls.' Mot. at 17. But this monetary injury is not irreparable. This Court previously ruled that Plaintiffs may obtain equitable disgorgement of past HIPF payments, and concluded that Plaintiffs thus have not "shown that a future requirement to pay the HIPF would constitute irreparable harm." *Texas*, 2018 WL 4271450, at *9 n.8. The Court explained that

"[b]ecause [it] has found that Plaintiffs are entitled to equitable disgorgement of their past HIPF payments, Plaintiffs may petition for equitable disgorgement of any unlawfully coerced HIPF payments in the future." *Id*. (internal citation omitted). Although Defendants respectfully disagree with the Court's equitable disgorgement ruling, Plaintiffs have not disavowed it. Thus, under Plaintiffs' own view, the requirement that the MCOs with which they contract make future HIPF payments does not cause them irreparable harm.

Plaintiffs seek to avoid this result by noting that the Fifth Circuit could "revers[e] the Court's remedial path" on appeal, thereby eliminating Plaintiffs' equitable disgorgement remedy. Pls.' Mot. at 18. But *certain* monetary relief is not required. If that were the standard, all monetary injuries would be irreparable, as damages awards (like all orders and judgments) are always subject to reversal on appeal. Instead, the Fifth Circuit has held that even "the *possibility* that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Dennis Melancon, Inc.*, 703 F.3d at 279 (emphasis added). Plaintiffs thus cannot obtain a preliminary injunction based solely on their fear that the very monetary relief they requested from the Court—and that the Court granted them—may actually be beyond the Court's power.

Plaintiffs also assert that their alleged harm is irreparable because they cannot obtain interest on any disgorged amounts. *See* Pls.' Mot. at 19. While Defendants of course do not concede that prejudgment interest would be available to Plaintiffs, under the logic of the Court's own prior order that is far from clear. *See Texas*, 2018 WL 4271450, at *8 (recognizing the Court's ability "to afford *complete relief* where a strict adherence to the text or precedent governing remedies at law prevents the plaintiff from *fully recovering*"). The mere possibility that Plaintiffs would be denied interest in some future proceeding does not warrant the extraordinary relief they seek.

In addition to the availability of after-the-fact monetary remedies, Plaintiffs also cannot establish irreparable harm because of their excessive delay in seeking a preliminary injunction. "Absent a good explanation, a substantial period of delay militates against the issuance of a preliminary injunction by demonstrating that there is no apparent urgency to the request for injunctive relief." *Gonannies, Inc. v. Goupair.Com, Inc.*, 464 F. Supp. 2d 603, 609 (N.D. Tex. 2006); *see Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1193 (5th Cir. 1975) (affirming denial of TRO where movant delayed three months in making request).

Here, Plaintiffs waited nearly five years after the promulgation of the IRS regulations they seek to enjoin before bringing suit and seeking "emergency" relief. During that time, the IRS has relied on the regulations (and on section 9010 of the ACA, pursuant to which the regulations were issued) to calculate the HIPF in the same manner for calendar years 2014, 2015, and 2016.[1] Plaintiffs thus have known for years that "imposition of the HIPF" in the same manner in 2018 "was always a factual possibility." *Texas I*, Order at 2, ECF No. 113; *see also, e.g.*, *Texas I*, Compl. ¶¶ 19-23, ECF No. 1 (citing the IRS regulations and asserting that they "include no specific language excluding the activities of for-profit managed care organizations providing Medicaid or CHIP services from being included in the fee calculations"). There is no excuse for Plaintiffs' delay, which is substantial by any measure. Indeed, this Court recently determined that Plaintiffs had failed to show "good cause" for their tardiness in bringing these claims. *See Texas I*, Order at 2, ECF No. 113.

Plaintiffs suggest that their eleventh-hour filing should be excused because they did not realize that the Court's invalidation of HHS's Certification Rule would fail to redress their alleged

[1] The IRS temporarily amended two provisions of the regulations (26 C.F.R. §§ 57.2(b)(3), 57.2(c)(3)(ii)) in February 2015, *see* 80 Fed. Reg. 10,333, and finalized those amendments in February 2018, *see* 83 Fed. Reg. 8,173, but Plaintiffs do not challenge those provisions.

injury. *See* Pls.' Mot. at 9; Pls.' App'x at 64, ECF No. 9. But Plaintiffs cannot credibly claim ignorance of this fact. Even setting aside that it would have been apparent had Plaintiffs discussed the issue with their own actuaries, Defendants have been pointing this fact out to Plaintiffs and the Court from the beginning of *Texas I*. As early as January 2016, when Defendants filed their first motion to dismiss in that case, Defendants argued that the Certification Rule was not the cause of, and its invalidation would not redress, Plaintiffs' alleged injury because, even in the absence of the Certification Rule, Plaintiffs likely would include the cost of the HIPF in their capitation rates "as a matter of good business practice." *See Texas I*, Br. in Supp. of Defs.' Mot. to Dismiss Pls.' Compl. at 11-12, ECF No. 15.[2] Therefore, Plaintiffs have known for more than two-and-a-half years that the relief they requested in *Texas I* may not redress their alleged injury. Their lack of urgency in seeking to challenge the IRS regulations and in moving for "emergency" relief entirely undermines any claim of irreparable injury. To the extent there is any emergency (and there is none), it is one of Plaintiffs' own making.

Because Plaintiffs cannot show that they are likely to suffer irreparable harm in the absence of preliminary relief, their motion should be denied.

II. PLAINTIFFS HAVE NOT SHOWN THAT THE BALANCE OF EQUITIES TIPS IN THEIR FAVOR OR THAT AN INJUNCTION IS IN THE PUBLIC INTEREST

The balancing of the equities and the public interest merge where, as here, the Federal Government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 435 (2009). In any event, Plaintiffs cannot establish either requirement. To the contrary, the injunctive relief they seek would substantially harm Defendants and third parties not before the Court.

---

[2] *See also Texas I*, Br. in Supp. of Defs.' Mot. to Dismiss Pls.' Am. Compl. at 10-11, ECF No. 27; *Texas I*, Br. in Supp. of Defs.' Mot. for Summ. J. & in Opp'n to Pls.' Mot. for Summ. J. at 15-16, ECF No. 63.

Plaintiffs assert that the equities tip in their favor because "[m]onetarily, the HIPF represents a substantial portion of Plaintiffs' budgets" and only "a mere 0.3% of the federal budget." Pls.' Mot. 20. But Plaintiffs' own evidence in *Texas I* demonstrates otherwise: Plaintiffs only presented evidence showing the total impact of the HIPF on Plaintiff States' budgets for Kansas and Texas (and not for the other four Plaintiff States), and that evidence showed that the financial impact of the HIPF represents 0.37 percent of Kansas's budget and 0.11 percent of Texas's budget. *See Texas I*, Defs.' Br. in Supp. of Mot. for Summ. J. at 48 n.34, ECF No. 63 (citing Randol Decl. at A0135-39, Parks Decl. at A1172, ECF No. 54-1, and Texas Comptroller, Certifying the 2016-2017 Texas State Budget, https://comptroller.texas.gov/about/media-center/infographics/2015/docs/certify-2016-17.pdf). It can hardly be said that these mere fractions of a percent of the total state budgets tip the balance of equities "decisively in Plaintiffs' favor." Pls.' Mot. 20. Moreover, as explained above, Plaintiffs have not shown that any monetary harm that may result in the absence of a preliminary injunction is irreparable.

Defendants, by contrast, will suffer substantial harm if the Court enjoins collection of the HIPF. The United States has a strong interest in its ability to "assess and collect taxes alleged to be due without judicial intervention." *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7 (1962). That interest is further amplified here because Congress has explicitly directed the IRS to collect $14.3 billion in HIPFs from covered entities "no . . . later than September 30" of this year. ACA § 9010(a), (e). If the IRS were enjoined from collecting the HIPF from some covered entities, it could not satisfy Congress's directive. And "there is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that agency to . . . enforce." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008); *see United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001) (A court must heed "the judgment

of Congress, deliberately expressed in legislation.”). There also are numerous practical problems with an injunctive order that would prevent the IRS from collecting taxes. *See infra* Part IV. Among other difficulties discussed below, the IRS simply has no mechanism to stop receipt of an HIPF payment.

In addition, an injunction would likely harm third parties not before the Court. *See Sierra Club v. FDIC*, 992 F.2d 545, 552 (5th Cir. 1993) (explaining that courts should consider third parties in assessing the public interest); *Texas Marine & Brokerage, Inc. v. Bennington Marine*, LLC, No. 1:12-CV-397, 2012 WL 12888827, at *7 (E.D. Tex. Oct. 17, 2012) (denying injunction where it would inflict harm on “a third party not represented in th[e] action”), *report and recommendation adopted*, No. 1:12-CV-397, 2012 WL 12892168 (E.D. Tex. Nov. 9, 2012). In 2018, there were 521 covered entities that reported premiums subject to the HIPF. *See* https://www.irs.gov/pub/irs-utl/Form8963FinalFeeYear2018.xlsx. If the IRS is prohibited from collecting some fees from the MCOs with which Plaintiffs contract, many of these other covered entities would be required to pay more. In addition, if the Court were to enter an injunction that is ultimately reversed, the MCOs with which Plaintiffs contract could be responsible for interest and penalties on their unpaid HIPFs. *See infra* n.5. Given the risk of harm to third parties and the Federal Government’s significant interest in collecting taxes without judicial interference, the equities and public interest weigh heavily against entry of a preliminary injunction.

III. PLAINTIFFS CLAIMS ARE NOT LIKELY TO SUCCEED.

Even if Plaintiffs could establish the three requirements for preliminary relief discussed above, their motion still should be denied because they are not likely to succeed on the merits of their claims. The claims are barred by the Anti-Injunction Act, and Plaintiffs also lack standing to assert them. Moreover, even if the Court had jurisdiction, the claims are meritless.

A. The Anti-Injunction Act Bars Plaintiffs' Claims.

The AIA provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). The Supreme Court has made clear that the AIA "could scarcely be more explicit" in barring suits seeking equitable relief restraining the collection of federal taxes. *Bob Jones Univ. v. Simon*, 416 U.S. 725, 732 n.7, 736-37 (1974). Moreover, the AIA applies whether a plaintiff seeks to restrain the assessment of its own taxes or "anyone's taxes." *Alexander v. Americans United Inc.*, 416 U.S. 752, 760 (1974).

Plaintiffs' claims fit squarely within the AIA's bar. The claims seek to restrain the IRS from collecting the HIPF from the MCOs with which Plaintiffs contract for Medicaid and CHIP services. *See* Pls.' Mot. at 23, ¶ D (asking the Court to 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 . . . for Plaintiffs' Medicaid and CHIP services"); *see also* Compl. ¶ 46, Prayer for Relief. And the HIPF is a tax for purposes of the AIA. *See* ACA § 9010(f)(1) (directing that the HIPF "shall be treated as [an] excise tax[]" for purposes of subtitle F of the Internal Revenue Code, which contains the AIA); *see also Texas*, 300 F. Supp. 3d at 834.

Invoking the exception set forth in *South Carolina v. Regan*, 465 U.S. 367 (1984), Plaintiffs argue that the AIA is inapplicable because "they do not have a refund remedy." Pls.' Mot. at 12. Even under this Court's prior reasoning, however, application of the *Regan* exception does not hinge on the availability of a *refund* remedy. Rather, any "alternative legal avenue by which to contest the legality of a particular tax" will suffice to render *Regan* inapplicable. *Texas*, 300 F. Supp. 3d at 835 (quoting *Regan*, 465 U.S. at 373). Moreover, under the Court's prior rulings,

Plaintiffs have an adequate, alternative remedy to restrain the IRS from collecting the HIPF against the MCOs with which they contract: Plaintiffs challenged the Certification Rule, and they obtained equitable disgorgement of funds used to pay the HIPF. These alternate avenues for relief mean that the AIA bars Plaintiffs' claims against the IRS regulations, even accepting the Court's prior application of *Regan*.

B. Plaintiffs Lack Standing Because the IRS Regulations Are Not the Cause of Plaintiffs' Alleged Injury.

The "irreducible constitutional minimum of standing" requires that a plaintiff (1) have suffered an injury in fact, (2) that is caused by the defendant's challenged conduct, and (3) that is likely to be redressed by a favorable ruling. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Although this Court determined in *Texas I* that Plaintiffs have standing to assert claims against section 9010 of the ACA and HHS's Certification Rule, Plaintiffs must separately demonstrate standing for their claims here. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). They cannot do so because, at a minimum, the IRS regulations are not the cause of Plaintiffs' alleged injury.

Plaintiffs' claims are premised on the assertion that the IRS regulations "function or operate to impose the HIPF upon Plaintiffs." Compl. ¶ 59. But that is not the case. The ACA imposes the HIPF on "covered entities," which include the MCOs with which Plaintiffs contract for Medicaid and CHIP services and other health insurance issuers, but not Plaintiffs themselves; the IRS regulations parrot this statutory requirement. *See* ACA § 9010; 26 C.F.R. §§ 57.2(b), 57.4. Indeed, Plaintiffs admit as much, stating that the "ACA requires 'covered entities' to pay the HIPF." Pls.' Br. at 4.

Nor do the IRS regulations require the MCOs with which Plaintiffs contract to pass along the costs of the HIPF to Plaintiffs. Rather, as Plaintiffs repeatedly acknowledge in their complaint

and motion, it is the Medicaid Act's requirement that capitation rates be actuarially sound, *see* 42 U.S.C. § 1396b(m)(2)(A)(iii), that requires states to account for the HIPF (as well as other taxes and fees paid by MCOs) in their Medicaid capitation rates. *See, e.g.*, Compl. ¶ 45 (alleging that "the actuarial soundness requirement of 42 U.S.C. § 1396b(m)(2)(A)(iii) has caused Plaintiffs' actuaries, employing their best judgment and discretion, to conclude that actuarial soundness in 2018 can only result from a full, dollar-for-dollar imposition upon Plaintiffs of any 2018 HIPF liability upon their Medicaid or CHIP MCOs"); Pls.' Mot. at 10. Thus, any alleged injury to Plaintiffs is caused by the Medicaid Act's actuarial soundness requirement (which Plaintiffs have never challenged), not the IRS regulations. At the very least, under this Court's prior ruling in *Texas I*, it is HHS's Certification Rule that has caused Plaintiffs' alleged injury, not the IRS regulations that Plaintiffs belatedly seek to challenge. *See* 300 F. Supp. 3d at 820 ("It is . . . the [HHS] regulation—not the tax—that harms Plaintiffs.").

C. Plaintiffs' Claims Are Not Likely To Succeed On The Merits.

Emergency relief also should be denied because Plaintiffs' claims fail on the merits.[3] Plaintiffs contend that the IRS regulations conflict with section 9010 of the ACA because the regulations "result" in Plaintiffs paying a portion of the HIPF through their Medicaid and CHIP managed care contracts. Pls.' Mot. at 13-15. According to Plaintiffs, the IRS is required to exclude premiums paid to the MCOs with which Plaintiffs contract for Medicaid and CHIP services from the calculation of those MCO's HIPF liability in order to "harmonize" "Congress's actuarial soundness requirement . . . with Plaintiffs' exemption from HIPF liability." *Id.* at 15. Plaintiffs'

[3] In seeking preliminary relief, Plaintiffs do not rely on all of the claims asserted in their complaint. *See, e.g.*, Compl. ¶¶ 53-54 (asserting claims against the error correction and refund procedures in 26 C.F.R. §§ 57.4, 57.6); *id.* ¶ 59 (alleging violations of the Tenth Amendment and doctrine of intergovernmental tax immunity). Defendants thus address only the claims raised in Plaintiffs' motion.

claims, however, fundamentally misunderstand the scope of the exclusion for governmental entities provided by section 9010(c)(2)(B) of the ACA. Moreover, the IRS regulations are entirely consistent with, and in most instances, merely parrot, the requirements of the ACA. Thus, there is no basis for enjoining application of those regulations.

Section 9010 of the ACA imposes the HIPF on "covered entit[ies]," which is defined as "any entity which provides health insurance for any United States health risk during [a particular] calendar year." ACA § 9010(c)(1). The statute excludes "governmental entit[ies]" from the definition of "covered entity," *id.* § 9010(c)(2)(B), meaning that, in circumstances where a governmental entity is "provid[ing] health insurance for any United States health risk" and thus would otherwise fit within the definition of "covered entity," it is not required to pay the HIPF based on the provision of that coverage, *id.* § 9010(c)(1).

Consistent with the statute, the IRS regulations also provide that "governmental entit[ies]," including "State[s]," are not "covered entities." 26 C.F.R. § 57.2(b)(2)(ii)(B). Accordingly, states are not required to "report [their] net premiums written for health insurance of United States health risks during [a] data year," *id.* § 57.3(a); the IRS does not send states a preliminary or final fee calculation, *see id.* §§ 57.5, 57.7; and states are not required to pay any HIPFs to the IRS "by September 30th of the fee year," *id.* § 57.7(d). Indeed, Plaintiffs do not claim otherwise.

Instead, the thrust of Plaintiffs' claims is that the exclusion of governmental entities from the definition of "covered entity" requires the IRS to exempt states not only from the requirements that are imposed on covered entities, but also to protect states from any and all possible downstream consequences of imposing the HIPF on covered entities with which Plaintiffs contract. If accepted, Plaintiffs' theory would have no limits. In this case, Plaintiffs are focused on the HIPF that is imposed on their Medicaid and CHIP MCOs. But there is no reason that Plaintiffs'

expansive theory would need to end there. Covered entities that provide health insurance to state employees undoubtedly pass some of the costs of the HIPF (as well as other taxes and costs incurred by the insurer) onto the state in any premiums they charge. Under Plaintiffs' theory, the IRS also would be required to exclude from the calculation of HIPFs the premiums paid to these insurers for state employees' health insurance.

And the consequences would not end there. As a practical matter, the cost of the HIPF (or at least a portion of it) will always be passed downstream to health insurance purchasers, whether individuals, employers, or otherwise. Insurance purchasers are not "covered entit[ies]" because they do not "provide[] health insurance," and thus, they are not subject to the HIPF. ACA § 9010(c)(1). Under Plaintiffs' theory, however, any insurance purchaser could rely on its exclusion from the definition of "covered entity" to prevent the IRS from considering the purchasers' premiums when calculating the HIPF for the purchaser's health insurance provider merely because some or all of the cost of the HIPF will be passed on to the purchaser. The IRS, in short, would be unable to collect the HIPF, as the ACA clearly requires it to do. But an entity's exemption from the imposition of a tax simply does not entitle that entity to avoid all of the possible downstream consequences of the tax.

More importantly, aside from these far-reaching consequences, Plaintiffs' theory is inconsistent with section 9010 of the ACA. Where Congress sought to exempt health insurance providers from the HIPF based on their provision of coverage for government programs like Medicaid and CHIP, Congress explicitly said so. Section 9010(c)(2)(C) provides that the term "covered entity" does not include any nonprofit entity that, among other things, receives "more than 80 percent of [its] gross revenues . . . from government programs that target low-income, elderly, or disabled populations under [Medicare, Medicaid, and CHIP]." The fact that Congress

did not include a similar exclusion for the for-profit MCOs with which Plaintiffs contract for Medicaid and CHIP services (or for nonprofit MCOs with a lesser proportion of government program business) shows that Congress intended those entities to be subject to the HIPF.

Furthermore, no provision of the ACA requires the IRS to exclude premiums received by the MCOs with which Plaintiffs contract for Medicaid and CHIP services when calculating those MCOs' HIPF payments. To the contrary, the statute explicitly excludes from the definition of the term "health insurance" "any medicare supplemental health insurance" or "any insurance for long-term care," but does not similarly exclude Medicaid or CHIP coverage. ACA § 9010(h)(3). The fact that Congress excluded some types of coverage from the definition of "health insurance," but did not exclude Medicaid or CHIP coverage, demonstrates that Congress intended the IRS to take account of the latter when calculating the HIPF. At the very least, the IRS's decision to do so is a reasonable interpretation of an ambiguous statute. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

Indeed, another provision of the ACA shows that Congress knew how to ensure that fee amounts were not calculated based on government programs when it wanted to do so. Section 6301(e)(2) of the ACA imposes a fee on specified insured and self-insured health plans to provide financing for the Patient-Centered Outcomes Research Trust Fund (PCORTF). This PCORTF fee is "equal to the product of $2 . . . multiplied by the average number of lives covered under [a] policy." ACA § 6301(e)(2)(A) (adding §§ 4375(a), 4376(a) to the Internal Revenue Code (IRC)). The statute contains an exemption from the fee for lives covered under certain governmental programs, like Medicaid and CHIP. Specifically, the statute states that "no fee shall be imposed . . . on any covered life under [an exempt governmental program]" and then defines "exempt governmental program" to include "the medical assistance program established by title

XIX or XXI of the Social Security Act" (i.e., Medicaid or CHIP). ACA § 6301(e)(2)(A) (adding § 4377(b) to the IRC). If Congress had intended to exclude premiums received by MCOs that provide Medicaid and CHIP services from consideration in calculating the HIPF, it could have included similar language in section 9010 of the ACA. Its failure to do so indicates that it did not intend to exclude such premiums with respect to the HIPF. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Plaintiffs maintain that the exclusion of governmental entities from the definition of "covered entity" would be "superfluous, void, or insignificant" if it did not permit Plaintiffs to avoid accounting for the HIPF in their Medicaid and CHIP managed care contracts. Pls.' Mot. at 16. But that is not so. The exclusion operates to exempt states and other governmental entities from paying the HIPF when they are "provid[ing] health insurance for any United States health risk" and thus would otherwise fit within the definition of "covered entity" if not for the exclusion. ACA § 9010(c)(1). Thus, for example, the exclusion means that a state does not have to pay the HIPF for a Medicaid fee-for-services program in which the state itself directly pays for benefits for Medicaid recipients. The exclusion similarly exempts other programs run by governmental entities—like county-run mental health or behavioral health organizations—that pay directly for health services.

Plaintiffs also claim that the IRS has unlawfully withheld or unreasonably delayed agency action by failing to exclude premiums received by the MCOs with which Plaintiffs contract for Medicaid and CHIP services from the calculation of the HIPF. *See* Pls.' Mot. 15-17. But the Administrative Procedure Act, 5 U.S.C. 706(1), can only be used to compel nondiscretionary

agency action that is "demanded by law," *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64-65 (2004), and "clear and indisputable," *United States ex rel. Bernardin v. Duell*, 172 U.S. 576, 582 (1899). And, as explained above, Plaintiffs' reading of section 9010 of the ACA is not supported by the statute's text. Indeed, what Plaintiffs ask the IRS to do is contrary to the statute.[4]

Because the Court lacks jurisdiction over Plaintiffs' claims and those claims would fail on the merits in any event, Plaintiffs' motion for emergency injunctive relief should be denied.

IV. IF THE COURT GRANTS PRELIMINARY RELIEF, IT SHOULD NOT ENTER THE PROPOSED ORDER REQUESTED BY PLAINTIFFS.

For all of the reasons explained above, the Court should deny Plaintiffs' motion for a temporary restraining order and permanent injunction. If the Court nevertheless is inclined to provide preliminary injunctive relief, it should not enter the Proposed Order submitted by Plaintiffs (ECF No. 7-1) for numerous of reasons.

Paragraph B of the Proposed Order would direct the IRS to notify the MCOs with which Plaintiffs contract for Medicaid and CHIP services in writing of the Court's injunctive order within 48 hours. Plaintiffs, however, do not explain why the onus of notifying their MCOs should fall on Defendants. Defendants do not know the identity of all of the MCOs with which Plaintiffs contract, much less possess contact information for them that would permit notification within 48 hours. Furthermore, for any MCO that is part of a controlled group (and many are), *see* 26 C.F.R. § 57.2(c), the IRS is prohibited from communicating with anyone other than the individual that signed Form 8963 on behalf of the controlled group (i.e., the designated entity), *see* 26 U.S.C. § 6103(e)(1)(D); 26 C.F.R. § 57.2(e)(1)(ii). The IRS thus cannot legally contact each of the MCOs

[4] Contrary to Plaintiffs' assertion, *see* Pls.' Mot. at 13-14, none of the Court's rulings in *Texas I* establish that the IRS regulations are unlawful or inconsistent with section 9010 of the ACA. Nor could they, as Plaintiffs did not challenge any IRS actions or regulations in *Texas I*.

with which Plaintiffs contract separately, if any of them are members of a controlled group. For these reasons, any obligations the Court imposes regarding notification of these MCOs should be placed on Plaintiffs, as they are in a better position to provide any such notice.

Paragraph B also suggests that the Court would order the IRS to "indefinitely suspend[]" the October 1, 2018 payment deadline for the HIPF. But, if the Court grants a temporary restraining order, the order cannot apply indefinitely. It must be limited to no more than 28 days. *See* Fed. R. Civ. P. 65(b)(2).

Paragraph E of Plaintiffs' Proposed Order would prohibit the IRS from "receiving, collecting, or otherwise processing any payment . . . from Plaintiffs' Medicaid and CHIP MCOs regarding any liability associated with the 2018 HIPF." The IRS, however, has no mechanism to stop receipt of HIPF payments. All payments must be made using the Electronic Federal Tax Payment System (EFTPS) and, as such, payments automatically post to the fee payers' account. *See* 26 C.F.R. § 57.2(d). As a practical matter, then, the IRS could not comply with Plaintiffs' Proposed Order by refusing HIPF payments. *See American Hosp. Ass'n v. Price*, 867 F.3d 160, 167 (D.C. Cir. 2017) ("[A] court may not require an agency to render performance that is impossible.").[5]

Paragraphs C and D of the Proposed Order would require the IRS to notify the MCOs with which Plaintiffs contract that the IRS "will issue new, amended final fee calculations" for those entities for 2018 and then, within 30 days, would require the IRS to "issue new, amended final fee

[5] Because the payment system is automated, failure to receive a payment will automatically generate a notice of non-payment and result in interest charges (and perhaps penalties). If the Court's preliminary injunction is subsequently reversed (either on appeal or at final judgment), covered entities may have incurred large amounts of interest (and penalties) for which they would then be responsible. As noted above, this potential harm to non-parties—here, the MCOs with which Plaintiffs contract—provides yet another reason to deny injunctive relief.

calculations" that exclude from the calculation the "premiums . . . for Medicaid and CHIP programs for Plaintiffs." This requested relief is improper because it is not *preliminary*. Instead, this directive would provide Plaintiffs with final relief on the merits, by requiring the IRS to recalculate HIPFs based on Plaintiffs' proffered interpretation of the statute. Final relief is not appropriate at this preliminary stage of the case.

Furthermore, even assuming the Court could award such relief at this stage of the case, it would be fraught with problems. As Defendants explained in a recent filing in *Texas I*, the IRS does not currently have sufficient information to compute the amount of the 2018 HIPF that is attributable to an MCO's Medicaid and CHIP services in the six Plaintiff States. *See Texas I*, ECF No. 114, at 3. The Form 8963 submitted by MCOs (or controlled groups) shows the total premiums written by each MCO (or controlled group) across all of their lines of business; it does not split up those premiums by state in which they were written, by plan for which they were written, or by type of insurance such as individual, group, Medicare, Medicaid, CHIP, or otherwise. *See id*. Thus, without additional information, the IRS cannot calculate the amount of the HIPF that is attributable to a particular MCO's Medicaid and CHIP premiums in a particular state.

In addition, once the IRS obtained this additional information (which may be costly for MCOs to provide), the IRS would have to manually compute any new fee calculations. The IRS uses an automated system to receive premium data submitted by covered entities, compute the fee, and transmit the final fee calculation to a master file. Once the final fee computation is completed, the system will not permit any further entries for the current calendar year. Performing recalculations manually would be labor intensive and could result in errors. Given these difficulties, any recalculation could not be completed within the 30-day timeframe Plaintiffs propose.

Finally, as Defendants previously explained in *Texas I*, changes in the HIPFs of some covered entities would require the IRS to recalculate the HIPF for all covered entities. *See Texas I*, ECF No. 114, at 3-4. Any relief the Court orders here, therefore, would impact all covered entities, not just the MCOs with which Plaintiffs contract, as Plaintiffs' Proposed Order suggests.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for a temporary restraining order and preliminary injunction.

Dated: September 26, 2018

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ERIN NEALY COX
United States Attorney

JENNIFER D. RICKETTS
Director, Federal Programs Branch

/s/ *Michelle R. Bennett*
MICHELLE R. BENNETT
CO Bar No. 37050
Senior Trial Counsel

JULIE STRAUS HARRIS
DC Bar No. 1021928
Trial Attorney

U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
Tel: (202) 305-8902
Fax: (202) 616-8470
E-mail: michelle.bennett@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2018, I filed the foregoing document with the Clerk of Court via the CM/ECF system, causing it to be electronically served on Plaintiffs' counsel of record.

/s/ *Michelle R. Bennett*
MICHELLE R. BENNETT