IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

TEXAS KANSAS LOUISIANA INDIANA WISCONSIN NEBRASKA, *Plaintiffs*, v. UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ALEX AZAR, in his Official Capacity as SECRETARY OF HEALTH AND HUMAN SERVICES, UNITED STATES INTERNAL REVENUE SERVICE, and DAVID J. KAUTTER, in his Official Capacity as ACTING COMMISSIONER OF INTERNAL REVENUE, *Defendants*.	§ §	CIVIL ACTION NO. 7:15-CV-00151-O

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THE MOTION FOR ENTRY OF JUDGMENT AND TO RECONSIDER THE COURT'S DISMISSAL OF PLAINTIFFS' CLAIMS FOR REFUNDS AND OTHER RULINGS

TABLE OF CONTENTS

INTRODUCTION TO REPLY

According to Defendants, Plaintiffs have no recourse whatsoever for the monetary impact of unlawful federal regulations. Defendants do not point to an alternate remedial path, or suggest how Plaintiffs might otherwise have their money returned to them. Rather, Defendants assume a zero responsibility position regarding the monetary effect of what the Court declared unlawful.

Contrary to Defendants' suggestion that Plaintiffs raise something new in their motion, Plaintiffs' quest to get their money back is an enduring part of this case. Plaintiffs pled for monetary relief in their complaint, clarified that demand in their amended complaint, argued that *Regan* and *Williams* open doors for Plaintiffs long before their motion for reconsideration, and never relinquished the demand to get their money back. Even when Defendants tarried significantly in responding to Plaintiffs' motion for summary judgment, Plaintiffs were resolute that action by Congress would not return their money or moot the case. ECF No. 60 at 3, 4.

Thus, as Plaintiffs requested from the outset, the Court may remedy the equitable harm suffered by Plaintiffs under the APA. Additionally, Plaintiffs' refund claim is both timely and permitted under *Regan* and *Williams*—cases that guarantee due process when the government's view of the law leaves the aggrieved with no remedy. Lastly, if neither the APA nor Internal Revenue Code (IRC) offer refuge, Plaintiffs' prayer enables the Court to award relief, even if not specifically pled.

REPLY ARGUMENT

I. UNDER THE APA, THE COURT MAY ENTER JUDGMENT RETURNING PLAINTIFFS' HIPF MONIES.

Defendants concede, as they must, that money is awardable under the APA. ECF No. 98 at 16 (citing *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988)). However, Defendants' argument that Plaintiffs seek "money damages" is nonsensical.

Contrary to Defendants' suggestion that Plaintiffs seek money as recompense for some other harm, Plaintiffs merely seek the return of their own money. As the Supreme Court made clear in *Bowen*, an action at law for damages is "intended to provide a victim with monetary compensation for an injury to his person, property, or reputation." *Bowen*, 487 U.S. at 893. But Plaintiffs do not seek recompense for personal injury, property damage, or to their reputation. Rather, "HHS effectively requires states to pay the HIPF—even though Congress exempted them from doing so—or risk losing Medicaid funds." ECF No. 88 at 4. In other words, while their Medicaid programs were held hostage, Defendants' unlawful regulations functioned to seize from Plaintiffs' fiscs specific *res*—HIPFs for fee years 2014, 2015, and 2016.

That Plaintiffs' MCOs serve as intermediaries in this process does not transform the nature of Plaintiffs' claim. In *Polanco v. U.S. Drug Enf't Admin.*, Mr. Polanco's money was first seized by New York State troopers, and then relinquished to the DEA. 158 F.3d 647, 649 (2d Cir. 1998); *see* ECF No. 95 at 6 n.4. That a middleman was involved did not transform the *res* into damages.

Defendants' efforts to distinguish *Bowen* are unavailing. To recover equitably here, Plaintiffs need not point to a law providing that "when an agency wrongfully takes what doesn't belong to them, you have a right to get your money back." However, such a law functionally exists. First in the form of congressional and IRS language that Plaintiffs are exempt from the effect of the HIPF. ACA § 9010(c)(2)(B) (2010); *see* 26 C.F.R. § 57.2(b)(2)(ii)(B). Second, that relief exists in the APA. Knowing that not every conceivable agency harm can be predicted with a specific remedy, the APA is an appropriate catch-all, permitting the Court to provide Plaintiffs with the necessary equitable relief in this instance—to have their money safely returned to them. *See Grosdidier v. Chairman, Broad. Bd. of Governors*, 560 F.3d 495, 497 (D.C. Cir. 2009) (calling the APA a "catchall").

Because the Court has jurisdiction under the APA, something Defendants

acknowledge, it may grant the *complete relief* authorized by APA § 706. *Bowen*, 487 U.S. at 911. And because the order sought by Plaintiffs is for "specific relief"—to get our money back—rather than for some form of unliquidated damages to compensate for some other harm, the relief sought by Plaintiffs is clearly "within the District Court's jurisdiction under § 702's waiver of sovereign immunity." *Id.* at 910.

II. PLAINTIFFS QUALIFY FOR A REFUND UNDER THE INTERNAL REVENUE CODE.

Because, among other reasons, Defendants responded to and rejected Plaintiffs' informal claim for a refund, Plaintiffs qualify for a refund under the IRC.

A. The Court Has Jurisdiction Over Plaintiffs' Refund Claims.

1. Plaintiffs Made a Valid Informal Refund Claim by Both Filing This Lawsuit and Then Delivering It to IRS.

Defendants conflate the time requirements associated with a refund claim and the form in which it must come. Just because section 6532 frowns upon the commencement of litigation before the six-month period expires does not mean a complaint cannot satisfy the informal claim doctrine.

Among other cases, Defendants cite *Whittington v. United States*, 380 F. Supp. 2d 806 (S.D. Tex. 2005) to support their argument that Plaintiffs did not sufficiently make an informal claim. However, *Whittington* supports Plaintiffs. In *Whittington*, the court looked at the facts of that specific case[1] and determined that an informal claim was made when a lawsuit was delivered to the IRS. *Whittington*, 380 F. Supp. 2d at 813. While the court felt that "filing" the lawsuit was insufficient, by *delivering* the lawsuit to the IRS, an informal claim was made. The facts here are like

[1] "There are no hard and fast rules for determining the sufficiency of an informal claim, and each case must be decided on its own facts with a view towards determining whether under those facts the Commissioner knew, or should have known, that a claim was being made." *PALA, Inc. Emp. Profit Sharing Plan & Trust Agreement v. United States*, 234 F.3d 873, 877 (5th Cir. 2000).

those in *Whittington*. Plaintiffs not only filed this lawsuit, but they delivered it to all Defendants, including IRS. *See* ECF Nos. 5–9.

The other cases cited by Defendants do not support their argument. In *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, the taxpayer did not contend the lawsuit was an informal claim, but rather a "properly filed administrative refund claim." 539 F. Supp. 2d 281, 292 (D.D.C. 2008), *aff'd in part, rev'd in part and remanded sub nom. Cohen v. United States*, 578 F.3d 1 (D.C. Cir. 2009). And in *RadioShack Corp. v. United States*, the court did not summarily reject the notion that a complaint may serve as a valid informal claim in all instances. 105 Fed. Cl. 617, 624 (2012). Rather, the court addressed the unique class-action circumstances before it and only concluded that a lawsuit was not "sufficient to satisfy the jurisdictional prerequisites for all potential class members." *Id.*

2. Plaintiffs' Refund Claims Are Timely Under Section 6532.

Though Defendants complain about the timeliness of Plaintiffs' complaint and refund claims under 26 U.S.C. § 6532, IRS voluntarily rejected Plaintiffs' refund claim, and Plaintiffs' amended complaint cured any prospective jurisdictional defect.

Plaintiffs' lawsuit and the proceedings herein constitute an informal refund claim. *See supra* Section II.A.1; ECF No. 95 at 12–15. However, the IRS rejected Plaintiffs' informal refund claim on January 27, 2016 when it filed its first motion to dismiss claiming that Plaintiffs are not taxpayers. *See* ECF No. 15 at 13. IRS did not complain about timeliness, the form of Plaintiffs' refund request, or other procedural matters. Rather IRS's sole contention was substantive—that Plaintiffs are not taxpayers. *Id.* Thus, "IRS understood plaintiff's claims to be claims for refund and unmistakably dispensed with the formal requirements and examined the claims" from a substantive standpoint. *Martti v. United States*, 121 Fed. Cl. 87, 102 (2015) (citing *Angelus Milling Co. v. Comm'r*, 325 U.S. 293, 297–98 (1945)). While IRS

argues that its rejection of Plaintiffs' claims in court has no significance, ECF No. 98 at 12–13, IRS cites no authority to support this proposition. To the contrary, it would seem that principles of judicial estoppel or Rule 11 would forbid IRS from representing to the Court a position not actually endorsed by the agency. *See, e.g.*, *Reynolds v. C.I.R.*, 861 F.2d 469, 472–73 (6th Cir. 1988).

When IRS rejected Plaintiffs' informal claims for refunds, at least three legal consequences flowed from this action. First, the moment that Plaintiffs' informal claims were rejected, Plaintiffs' informal claims became formal claims. *See Angelus Milling*, 325 U.S. at 297; *see also United States v. Memphis Cotton Oil Co.*, 288 U.S. 62 (1933) (refund claim, though informal, was sufficient if adjudicated by the agency). Plaintiffs did not need to do anything else or fulfill any other requirements.

Second, the Plaintiffs did not need not wait six months for the Court to assume jurisdiction over this matter. The six month time period is waived once the IRS makes a determination. 26 U.S.C. § 6532(a)(1).

Third, by amending the complaint on February 24, 2016, after the IRS's rejection of Plaintiffs' claims, any jurisdictional defect that may have existed was fully remedied as Plaintiffs' complaint now came after "the Secretary render[ed] a decision" as contemplated by section 6532(a)(1). *See also Mires v. United States*, 466 F.3d 1208, 1211 (10th Cir. 2006); *Harriman v. IRS*, 233 F. Supp. 2d 451, 459 (E.D.N.Y. 2002) ("Plaintiff's amended complaint cures any prior jurisdictional defect with respect to the six month waiting period."); *Sumser v. Dist. Dir. of IRS VA-WV Dist.*, CIV. 00-822-A, 2001 WL 241060, at *1 (E.D. Va. Jan. 12, 2001) (where the refund lawsuit was filed before the expiration of the six-month waiting period, "[t]he court finds that because the court could simply grant the plaintiff leave to amend his complaint," thereby making dismissal inappropriate).

B. Both *Williams* and *Regan* Permit Plaintiffs Access to the Remedies Under the Internal Revenue Code.

Both *Williams* and *Regan* stem from the same root—one where the party had no other remedy or recourse. *United States v. Williams*, 514 U.S. 527, 536 (1995) ("The Government's strained reading of § 1346(a)(1), we note, would leave people in Williams' position without a remedy."); *South Carolina v. Regan*, 465 U.S. 367, 374 (1984) ("the Act was not intended to apply in the absence of such a remedy.").[2] If the Court determines that Plaintiffs' money cannot be disgorged under the APA, Plaintiffs stand in the same shoes previously worn by Ms. Williams and the State of South Carolina: no relief in sight.

Defendants note the Fifth Circuit's pronouncement in *Wagner v. United States*, 545 F.3d 298 (5th Cir. 2008) and Congress's amendment to 26 U.S.C. § 7426. But as the instant case makes clear, Congressional clairvoyance is imperfect and what remains unchanged is that "Congress did not intend refund actions under § 1346(a)(1) to be unavailable to persons situated as Lori Williams is." *Williams*, 514 U.S. at 536. Both *Williams* and *Regan* navigated the pitfalls in the Congressional scheme at issue to prevent an injustice.

Moreover, while the *Wagner* court sought to honor Congress's amendment to section 7426, that court also made reference to *EC Term of Years Tr. v. United States*, 550 U.S. 429, 435 (2007), another case regarding the reaches of section 7426. In *EC Term of Years*, the Supreme Court reaffirmed the essence of *Williams*—that it was premised "on the specific understanding that no other remedy . . . was open to the plaintiff in that case." 550 U.S. at 435. In *EC Term of Years*, another remedy was available to the plaintiff. *Id*. In *Wagner*, though not addressed by the court, it is clear that Ms. Wagner could return to family court to balance any inequities with her ex-

[2] In *Williams*, for example, "the Government point[ed] to three other remedies" that it contended were available to Ms. Williams. Here, the government does no such thing, anchoring itself to the extraordinary position that Plaintiffs are just out of luck with no recourse available.

spouse as a result of the IRS tax lien.

But Plaintiffs here have no such option. And the principle extolled in both *Williams* and *Regan*—that Congress did not intend to close remedial doors upon those that have no other remedy—should be applied. Thus, Plaintiffs should be provided relief if Congress provided no clear path by which to remedy the harm at issue.

That Plaintiffs may be resorted to calling upon the Court to recognize an exception to what Congress wrote can be no surprise given the nature of the liability imposed upon Plaintiffs. Undoubtedly, the circuitous manner in which the HIPF came to be imposed upon Plaintiffs, contrary to the clear admonition of Congress, may beget the same form remedial application seen in both *Regan* and *Williams*.

And while Defendants contend that Plaintiffs are merely "downstream" participants[3] in a greater and larger circumstances, ECF No. 98 at 6, that argument contradicts the Court's ruling that "HHS effectively requires states to pay the HIPF." ECF No. 88 at 4. Thus, Plaintiffs are situated like Ms. Williams, where the Supreme Court found that "the Government surely subjected Williams to a tax, even though she was not the assessed party." *Williams*, 514 U.S. at 535. Moreover, like Ms. Williams, Plaintiffs paid the HIPF under protest, *id*. at 530, as the price of not paying the HIPF was the loss of Medicaid funds. ECF No. 88 at 4–6.

At bottom, Plaintiffs are situated like the plaintiffs in *Regan* and *Williams*. The State of South Carolina came to court to address "the practical effect" of the new Congressional law at issue. *Regan*, 465 U.S. at 371. And in like manner, Ms. Williams "had no realistic alternative to payment of a tax she did not owe." *Williams*, 514 U.S. at 529. Here, "the HHS regulation effectively requires the states to pay this tax," ECF No. 88 at 1, meaning that Plaintiffs have a right to a remedy.

[3] Nothing about Plaintiffs' circumstance is "downstream." Not only did the Court find that the regulations at issue impose upon Plaintiffs every cent of the HIPF, ECF No. 88 at 42, but that finding is undergirded by the unrefuted testimony of experts. ECF No. 54 at 13–14.

III. PLAINTIFFS' GENERAL PRAYER FOR RELIEF PERMITS THE COURT TO GRANT THE NECESSARY RELIEF.

If Plaintiffs' remedy exists under neither the APA nor the IRC, Plaintiffs nonetheless prayed for "such other and further relief to which they are justly entitled at law and in equity." ECF No. 19 at 29. And a final judgment "should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Fed. R. Civ. P. 54(c).

The Fifth Circuit "consistently interpret[s] this provision to allow a plaintiff *any* relief that the pleaded claim supports; requesting an improper remedy is not fatal." *Laird v. Integrated Res., Inc.*, 897 F.2d 826, 841 (5th Cir. 1990) (emphasis added). "Admittedly, it is odd 'to think that a court with authority to issue [an injunction] is without power to declare the rights of the parties in connection therewith.'" *Cohen v. United States*, 650 F.3d 717, 727 (D.C. Cir. 2011) (quoting *Tomlinson v. Smith*, 128 F.2d 808 (7th Cir. 1942)).

Whole Woman's Health v. Hellerstedt involved a challenge to a Texas law regulating abortion providers.[4] Part of the challenge was to the law's "admitting privileges requirement." *Id*. In praying for relief, the plaintiffs in that case did not request that the court facially invalidate the requirement. Rather, as to the "admitting privileges requirement," the plaintiffs pled as follows:

> Plaintiffs respectfully request that this Court:
>
> A. Issue a declaratory judgment that the admitting privileges requirement is unconstitutional and unenforceable:
>
> a. *as applied* to the McAllen clinic; and/or
> b. *as applied* to the provision of medical abortion at the McAllen clinic; and/or
> c. *as applied* to the El Paso clinic; and/or
> d. *as applied* to the provision of medical abortion at the El Paso clinic; and/or

[4] Complaint, *Whole Woman's Health et al. v. Lakey et al.*, No. 1:14-cv-00284 (W.D. Tex. Apr. 2, 2014), ECF No. 1, *available at* https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/WWH%20v%20Lakey_Complaint_File-Stamped.pdf.

> . . .
>
> C. Permanently enjoin Defendants and their employees, agents, and successors in office from enforcing the admitting privileges requirement:
>
> a. *as applied* to the McAllen clinic; and/or
>
> b. *as applied* to the provision of medical abortion at the McAllen clinic; and/or
>
> c. *as applied* to the El Paso Clinic; and/or
>
> d. *as applied* to the provision of medical abortion at the El Paso clinic; and/or
>
> . . .
>
> F. Grant such other and further relief as the Court may deem just, proper, and equitable.[5]

Thus, Plaintiffs specifically asked for "as applied" relief regarding the "admitting privileges requirement" and never specifically sought that the "admitting privileges requirement" be facially invalidated.[6]

On appeal, the Fifth Circuit reversed, concluding that "[b]y facially invalidating the admitting privileges requirement, the district court granted more relief than anyone requested or briefed." *Whole Woman's Health*, 790 F.3d at 580. But the Supreme Court reversed the Fifth Circuit and upheld the district court's broad, facial grant of relief. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2307 (2016). Though plaintiffs never specifically asked for facial relief, the Supreme Court acknowledged that Plaintiffs did request "such other and further relief as the Court may deem just, proper, and equitable." When coupled with the language of Fed. R. Civ. P. 54(c)—that a "final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings"—plaintiffs general prayer at the end of their complaint was more than enough to warrant the district court granting the necessary relief.[7]

---

[5] *Id*. at 30–31 (emphasis added).

[6] *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 687–88 (W.D. Tex. 2014), *aff'd in part, vacated in part, rev'd in part sub nom. Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), *rev'd and remanded sub nom. Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

[7] The Supreme Court did not reach a novel conclusion, but rather one long acknowledged by scholars and the Fifth Circuit. "Inasmuch as the demand for relief does not constitute part of the pleader's

As Plaintiffs here contended in response to Defendants' motion to dismiss, "[a] pleading which sets forth a claim for relief . . . shall contain . . . (3) a demand for judgment for the relief to which he deems himself entitled." Fed. R. Civ. P. 8(a)(3). ECF No. 29 at 10. In their Amended Complaint, Plaintiffs pled the relief they believe they are entitled to receive, and prayed as follows:

> 71. Plaintiff States are entitled to a refund from the United States because the fee violates the clear notice rule, is arbitrary and capricious, failed to follow statutorily required procedures, is unconstitutionally coercive, exceeds constitutional and statutory authority, constitutes an unconstitutional tax of a sovereign, and is insufficiently related to federal Medicaid funding to the States.
>
> . . .
>
> L. Order a refund of the amounts the Plaintiff States have paid (or may pay during the course of this litigation) under the Health Insurance Providers Fee, including any prejudgment or post-judgment interest as allowed by law; and
>
> M. Grant the Plaintiff States such other and further relief to which they are justly entitled at law and in equity.

ECF No. 19 at 25, 29. Thus, any final judgment should include an order requiring Defendants to disgorge Plaintiffs' money back to them.

CONCLUSION

Plaintiffs respectfully request that the Court enter the final judgment remitted with their motion.

---

claim for relief, a failure to demand the appropriate relief will not result in a dismissal. The question is not whether plaintiff has asked for the proper remedy but whether plaintiff is entitled to any remedy." 10 Charles Alan Wright et al.. Miller, FEDERAL PRACTICE AND PROCEDURE § 2664 (3d ed. 2015) (footnotes omitted).

> [T]he Court is bound to grant whatever relief the facts show is necessary or appropriate. . . . [D]ismissing the whole main case could be sustained, not by showing that the relief prayed for was not available, but rather that there was no genuine issue of fact on which any kind or type of relief, complete, final, contingent or interim, could be granted.

Burton v. State Farm Mut. Auto. Ins. Co., 335 F.2d 317, 320 (5th Cir. 1964).

Respectfully submitted this the 25th day of June, 2018,

DEREK SCHMIDT
Attorney General of Kansas

JEFF LANDRY
Attorney General of Louisiana

CURTIS HILL
Attorney General of Indiana

BRAD SCHIMEL
Attorney General of Wisconsin

DOUG PETERSON
Attorney General of Nebraska

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY D. STARR
Deputy First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General for Civil Litigation

/s/ Austin R. Nimocks
AUSTIN R. NIMOCKS
Special Counsel for Civil Litigation
Texas Bar No. 24002695
austin.nimocks@oag.texas.gov

ATTORNEY GENERAL OF TEXAS
P.O. Box 12548, Mail Code 001
Austin, Texas 78711-2548
Tel: 512-936-1414

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I certify that on the 25th day of June, 2018, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Austin R. Nimocks
AUSTIN R. NIMOCKS