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

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INTRODUCTION

As the Court held, unlawful federal regulations require Plaintiffs and their taxpayers to pay hundreds of millions of dollars in Health Insurance Providers Fees ("HIPF"). ECF No. 88. Consistent with that opinion, the Court should now enter final judgment (1) declaring that regulations imposing HIPF on Plaintiffs are unlawful, and (2) enjoining Defendants' enforcement of those regulations.

Moreover, consistent with Plaintiffs' pleadings and perpetual requests to get their taxpayers' money back, the Court should also, in its final judgment, direct Defendants to return the HIPFs Plaintiffs already paid. Ordering disgorgement of the HIPFs paid by Plaintiffs is not only in line with the Court's holding that the regulations themselves are unlawful, but supported by three alternative—and individually sufficient—statutes or doctrines.

First, the Administrative Procedure Act ("APA") allows disgorgement as part of Plaintiffs' APA claim seeking declaratory and injunctive relief because the recovery of previously paid funds is equitable relief, not money damages.

Second, and alternatively, a refund is available under 28 U.S.C. § 7422, because Plaintiffs are "taxpayers" and Defendants waived sovereign immunity. *See United States v. Williams*, 514 U.S. 527 (1995). Although this Court previously dismissed Plaintiffs refund claim, in part because the Court found that Plaintiffs are not taxpayers, Plaintiffs respectfully request that it reconsider the dismissal in light of its March 5, 2018 order. As "persons" under the statute, Plaintiffs are "subject to" the HIPF.

Third, even if this Court holds that disgorgement is unavailable under the APA, and declines to reconsider its dismissal of Plaintiffs' section 7422 refund claim, Plaintiffs may still recover under *South Carolina v. Regan*, 465 U.S. 367 (1984). As this Court recognized, *Regan* permits Plaintiffs a path to gain their money back whenever they have no other available remedy. ECF No. 88 at 26–28.

ARGUMENT

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

Though the HIPF is a "fee," Congress directed that Defendants treat the "fee" like a "tax." 124 Stat. 867; Pls.' App. 47, ECF No. 54-1. But that the *IRS* must *treat* the HIPF like a tax for administrative purposes does not make the HIPF itself a tax.

Whether something is a tax for *constitutional* purposes is a question reserved to the courts. *See Nat'l Fed'n of Indep. Bus. v. Sebelius* (*NFIB*), 132 S. Ct. 2566, 2583 (2012) ("Congress cannot change whether an exaction is a tax or a penalty for constitutional purposes simply by describing it as one or the other."). Thus, regardless of the label used by Congress, or upon whom the liability is textually committed, the court determines whether an unconstitutional taxing of Plaintiffs occurred. Here, the Court determined that, for purposes of the Constitution, the HIPF did not operate as an unconstitutional federal tax upon the States. ECF No. 88 at 58–61.

However, for purposes of the Declaratory Judgment Act ("DJA"), APA, and Anti-Injunction Act ("AIA"), the HIPF is a "fee"—Congress said so. Thus, the injunctive and equitable powers of the Court, authorized under the DJA, APA, and AIA, permit the Court to grant Plaintiffs an element of the relief they have sought from the outset—to get their money back.

A. For Purposes of Federal Statutes, the HIPF is a "Fee."

Whether the HIPF is a "tax" or "fee" for purposes of congressional enactments (*i.e.*, DJA, AIA, or APA) turns upon the language of Congress. Though the Court concluded otherwise in its opinion, ECF No. 88 at 23–24, Plaintiffs aver that the "fee" label used by Congress, Pub. L. 111-148, § 9010(c)(1)–(2), 124 Stat. 866, controls whether the DJA, AIA, and APA provide applicable remedies for the Plaintiffs' challenge here, *NFIB*, 567 U.S. at 543, and respectfully request the Court to

reconsider its conclusion in that regard.[1]

In *NFIB*, Congress "chose to describe the '[s]hared responsibility payment' imposed on those who forgo health insurance not as a 'tax,' but as a 'penalty.'" *NFIB*, 567 U.S. at 543 (citing 26 U.S.C. § 5000A(b), (g)(2)). The applicable "penalty" is codified in the Internal Revenue Code ("IRC"), collected by and/or paid to the IRS, and is "included with a taxpayer's return under chapter 1 for the taxable year which includes such month." 26 U.S.C. § 5000A(b)(2). Congress also directed that "the penalty for not complying with the mandate 'shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68,'" *NFIB*, 567 U.S. at 545 (quoting 26 U.S.C. § 5000A(g)(1)), part of subtitle F of the IRC. "Assessable penalties in Subchapter 68B, in turn, 'shall be assessed and collected in the same manner as taxes.'" *Id.* (quoting 26 U.S.C. § 6671(a)). By any measure, the "penalty" looked and acted like a tax.

However, the Supreme Court concluded that *treating* the "penalty" like a tax did not necessarily make it a tax. Tax-like *treatment* means the governing authorities will employ the "methodology and procedures" associated with taxes for the collection and treatment of the "penalty," and tax-like treatment does not bring the "penalty" itself within the AIA. *NFIB*, 567 U.S. at 545–46 (The "earlier observation that the

[1] The Court recognized that Plaintiffs characterized the HIPF as a "tax" in the Introduction of its Motion for Summary Judgment. ECF No. 88 at 24 n.36 (citing ECF No. 54 at 3). Respectfully, Plaintiffs aver that this characterization does not dispose of this issue. Plaintiffs' characterization there animated its intergovernmental tax immunity claim, which the Court denied. ECF No. 88 at 58–61. When the issue of the HIPF and AIA were previously considered by the Court, Plaintiffs were consistent that, for purposes of statutory remedies, the label ascribed by Congress—"fee"—is what controls. *See* ECF No. 29 at 8–9. Even if Plaintiffs proclaimed the HIPF as a "tax" in its summary judgment briefing for *all* purposes, Plaintiffs were doing so as an alternative argument in the wake of the Court's prior ruling denying them a path through which to reclaim their money. *Gabarick v. Laurin Mar. (Am.) Inc.*, 753 F.3d 550, 555 (5th Cir. 2014) ("Judicial estoppel is not permitted 'if it was the court, not the party, that instigated the first position that the party later chose to abandon.'" (quoting 18B Charles Alan Wright, et al., Federal Practice & Procedure, Jurisdiction § 4477 (2d ed. 2014))). Alternative pleadings and arguments, even inconsistent ones, are not only permitted, Fed. R. Civ. P. 8(d), but Plaintiffs cannot be estopped from asserting their primary argument—that the HIPF is a "fee," not a "tax"—as any prerequisite to the application of judicial estoppel is not met here. *See Gabarick*, 753 F.3d at 553–57.

Code requires assessable penalties to be assessed and collected 'in the same manner as taxes' makes little sense if assessable penalties are themselves taxes. . . . The Affordable Care Act does not require that the penalty for failing to comply with the individual mandate be treated as a tax for purposes of the [AIA]. The [AIA] therefore does not apply to this suit, and we may proceed to the merits.").

Here, the wording used by Congress in the ACA—"fee"—demands a like result. Regarding the HIPF, Congress acted like it did with the individual mandate "penalty," declaring that the HIPF shall be *treated* as a tax "for purposes of subtitle F of the Internal Revenue Code of 1986." Pub. L. 111-148, 124 Stat. 867; Pls.' App. 47 ("Tax Treatment of Fees"). Subtitle F regards "Procedure and Administration" and is the same subtitle from which Congress borrowed the "methodology and procedures" for the treatment of the individual mandate "penalty." *NFIB*, 567 U.S. at 546. Therefore, as per the analogous circumstance in *NFIB*, the remedies under the DJA and APA, and the Court's equitable powers associated therewith, and not remedies under the IRC, apply.

B. The Court May Order the Return of Plaintiffs' Money to Them Under the APA.

While Plaintiffs want their money back, they are not claiming "money damages" under the APA. *See* 5 U.S.C. § 702 (authorizing "relief other than money damages").[2] Rather, Plaintiffs are asking the Court to exercise its equitable power under the APA and order the return of Plaintiffs' taxpayers' money to Plaintiffs' fiscs, as the Supreme Court recognized it may do.

> Our cases have long recognized the distinction between an action at law for damages—which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation—and an equitable action for specific relief—which may include an order providing for the reinstatement of an employee with

[2] In its opinion, the Court characterized the APA as a mechanism for "non-monetary relief." ECF No. 88 at 28. Plaintiffs respectfully request that this statement be clarified, under *Bowen v. Massachusetts*, 487 U.S. 879 (1988), because the APA authorizes all "relief other than money damages." 5 U.S.C. § 702.

> backpay, or for "the recovery of specific property *or monies*, ejectment from land, or injunction either directing or restraining the defendant officer's actions." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688, 69 S. Ct. 1457, 1460, 93 L.Ed. 1628 (1949) (emphasis added). *The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as "money damages."*

Bowen v. Massachusetts, 487 U.S. 879, 893 (1988) (emphasis added).

In *Bowen*, a State, as part of its broader APA claim, sought a monetary award for the federal government's refusal "to reimburse a State for a category of expenditures under its Medicaid program." *Id.* at 882. Because the district court had jurisdiction under the APA as "the reviewing court," it had authority to grant the *complete relief* authorized by APA § 706. *Id.* at 911.[3] And because "the orders are for specific relief . . . rather than for money damages . . . they are within the District Court's jurisdiction under § 702's waiver of sovereign immunity." *Id.* at 910.

The Fifth Circuit has since recognized the significance of *Bowen*:

> The APA, moreover, permits judicial review of claims for specific relief that result in the payment of money—such as a claim seeking a declaratory judgment ordering that an agency comply with a mandatory funding requirement—because such actions are not for "money damages," in the form of compensation for a loss that the plaintiff has suffered or will suffer but for specific relief related to agency action.

St. Tammany Par., ex rel. Davis v. Fed. Emergency Mgmt. Agency, 556 F.3d 307, 317–18 (5th Cir. 2009).

The circumstances presented in *Bowen* are apt to the case *sub judice*. The Court has jurisdiction under 5 U.S.C. § 706. *See* ECF No. 88 at 1–2, 35 n.40, 47, 48 n.48, 50–51, 62. As "the reviewing court," the Court also has the authority to grant Plaintiffs the *complete relief* authorized by section 706. Yes, Plaintiffs want money, among other things, but they do not seek "money damages." Under the APA, they are

[3] This means that, as a "reviewing court" under the APA, the Court may use the APA to return Plaintiffs' money to them even if Plaintiffs have a viable refund claim. As the Court found, Defendants engaged in unlawful administrative action for which the APA is an appropriate remedy. ECF No. 88 at 51. However, if the Court maintains its dismissal of Plaintiffs' refund claim under 28 U.S.C. § 7422, ECF No. 34, for purposes of getting their money back, the APA is appropriate as Plaintiffs have "no other adequate remedy in Court." 5 U.S.C. § 704.

entitled to this equitable remedy.[4]

C. The IRS May Be Compelled to Disgorge Money Under APA.

"The IRS envisions a world in which no challenge to its actions is ever outside the closed loop of its taxing authority." *Cohen v. United States*, 650 F.3d 717, 726 (D.C. Cir. 2011) (en banc). This, of course, is not the case as the IRS is not beyond the reach of the APA. *Id*. However, notwithstanding the IRS's own regulatory fault,[5] the IRS is primarily a Defendant in this matter because the IRS has Plaintiffs' money. *See, e.g.*, 26 C.F.R. § 57.7(d).

As the Court recognized, "[n]otwithstanding Congress's direction in the ACA, the *HHS regulation* effectively requires the states to pay this tax," and "*HHS's unlawful delegation* enabled a private entity to effectively rewrite the ACA, wrongfully forcing Plaintiffs to pay this tax." ECF No. 88 at 1 (emphasis added). If the unlawfulness suffered by Plaintiffs comes at the hand of HHS regulations, that the APA is the vehicle by which Plaintiffs obtain relief is hardly surprising. Indeed,

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[4] Myriad courts have granted monetary remedies under the APA. *See, e.g.*, *MBank New Braunfels, N.A. v. FDIC*, 772 F. Supp. 313, 318 (N.D. Tex. 1991) ("this suit is not one where the Plaintiff seeks money damages. MBNB asks for the return of its $17.1 million, a specific remedy that can be characterized as equitable relief." (citing *Texas Am. Bancshares, Inc. v. Clarke*, 740 F. Supp. 1243, 1248 (N.D. Tex. 1990); *Bowen*, 487 U.S. at 895)). *See also Armendariz-Mata v. U.S. Dep't of Justice, Drug Enf't Admin.*, 82 F.3d 679, 682 (5th Cir. 1996) ("the district court properly determined the only claim over which it had subject-matter jurisdiction was Mata's equitable claim for the return of $8,819 in currency"); *United States v. Minor*, 228 F.3d 352, 355 (4th Cir. 2000) ("Minor seeks restitution of 'the very thing' to which he claims an entitlement, not damages in substitution for a loss."); *Polanco v. U.S. Drug Enf't Admin.*, 158 F.3d 647, 649, 652 (2d Cir. 1998) (section 702 provided waiver of sovereign immunity in "petition for return of personal property in the amount of $6,920.00 in U.S. currency."); *Resolute Forest Products, Inc. v. U.S. Dep't of Agric.*, 219 F. Supp. 3d 69, 78 (D.D.C. 2016) ("the Court concludes that sovereign immunity does not bar a refund, as that relief falls within the scope of § 702's waiver."); *In re Epps*, 110 B.R. 691, 698 (E.D. Pa. 1990) (section 702 provided sovereign immunity waiver for equitable relief in Chapter 13 bankruptcy matter); *Sterling v. United States*, 749 F. Supp. 1202, 1207 (E.D.N.Y. 1990) (section 702 provided sovereign immunity waiver for equitable relief even though "[t]he complaint in this case seeks monetary damages, but in the exact amount seized from plaintiff and accordingly can be construed as requesting a specific equitable remedy; namely, the return of the moneys taken.") (citing *Marshall Leasing, Inc. v. United States*, 893 F.2d 1096, 1099–100 (9th Cir. 1990) (claim seeking return of property forfeited pursuant to 21 U.S.C. § 881 cognizable under APA); *Willis v. United States*, 787 F.2d 1089, 1092 (7th Cir. 1986) (same)).

[5] The IRS does not exclude Medicaid premiums from how the HIPF is calculated. *See* 26 C.F.R. § 57.4.

it may appear disjointed to employ the IRC to extract money paid to a private entity by virtue of an unlawful HHS regulation. As the Court recognized, this case is primarily an APA lawsuit for unlawful agency action by HHS. ECF No. 88 at 23 ("Plaintiffs bring several APA claims" (citing Pls. Am. Compl. ¶¶ 19–27, ECF No. 19)). On the other hand, the refund mechanism provided in the IRC exists primarily for "taxpayers" that are "subject to" a tax.

II. IF PLAINTIFFS' PATH TO RESTITUTION IS THROUGH A REFUND UNDER 28 U.S.C. § 7422, PLAINTIFFS QUALIFY FOR SAID RELIEF AND RESPECTFULLY REQUEST THE COURT TO RECONSIDER ITS PRIOR DECISION DISMISSING PLAINTIFFS' CLAIM FOR A REFUND.

Defendants employed a circuitous path by which to impose the HIPF on Plaintiffs. Thus, it is not without a sense of irony if Plaintiffs must *strictly* adhere to the refund process under the IRC. However, if Plaintiffs are "taxpayers," and their restitution or refund requests are analyzed under the IRC, Plaintiffs qualify for the relief they seek. The HIPF is paid, dollar-for-dollar, by Plaintiffs, ECF No. 88 at 8. Because Plaintiffs are statutorily exempt from the HIPF, Plaintiffs are wrongfully taxed and thus qualify for remedial relief under the IRC.

A. Sovereign Immunity is Waived Under 28 U.S.C. § 1346(a)(1).

Assuming that the Plaintiffs are "taxpayers," and that the HIPF is "assessed or collected" against them, the Court has jurisdiction over this action by reason of 28 U.S.C. § 1346(a)(1). This section gives the Court jurisdiction over,

> [a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

28 U.S.C. § 1346(a)(1). In other words, the wrongfully taxed may seek a refund. Section 1346(a)(1) also "requires full payment of the assessment before an income tax refund suit can be maintained in a Federal District Court," *Flora v. United States*,

362 U.S. 145, 177 (1960), something Plaintiffs did, *see, e.g.*, ECF No. 88 at 32.

Defendants have Plaintiffs' taxpayers' money—an uncontested fact. Plaintiffs want the money back. By whatever mechanism, the government has clearly waived, through section 1346, sovereign immunity for returning to the taxpayer community (States included) taxes wrongfully assessed or collected. *See also infra* Section III.B.

B. Plaintiffs Qualify for a Refund Under *United States v. Williams*.

In *United States v. Williams*, the Supreme Court emphasized the "broad language" of section 1346(a)(1), permitting "*any* civil action" to recover "*any* internal-revenue tax alleged to have been *erroneously* or illegally assessed or *collected*" or "in any manner wrongfully *collected*." 514 U.S. 527, 532 (1995) (italics in original). There is a preference for "substance over form," *id*. at 535, and "commonsense inquiries over formalism," *id*. at 536, in reading tax provisions. Congress, federal regulators, and courts have carved numerous exceptions out of the general rule against third parties challenging the tax liabilities of others. *Id*. at 539.

In previously addressing *Williams*, the Court placed emphasis on *to whom* Plaintiffs paid the HIPF. ECF No. 34 at 21. Defendants make a similar argument. ECF No. 27 at 12. Respectfully, Plaintiffs aver this approach tends to read too much into *Williams*. *Williams* never *per se* demands "direct" payment to the IRS; nor does the IRS. *See* 26 C.F.R. § 57.9 ("made by the entity that paid the fee"). Rather, what *Williams* provides is that "[s]ection 1346(a)(1) is a postdeprivation remedy, available only if the taxpayer has paid the Government *in full*." *Williams*, 514 U.S. at 538 (emphasis added). Thus, both *Williams* and the IRS demand that the person applying for the refund be the person saddled with the full liability, not necessarily the person that delivered the check to the IRS. Such a reading, Plaintiffs contend, is consistent with the *Williams* court's search for "substance over form," *id*. at 535, and "commonsense inquiries over formalism," *id*. at 536.

To emphasize its point about dealing with those that ultimately bear the full burden of the tax, *Williams* discusses several instances where a third party may justly stand in the shoes of the assessed, ranging from fiduciaries, executors or administrators, certain transferees, etc. *Id*. at 539. In each instance, the Supreme Court expresses no concern with who wrote the check, but whether the person making the claim speaks for the full liability. *Id*.

Like the government's position in *Williams*, Defendants repeats the "forecast that allowing [Plaintiffs] to sue will lead to rampant abuse." *Id*. at 540; ECF No. 27 at 12. But the circumstances here are unlikely to see much repetition, if any.

> [C]ases of this nature, ultimately raising nonfrivolous constitutional objections to IRS action, are "few and far between": they do not threaten large interference by "public interest" litigants with the administrative process of collecting taxes. *See* Bittker & Kaufman, *Taxes and Civil Rights: 'Constitutionalizing' the Internal Revenue Code*, 82 Yale L.J. 51, 55 (1972).

Apache Bend Apartments, 702 F. Supp. At 1295 n.10 (quoting *Wright v. Regan*, 656 F.2d 820, 836 n.52 (D.C. Cir. 1981)).

Here, a "fee" from which Plaintiffs are expressly exempt is nonetheless foisted upon them by Defendant's unlawful regulations and incurred by Plaintiffs *in toto* as part of their "capitation rates" paid to their business partners (MCOs). These circumstances do not create a slippery slope that opens section 1346 to every family member that ever loaned money for taxes to another. Plaintiffs are not voluntary benefactors, but rather recalcitrant victims.

C. Exhausting Administrative Remedies is Not Required.

For many reasons, Plaintiffs are not be required to exhaust administrative remedies. First, exhaustion of administrative remedies should not stand in the path of judicial review when serious constitutional questions are afoot. "Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions."

Califano v. Sanders, 430 U.S. 99, 109 (1977). Indeed, it is a "well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the extraordinary step of foreclosing jurisdiction unless Congress' intent to do so is manifested by clear and convincing evidence." *Id.* (citations and internal quotations omitted).

The AIA and the refund mechanism under section 7422 do not exist for resolving the legitimate constitutional questions presented herein. Rather, the Supreme Court acknowledged that the provisions serve two specific purposes:

> It responds to "the Government's need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial interference"; and it "'require[s] that the legal right to the disputed sums be determined in a suit for refund,'" *ibid.* (quoting *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7, 82 S. Ct. 1125, 8 L.Ed.2d 292 (1962)).

Hibbs v. Winn, 542 U.S. 88, 103 (2004). Here, the government collected the HIPF in an expeditious fashion and Plaintiffs do not challenge the government's math or whether what it calculated was apportioned correctly. Thus, the purposes of Plaintiff's lawsuit are beyond and do not impede the IRS's interests in its administrative procedures. Here, the only interest the IRS has in its administrative remedies is to maintain its judicially-rejected vision of "a world in which no challenge to its actions is ever outside the closed loop of its taxing authority." *Z St. v. Koskinen*, 791 F.3d 24, 29 (D.C. Cir. 2015) (quoting *Cohen*, 650 F.3d at 726). As the Court found constitutional infirmities in the regulatory scheme employed by Defendants, this case represents the quintessential circumstance where administrative remedies can and should be waived.

Second, administrative remedies should not preclude relief here on the grounds of futility. The Fifth Circuit recognizes the doctrine of futility as a defense to requirements that administrative remedies be exhausted. *See Bourgeois v. Pension Plan for Employees of Santa Fe Intern. Corps.*, 215 F.3d 475, 479 (5th Cir. 2000) (citing *Hall v. Nat'l Gypsum Co.*, 105 F.3d 225, 232 (5th Cir. 1997)); *see Honig v. Doe*,

484 U.S. 305, 327 (1988). Because the administrative processes are designed for (1) the expeditious collection of revenue, and (2) a fora for resolving disputes regrading amounts, nothing about an administrative fora provided by the IRS offers any promise of resolution regarding Plaintiffs' claims herein.

The futility of the administrative process is on full display here as Plaintiffs continue to await any form of action from the IRS in response to a refund claim. *See* Supp. Decl. of Greta Rymal; Pls. App. 1178–88. Other than merely acknowledging the receipt of the refund claim, *id.*, the IRS has done *nothing*—no word, no follow-up, etc.

Moreover, the Court may reasonably conclude that any hope of the IRS distilling the nature of Plaintiffs' claim into some form of cogent constitutional ruling that also produces the refund that Plaintiffs seek is futile. "The purpose of the exhaustion rule is to permit agencies to exercise discretion and apply their expertise, to allow the complete development of the record before judicial review, to prevent parties from circumventing the procedures established by Congress, and to avoid unnecessary judicial decisions by giving the agency an opportunity to correct errors." *Urban by Urban v. Jefferson Cty. Sch. Dist. R–1*, 89 F.3d 720, 724 (10th Cir. 1996) (analyzing administrative remedies under IDEA). The refund sought by Plaintiffs here—due to an unconstitutional regulatory scheme—is not the typical circumstance analyzed by the IRS regarding, *e.g.*, capital gains versus ordinary income, accuracy-related penalties, among other things. The IRS is not qualified to address the constitutional questions raised by Plaintiffs. Moreover, the IRS lacks the discretion to approve unconstitutional action, ensuring that any administrative process offered by the IRS provides no opportunity "to avoid [an] unnecessary judicial decision[]." Thus, Plaintiffs gain nothing through the IRS's administrative processes.

Moreover, the exhaustion of administrative remedies is not required when "an agency has adopted a policy or pursued a practice of generally applicability that is contrary to law." *Urban*, 89 F.3d at 724 (quotation omitted). Here, as the Court found,

not only did Defendants unlawfully delegate legislative power to a private entity, but they authored, implemented, and continue to enforce a regulatory scheme that produces a result (Plaintiffs paying the HIPF) that runs contrary to the statute.

When an agencies abuse their authority, or defy Congress, they should not be entitled to shield themselves from answering for their actions by hiding behind an administrative process—one here that has produced no substantive response in now over 30 months. *See infra* Section II.D.3. Under these circumstances, Plaintiffs are entitled to come directly to court to obtain the relief they require.

D. Plaintiffs Exhausted Administrative Remedies Under 26 U.S.C. §§ 6511(a) and 7422(a).

1. Plaintiffs Made a Valid Refund Claim With This Lawsuit.

Plaintiffs submitted a valid refund claim by filing this lawsuit and delivering it to all Defendants, including IRS. ECF Nos. 5–9. The nature of filing a claim is not one where form trumps substance. "Taxpayers fearing that the IRS will reject their otherwise timely refund claims for failure to dot an *i* need not worry that the statutory time limit will expire before they can cure any defects." *Goldberg v. United States*, 881 F.3d 529, 532 (7th Cir. 2018), *cert. denied*, 17-1230, 2018 WL 1142999 (U.S. Apr. 16, 2018). "In determining whether a claim for refund is sufficient to satisfy these requirements, it must be 'judged by the substance as related to the facts rather than the form in which it is stated.'" *Stuart v. United States*, 130 F. Supp. 386, 388 (Ct. Cl. 1955) (quoting *Higginson v. United States*, 81 F. Supp. 254, 268 (Ct. Cl. 1948)).

Here, the lawsuit, and the entirety of this litigation, both timely and substantively comprehensive, more than qualifies as a comprehensive and adequate refund claim. At an absolute minimum, Plaintiffs' lawsuit is a sufficient "informal claim." *See United States v. Kales*, 314 U.S. 186, 194 (1941); *PALA, Inc. Emp. Profit Sharing Plan & Trust Agreement v. United States*, 234 F.3d 873, 877 (5th Cir. 2000).

> According to this doctrine, an informal claim is sufficient if it is filed within the statutory period, puts the IRS on notice that the taxpayer believes an erroneous tax has been assessed, and describes the tax and year with sufficient particularity to allow the IRS to undertake an investigation. Although an informal claim may include oral communications, it must have a written component. 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, 234 F.3d at 877.

Here, of course, Plaintiffs' lawsuit, and all of the briefing and evidence submitted herewith,[6] more than completes their claim. Indeed, informal refund claims have been made by notations on checks, *Night Hawk Leasing Co. v. United States*, 18 F. Supp. 938 (Ct. Cl. 1937), letters, *Kales*, 314 U.S. at 194; *Penn Mut. Indemn. Co. v. Comm'r*, 277 F.2d 16, 18–19 (3d Cir. 1960), tax returns, *Simmons v. United States*, 29 Fed. Cl. 136 (1993), written protests attached to tax payments, *Newton v. United States*, 163 F. Supp. 614, 619–20 (Ct. Cl. 1958), and litigation, *Stuart*, 130 F. Supp. at 388.

With the IRS in receipt of the claim, and by acting as a party to this matter, these proceedings more than sufficiently identify the problems to the Defendants, the nature of the tax about which Plaintiffs are complaining, and what they want—all of their money back. Thus, Plaintiffs' lawsuit more than suffices.

2. The IRS Already Adjudicated and Rejected Plaintiffs' Refund Claims, Permitting This Refund Case.

If Plaintiffs' lawsuit and the proceedings herein constitute an informal claim, the IRS already rejected that claim as of January 27, 2016 when it filed its first motion to dismiss. ECF No. 14. The IRS specifically addressed Plaintiffs' refund

[6] Knowing that more detail is oftentimes required, the IRS tells taxpayers that "[i]f you need more space, attach additional sheets." *See* Ex. A (Form 843) to Supp. Decl. of Greta Rymal; Pls. App. 1181. Plaintiffs, of course, have filed many "additional sheets."

claims and why they are rejected. ECF No. 15 at 13.[7] The IRS may waive any requirement for a "formal" refund claim by adjudicating an informal claim as if it were a formal claim. *See, e.g.*, *Blue v. United States*, 108 Fed. Cl. 61, 69 (2012).

In *Angelus Milling Co. v. Commissioner*, 325 U.S. 293 (1945), the IRS adjudicated a refund claim not submitted on an official form. The Supreme Court held the action by the IRS functionally transformed the informal claim into a formal one.

> If the Commissioner chooses not to stand on his own formal or detailed requirements, it would be making an empty abstraction, and not a practical safeguard, of a regulation to allow the Commissioner to invoke technical objections after he has investigated the merits of a claim and taken action on it.

Id. 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).

The Federal Circuit states that the primary purpose of this waiver doctrine is "to prevent IRS agents from lulling taxpayers into missing the limitations deadline." *Computervision Corp. v. United States*, 445 F.3d 1355, 1366 (Fed. Cir.), adhered to on denial of reh'g, 467 F.3d 1322 (Fed. Cir. 2006). As stated by that court, "[w]here the taxpayer learns, within the limitations period, that the IRS has addressed the merits of a particular ground, and thus fails to file a timely formal claim raising that ground, the taxpayer's claim is not barred." 445 F.3d at 1366–67.

The IRS rejected Plaintiffs' refund claims long ago, and it has continued to do so. It is, thus, nonsensical that Plaintiffs must submit to the IRS any form of formal request for a refund to establish an entitlement to restitution.

3. Plaintiffs Remitted Formal Refund Requests.

If necessary, Plaintiffs' refund claims were formalized. Texas sent its first refund request to the IRS a mere six days after this lawsuit was filed. *See* Supp. Decl. of Greta Rymal; Pls. App. 1178–88. So long as one Plaintiff has standing, the Court

[7] The same motion and arguments were repeated by Defendants after Plaintiffs' filed their amended complaint. See ECF Nos. 26 & 27 at 11–12.

need not query whether the remaining plaintiffs have standing. *See, e.g.*, *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977). Nonetheless, all Plaintiffs remitted formal refund claims. *See* Pls. App. 1178–1226.

4. Doubts Are Resolved in Favor of Plaintiffs.

Finally, where taxes are afoot, the federal government bears the perpetual burden of having doubts resolved against the federal government, and in favor of those that bear the ultimate brunt of taxation. "'In case of doubt, [statutes levying taxes] are construed most strongly against the government and in favor of the citizen.'" *B & M Co. v. United States*, 452 F.2d 986, 990 (5th Cir. 1971) (quoting *Gould v. Gould*, 245 U. S. 151, 153 (1923)). "If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer." *United States v. Merriam*, 263 U. S. 179, 188 (1923) (citing *Gould*, 245 U.S. at 153).

III. AS AN ALTERNATIVE TO THE APA, THE COURT MAY RETURN PLAINTIFFS' MONEY UNDER *SOUTH CAROLINA V. REGAN*.

South Carolina v. Regan, 465 U.S. 367 (1984), alternatively, guarantees that Plaintiffs still have a way for their taxpayers' money returned to them. Indeed, the equitable exception created by the Supreme Court in *Regan* arose from an attenuated liability like the one in this case—one indirectly imposed upon South Carolina by virtue of alternate mechanisms. Thus, the unique nature of the circumstances presented here—that a "fee" from which Plaintiffs are expressly exempt, by and through Defendants' collective regulations, is nonetheless foisted upon them *in toto* as added to Plaintiff's "capitation rates" paid to their business partners (MCOs)—is precisely the unique nature of circumstances for which *Regan* exists. Moreover, the application of *Regan* is even more apt here, as the state bonds at issue in *Regan* were not expressly exempted by Congress, whereas Plaintiffs are expressly exempted from the HIPF liability, ACA § 9010(c)(2)(B), though nonetheless subjected to it.

Like South Carolina, which incurred no direct tax liability itself as a result of the challenged law (because the tax would be on its bondholders instead), Plaintiffs here "will incur no *tax* liability" *per se*. *Regan*, 465 U.S. at 379–80 (emphasis added). Plaintiffs pay a "fee" to Defendants through their MCOs, though Plaintiffs don't even really pay a "fee," but "capitation rates," or insurance premiums, to the insurance companies that are contracted to provide Medicaid services. Added to the insurance premium is the "fee" (HIPF). "Accordingly, the [AIA] cannot bar this action." *Id*. As stated by Judge Mahon in addressing the significance of *Regan*,

> The constitutionality of the Anti–Injunction Act could be called into question if courts interpreted it to prohibit suits where there is no adequate alternative remedy *in the form of a refund suit*. If the Anti–Injunction Act prevented a suit where there was no other adequate forum, *such as a refund suit*, there would be serious questions as to whether the Act violated the Due Process Clause because it would foreclose one's right to an adjudicative forum. *Schildcrout v. McKeever*, 580 F.2d 994 (9th Cir. 1978).

Apache Bend Apartments, Ltd. v. United States, 702 F. Supp. 1285, 1295 n.9 (N.D. Tex. 1988), *aff'd in part, rev'd in part on other grounds*, *Apache Bend Apartments, Ltd. v. U.S. Through IRS*, 987 F.2d 1174 (5th Cir. 1993) (emphasis added). South Carolina did not need to jump through various hoops to be heard by the highest court in the land. In like manner, Plaintiffs are entitled access to a judicial fora to obtain full and complete relief from an unconstitutional regulatory scheme.

A. Absent Reconsideration, There is No Remedy For Plaintiffs to Recover Their Money.

As the Court recognized, "[u]nder the ACA, the sole avenue for challenging the HIPF is a 'civil action[ ] for refund' by a covered MCO." ECF No. 88 at 26 (quoting ACA § 9010(f)(1)). Because there is no alternative for Plaintiffs' rights to be adjudicated, this Court should apply *Regan*.

B. For the Return of Plaintiffs' Monies, Waivers of Sovereign Immunity Are Provided Under Both 5 U.S.C. § 702 and 28 U.S.C. § 1346(a)(1).

The waiver of sovereign immunity that the APA provides for equitable relief (5 U.S.C. § 702) may be recognized here by the Court in conjunction with the jurisdiction it exercises under *Regan*. Indeed, [t]he APA's waiver of sovereign immunity applies to any suit whether under the APA or not." *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996); *see Trudeau v. FTC*, 456 F.3d 178, 186 (D.C. Cir. 2006) ("nothing in the language of the second sentence of § 702 that restricts its waiver to suits brought under the APA"). *See also supra* Section I.B.

For example, in *Cohen*, the D.C. Circuit recognized the waiver of sovereign immunity provided by the APA in a suit against the IRS seeking equitable relief.

> Appellants, who seek only equitable relief, argue Congress provided the necessary waiver of immunity in § 702 . . . . We agree. Even construing § 702 "strictly," as the [IRS] requests, *see Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260–61, 119 S. Ct. 687, 142 L.Ed.2d 718 (1999), there is no doubt Congress lifted the bar of sovereign immunity in actions not seeking money damages. *See Trudeau*, 456 F.3d at 186. The IRS is not special in this regard; no exception exists shielding it—unlike the rest of the Federal Government—from suit under the APA.

650 F.3d at 723.

The Court may also use the waiver of sovereign immunity under 28 U.S.C. § 1346(a)(1) to return Plaintiffs' money to them. Section 1346(a)(1) governs the "recovery" of "*any* internal-revenue tax." *Id.* "Recovery" is a broad term.[8] Plaintiffs' quest to get their money back easily qualifies as a "recovery."

But recovery from whom? The IRS, who is required to treat the HIPF like a "tax." Pub. L. 111-148, 124 Stat. 867; Pls.' App. 47. Thus, while Plaintiffs are looking to regain what is a "fee" to them (or their MCOs), or what really appeared to Plaintiffs

[8] According to Black's Law Dictionary, "Recovery" means: "1. The regaining or restoration of something lost or taken away. 2. The obtainment of a right to something (esp. damages) by a judgment or decree. 3. common recovery. 4. An amount awarded in or collected from a judgment or decree." Recovery, BLACK'S LAW DICTIONARY (10th ed. 2014).

as part of their "capitation rates," the question here is whether the government provided a key to its coffers—where it keeps Plaintiffs' "fees" that the IRS is required to call "taxes." As such, a clear and applicable waiver of sovereign immunity exists.

That Plaintiffs seek recovery of their money under *Regan*, and not 28 U.S.C. § 7422, does not change or alter the fact that Congress waived sovereign immunity under section 1346(a)(1) for efforts to "recover" what the IRS calls "taxes." Moreover, *Williams* expands the application of section 1346(a)(1) to third parties. *See supra* Section II.B.

Defendants have Plaintiffs' money—an uncontested fact. Plaintiffs want their money back—a position they have maintained from the outset. *See infra* Section III.C. By whatever measure, the government has clearly waived, through both 5 U.S.C. § 702 and 28 U.S.C. § 1346(a)(1), sovereign immunity for returning to Plaintiffs money that does not rightfully belong to the federal government.

C. Plaintiffs Have Consistently Maintained the Right to Get Their Money Back.

Because Plaintiffs should not be required to pay the HIPF, Plaintiffs' initial claim was that, in addition to declaratory and injunctive relief, they should get their money back. ECF No. 1 at 17, 19. In their amended complaint, Plaintiffs reiterated and expanded their demands for restitution. ECF No. 19 at 24–29.

The Court will recall that after Plaintiffs filed their motion for summary judgment on January 6, 2017, Defendants delayed significantly in responding. Defendants' told the Court that their continued delay requests came "in light of recent and possible legislative developments . . . which, if passed . . . in its current or a substantially similar form, would eliminate the Health Insurance Providers Fee (HIPF)." ECF No. 59 at 1–2. Plaintiffs were clear that eliminating the HIPF would *not* moot the case, as Plaintiffs continue to maintain a right to reparations, to wit:

> Plaintiffs seek a refund or disgorgement of the HIPFs paid to this point. Pls.' First Am. Compl. ¶ 69–71, 78–80, ECF No. 19. Though the Court

> dismissed the refund and disgorgement claims of Plaintiffs' First Amended Complaint, ECF No. 34 at 21, Plaintiffs maintain that they have a right to disgorgement or a refund of the HIPFs paid and shall appeal the Court's ruling once a final judgment is entered. However, preceding any claim Plaintiffs' have for a refund or disgorgement is a substantive finding that the HIPF is unlawful.
>
> . . .
>
> For this matter to become arguably mooted, Congress not only must eliminate the HIPF, but also refund to Plaintiffs the past HIPFs paid.

ECF No. 60 at 3, 4.

CONCLUSION

At bottom, by whatever path, the Plaintiffs successfully pled and are entitled to the full restoration of the monies unlawfully extracted from them. In light of the foregoing, Plaintiffs respectfully request the following:

(1) That the Court enter an interim order re-clarifying that no final judgment yet exists in this matter and that Defendants' interlocutory notice of appeal, ECF No. 92, and Plaintiffs' interim notice of appeal, ECF No. 94, does not divest the Court of jurisdiction over this matter and shall be treated as filed on the date of and after the entry of judgment. Fed. R. App. P. 4(a)(2); and

(2) That the Court enter a final judgment that declares the unlawfulness of Defendants' regulations utilized to impose the HIPF upon Plaintiffs, enjoins Defendants from further enforcement of those same regulations, and directs Defendants to return to Plaintiffs the HIPFs paid by them.

Respectfully submitted this the 21st day of May, 2018,

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CERTIFICATE OF SERVICE

I certify that on the 21st day of May, 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

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

FINAL JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and decisions duly rendered,

It is ORDERED, ADJUDGED, and DECREED that:

1. For the reasons set out in the Court's prior memorandum opinions and orders, the Court declares that 42 C.F.R. §§ 438.2–438.6 delegate legislative power in violation of the United States Constitution and the APA and the Court declares that

they are set aside as "contrary to constitutional right, power, privilege, or immunity," and "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . ." 5 U.S.C. § 706(2)(B)–(C).

2. Defendants are enjoined from enforcing 42 C.F.R. §§ 438.2–438.6 or other regulations that function to impose liability for the Health Insurance Providers Fee upon Plaintiffs and their agencies.

3. Defendants are directed to disgorge and return to Plaintiffs all Health Insurance Providers Fees paid to Plaintiffs' Managed Care Organizations from Fee Year 2014 to present, plus pre-judgment and post-judgment interest in accordance with 28 U.S.C. § 1961.

4. The taxable costs of court, as calculated by the clerk of court, shall be borne by the party incurring the same.

5. All such other relief requested by Plaintiffs that is not specifically granted herein is denied. This is a final judgment as to all of Plaintiffs' claims.

6. The clerk shall transmit a true copy of this Judgment to the parties.

SO ORDERED on this ____ day of _____, 2018.

_____
Reed O'Connor
UNITED STATES DISTRICT JUDGE