IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACQUELINE HALBIG, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:13-cv-00623-RWR
	)	
KATHLEEN SEBELIUS, in her official capacity as U.S. Secretary of Health and Human Services, *et al.*,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT

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Introduction

The Patient Protection and Affordable Care Act ("ACA" or "Act") includes a series of measures that will expand the availability of affordable health coverage. Of particular relevance here, the Act provides for the establishment of new health insurance Exchanges, in which the purchasing power of individuals and small businesses will be combined so that they can buy more affordable insurance. States will establish and operate these Exchanges or, where a state chooses not to do so consistent with federal standards, the federal government will establish and operate the Exchange in place of the state. The Act provides for financial assistance and tax incentives to encourage the purchase of insurance, including premium tax credits for eligible individuals to help defray the cost of insurance purchased through the Exchanges. 26 U.S.C. § 36B. These tax credits, when they become available in 2014, will provide substantial financial assistance to millions of Americans for the purchase of affordable health insurance.

The plaintiffs here seek to interfere with the Treasury Department's administration of these tax credits. They contend that they reside in states where the federal government will operate the Exchange, and they read the Affordable Care Act to prohibit the allowance of premium tax credits to individuals purchasing insurance through the Exchanges in these states. The plaintiffs' reading of the Act is wrong; Congress made clear that an Exchange established by the federal government stands in the shoes of the Exchange that a state chooses not to establish, *see* 42 U.S.C. § 18041(c)(1), and the Treasury Department has reasonably interpreted the Act to provide for eligibility for the premium tax credits for individuals in every state, regardless of which entity operates the Exchange.

This lawsuit, however, is not the right forum to resolve this question. The plaintiffs are attempting here to bring a virtually unheard-of suit, an action under the APA either to declare that the plaintiffs are not themselves eligible to receive favorable tax treatment, or to increase the tax liabilities of parties not before the court. The plaintiffs' claims suffer from a host of defects.

First, the plaintiffs lack Article III standing to proceed. The individual plaintiffs contend that they would prefer to be exempt from the ACA's minimum coverage provision, which imposes a tax penalty for the failure to maintain qualifying coverage. They contend that, by making insurance "less unaffordable," the Section 36B tax credits diminish their hopes to be exempt from the minimum coverage provision on affordability grounds. This theory depends on utter conjecture as to the plaintiffs' income levels and the costs of qualifying insurance, and thus does not suffice to plead an injury-in-fact. The employer plaintiffs, for their part, contend that they face injury from the possibility that they will be subject to a tax assessment for large employers that fail to offer adequate coverage for their full-time employees. That assessment turns in part on whether one or more of the employer's full-time employees obtains a Section 36B tax credit. The employees are not present in this lawsuit, however, and this Court cannot prohibit them from seeking or obtaining the tax credit. The employer plaintiffs thus cannot gain redress for their supposed injuries in this action, even under their theory of the case.

Second, the plaintiffs lack prudential standing to proceed in this APA action. Congress had an obvious purpose in enacting Section 36B: to make insurance more affordable. The plaintiffs here, however, object to the Treasury Department's interpretation of Section 36B because that interpretation will make insurance "less unaffordable." The plaintiffs thus seek to pursue an interest that is diametrically opposed to Congress's purpose, and they do not fall

within the zone of interests that the statute protects. Moreover, the employer plaintiffs lack prudential standing to seek to increase the federal tax liabilities of their employees. Under settled principles of tax law, a plaintiff lacks standing to litigate the federal tax liabilities of a non-party, particularly when the plaintiff seeks to increase the non-party's tax obligations.

Third, the plaintiffs' claims are not ripe to proceed in an APA action at this time, as opposed to post-enforcement litigation after any tax liabilities have been determined and assessed by the IRS. The issues that the plaintiffs seek to litigate here are not fit for resolution, because the federal government has yet to apply its interpretation of the Internal Revenue Code to their circumstances in any concrete way. Nor do the plaintiffs suffer any hardship that could cause this Court to depart from the principle that Article III courts should make decisions only when they have to, and then, only once.

Fourth, the plaintiffs may not proceed under the APA, because Congress has specified a different and adequate form of proceeding for their claims, namely, an action for a tax refund. Congress has specified in unmistakable terms that a plaintiff seeking to litigate matters of federal tax liability must first pay the tax assessed, file an administrative refund claim, and only then proceed to federal court. The plaintiffs may not depart from the exclusive form of review that Congress provided for tax claims by filing a pre-enforcement APA action.

Fifth, the employer plaintiffs' claims are barred by the Anti-Injunction Act, 26 U.S.C. § 7421, which prohibits suits for the purpose of restraining the assessment or collection of a tax under the Internal Revenue Code. The employer plaintiffs seek relief to preclude the potential application of the ACA's large employer tax assessment against them. The Anti-Injunction Act bars pre-enforcement suits for such a purpose.

Last, in the alternative, if the employer plaintiffs could otherwise proceed despite the numerous defects in their claims for relief, their claims should nonetheless be dismissed for their failure to join indispensable parties. As noted above, the employer plaintiffs could not gain relief in this suit without the participation of their employees. Those employees have an obvious interest in protecting their eligibility for the Section 36B premium tax credits. This suit thus cannot fairly proceed in those employees' absence. And because the employees cannot be joined in this action, the suit should be dismissed.

Background

I. The Affordable Care Act

Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), to address a crisis in the national health care market. The Act establishes a framework of economic regulation and incentives that will reform health insurance markets, expand access to health care services, control costs, and reduce the market-distorting effects of cost-shifting. The claims raised by the plaintiffs in this case involve four features of the Act: (1) the establishment of health insurance Exchanges to facilitate the purchase of insurance by individuals and small groups; (2) the availability of premium tax credits to assist with the purchase of insurance on the Exchanges; (3) the potential imposition of a tax assessment on applicable large employers that do not offer affordable, minimum value insurance coverage to their full-time employees; and (4) the minimum coverage provision, which requires most individuals either to maintain qualifying coverage or to pay a tax penalty for the failure to do so.

A. The Health Insurance Exchanges

For the individual and small-group health insurance markets, Congress established health insurance Exchanges to serve "as an organized and transparent marketplace for the purchase of health insurance where individuals and employees (phased-in over time) can shop and compare health insurance options." H.R. REP. NO. 111-443, pt. II, at 976 (2010) (internal quotation omitted). The Exchanges will allow qualified individuals and qualified employers to use the leverage of collective buying power to obtain prices and benefits that are competitive with those of large-employer health plans. 42 U.S.C. §§ 18031-18044. Among other functions, the Exchanges will certify the qualified health plans that will be offered in the Exchanges; determine the eligibility of individuals to enroll through the Exchanges in these qualified health plans; determine the eligibility of individuals for advance payments of the Act's premium tax credits and cost-sharing reductions (discussed below); and grant certifications that individuals are exempt from the penalty under the Act's minimum coverage provision (also discussed below). 42 U.S.C. § 18031(d)(4); 45 C.F.R. § 155.200 *et seq.* Each Exchange is also directed to report information to the IRS for the purpose of determining whether participants in that Exchange are eligible for premium tax credits. 26 U.S.C. § 36B(f)(3).

The Exchanges will offer plans offering different levels of coverage, designated as "bronze," "silver," "gold," and "platinum" coverage. 42 U.S.C. § 18022(d). Each plan offered through an Exchange must provide coverage of essential health benefits, as defined in regulations promulgated by the Department of Health and Human Services. 42 U.S.C. § 18021(a)(1)(B); *see* 45 C.F.R. §§ 156.20, 156.200(b)(3); *see also* 45 C.F.R. § 156.110 *et seq.* (defining essential health benefits package). A bronze plan offers coverage that is "designed to

provide benefits that are actuarially equivalent to 60 percent of the full actuarial value of the benefits provided under the plan." 42 U.S.C. § 18022(d)(1). Silver, gold, and platinum plans are designed to offer benefits equivalent to 70, 80, and 90 percent of the actuarial value of the benefits provided under the plan, respectively. *Id.*

The Exchanges may also offer "catastrophic" plans. 42 U.S.C. § 18022(e); *see* 45 C.F.R. § 156.155. Catastrophic plans must provide coverage of essential health benefits, but such benefits will not be covered until the insured person has incurred the annual limitation on cost-sharing expenses. 42 U.S.C. § 18022(c), (e).[1] A catastrophic plan may not impose any cost-sharing requirements on preventive health services, and must also provide coverage for at least three primary care visits per year. 42 U.S.C. § 18022(e); 45 C.F.R. § 156.155(a), (b). Enrollment in catastrophic plans is limited to persons who are under 30 years of age, or whom the Exchange has certified to be exempt from the minimum coverage provision by reason of hardship or the lack of affordable insurance options. 42 U.S.C. § 18022(e); 45 C.F.R. § 156.155(a).

The Act provides that "[a]n Exchange shall be a governmental agency or nonprofit entity that is established by a State." 42 U.S.C § 18031(d)(1); *see also* 42 U.S.C. § 18031(b)(1) ("Each State shall, not later than January 1, 2014, establish [an Exchange] for the State"). The Act does not impose any sanction, however, if a State elects not to establish an Exchange that complies with federal standards. Instead, the Act directs that the Secretary of Health and Human Services shall "establish and operate such Exchange within the State." 42 U.S.C. § 18041(c)(1); *see* 45 C.F.R. § 155.105(f).

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[1] For 2014, the annual cost-sharing limit is $6,350 for individual coverage and $12,700 for family coverage. 26 U.S.C. § 223(c)(2)(A)(ii); Rev. Proc. 2013-25, 2013-21 I.R.B. 1110.

Health plans offered under the Exchanges will offer coverage effective by January 1, 2014. 45 C.F.R. § 155.410(c). The initial enrollment period for plans offered through the Exchanges will open on October 1, 2013, and will close on March 31, 2014. 45 C.F.R. § 155.410(b).

B. Premium Tax Credits and Cost-Sharing Reductions

Congress also enacted new premium tax credits and cost-sharing reduction payments in order to ensure that health insurance is affordable. The Act establishes federal premium tax credits to assist eligible individuals with household incomes from 100% to 400% of the federal poverty level to purchase insurance through the new Exchanges. 26 U.S.C. § 36B. These premium tax credits, which are advanceable and fully refundable such that individuals with little or no income tax liability can still benefit, are designed to make health insurance affordable by reducing a taxpayer's net cost of insurance. For eligible individuals with income up to 250% of the federal poverty level, the Act also provides for federal payments to insurers to help cover those individuals' cost-sharing expenses (such as co-payments or deductibles) for insurance obtained through an Exchange. 42 U.S.C. § 18071(c)(2); 45 C.F.R. § 155.305(g).

Individuals who purchase coverage either through state-based Exchanges or through federally-facilitated Exchanges can be eligible for these premium tax credits and cost-sharing reductions. 26 U.S.C. § 36B(c)(2)(A); *see* 26 C.F.R. §§ 1.36B-1(k), 1.36B-2(a); 45 C.F.R. §§ 155.20, 155.305. The statute imposes certain conditions on eligibility for the premium tax credits, however. If the taxpayer is married, he or she must file a joint return to receive the credit. 26 U.S.C. § 36B(c)(1)(C). The taxpayer may not receive a credit if he or she is eligible to be claimed as a dependent on another taxpayer's return. 26 U.S.C. § 36B(c)(1)(D). The

credit is available only for coverage of persons lawfully present in the United States. 26 U.S.C. § 36B(e). And the taxpayer may not receive a premium tax credit if he or she is eligible for any other form of coverage that qualifies as "minimum essential coverage" under the ACA, such as Medicare or Medicaid. 26 U.S.C. § 36B(c)(2)(B).

Employer-sponsored coverage is defined as minimum essential coverage for this purpose. Section 36B nonetheless permits an employee who is eligible for, but does not enroll in, employer-sponsored health coverage to receive premium tax credits or cost-sharing reductions, if that coverage is unaffordable, meaning that the employee is required to pay more than 9.5% of his household income for that coverage, or if the plan does not offer minimum value, meaning that it fails to cover at least 60% of the total allowed costs of benefits under the plan. 26 U.S.C. § 36B(c)(2)(C).

The amount of the premium tax credit available to a taxpayer under Section 36B varies depending on the taxpayer's household income. The amount of the premium tax credit is defined as the difference between the cost of the "applicable second lowest cost silver plan" available on the Exchange to the taxpayer and a defined percentage of the taxpayer's household income. 26 U.S.C. § 36B(b)(2), (b)(3). For example, a taxpayer with income at 200% of the federal poverty level could receive a credit that is equal to the cost of the second lowest cost silver plan available on the Exchange, less 6.3% of the taxpayer's household income. 26 U.S.C. § 36B(b)(3); 26 C.F.R. § 1.36B-3(g). A taxpayer need not purchase a silver plan to receive the premium tax credit. He or she may receive a credit in the same amount (subject to a cap equal to the amount of the premiums for the plan he or she purchases) for a cheaper bronze

plan, or for a more expensive gold or platinum plan. 26 U.S.C. § 36B(c)(3)(A). Premium tax credits are not available for the purchase of catastrophic plans, however. *Id.*

The Exchanges will also administer a program for the advance payments of the premium tax credits for eligible individuals. 42 U.S.C. §§ 18022, 18081-18082. Under this program, the Exchange will request the Department of Health and Human Services and the Department of the Treasury to determine a taxpayer's anticipated eligibility for the premium tax credit at the time that the taxpayer or a family member applies for coverage under a plan offered on the Exchange. *Id.* If the Exchange approves advance payments of the premium tax credit, the payments will be made directly to the insurer offering the plan in which the individual is enrolled, and the individual will be responsible to pay only the net cost of the premium after those payments are applied. *Id.* For applicants who are employed, the Exchanges will review whether the applicant is offered health coverage by his employer, and whether that coverage is affordable and provides minimum value under the standards described in Section 36B. 42 U.S.C. § 18081(b)(4). If the Exchange determines that the individual has not been offered adequate coverage by his or her employer, the Exchange will provide notice to the employer of that fact and that the employer "may be liable" for an assessment under 26 U.S.C. § 4980H (which is discussed in more detail below). 42 U.S.C. § 18081(e)(4)(B). The Act provides a process for an administrative appeal by an employer of that notice. 42 U.S.C. § 18081(f)(2). This administrative process is "separate and distinct" from the process that the IRS follows for the assessment of any tax owed under Section 4980H. 78 Fed. Reg. 4594, 4653-54 (Jan. 22, 2013). That tax will be assessed and collected in the same manner as other taxes and assessable penalties under the Internal Revenue Code. 26 U.S.C. § 4980H(d)(1).

The Congressional Budget Office ("CBO") has projected that, by 2018, twenty million people, or 80% of people who buy non-group insurance policies through Exchanges, will receive premium tax credits. CBO, *Effects on Health Insurance and the Federal Budget for the Insurance Coverage Provisions in the Affordable Care Act: May 2013 Baseline*, tbl. 3 (May 14, 2013). It has also projected that the average subsidy, for each person who receives subsidized coverage through the Exchanges, will amount to $5,290 per person in 2014, rising to $7,900 in 2023. *Id.*, tbl. 1. Those credits, on average, will cover nearly two-thirds of the premiums for policies purchased through the Exchanges. CBO, *An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act*, at 6 (Nov. 30, 2009).

The Exchanges are still in the process of certifying qualified health plans. The reporting on premium affordability that is available as of July 2013 is promising, however. Among eleven states that have reported data so far, "greater competition and greater transparency are driving down prices in the Marketplace"; the reported cost of silver plans is on average 18% lower than that contemplated under the CBO's previous projections.[2] The Act's financial assistance for the purchase of insurance through the Exchanges plays a significant role in limiting the projected cost of premiums on the Exchanges. Because that financial assistance will encourage individuals with lower expected health costs to participate in the Exchanges, the result will be an expansion of the risk pool and a decrease in the expected cost of plans offered on the Exchanges. *See* Linda J. Blumberg & John Holahan, Urban Institute, *Health Status of Exchange Enrollees: Putting Rate Shock in Perspective* at 2, 8 (July 2013).

[2] Laura Skopec & Richard Kronick, Office of the Ass't Sec'y for Planning & Evaluation, U.S. Dep't of Health & Human Servs., *ASPE Issue Brief: Market Competition Works: Proposed Silver Premiums in the 2014 Individual and Small Group Markets Are Nearly 20% Lower Than Expected* at 1, 3 (July 2013).

C. The Tax Assessment for Large Employers That Fail to Offer Adequate Coverage

The Affordable Care Act also builds on the existing system of employer-based health coverage, in which most individuals receive coverage as part of employee compensation. As with previous measures designed to encourage employer-based health coverage, Congress used the federal tax laws to help achieve its goal, establishing tax incentives for eligible small businesses to purchase health insurance for their employees, 26 U.S.C. § 45R, and prescribing tax assessments under specified circumstances for certain large businesses that do not offer affordable, minimum value coverage to their full-time employees, 26 U.S.C. § 4980H.

Under the latter provision, an applicable large employer that offers health coverage to its full-time employees and their dependents will be subject to a "tax," 26 U.S.C. § 4980H(b)(2), *see also* 26 U.S.C. § 4980H(c)(7), if one or more of its full-time employees "has been certified to the employer under [42 U.S.C. § 18081] as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee." 26 U.S.C. § 4980H(b)(1)(B); *see also* 26 U.S.C. § 4980H(a)(2) (same condition for assessment against applicable large employer that offers no coverage to its full-time employees and their dependents). As noted above, an employee who is eligible for employer-sponsored health coverage is eligible to receive these subsidies only if the coverage offered by the employer fails to meet certain standards for affordable, minimum value coverage. *See* 26 U.S.C. § 36B(c)(2)(C). Accordingly, an applicable large employer that offers coverage to its full-time employees and their dependents that meets these standards will not be subject to the Section 4980H tax. The large employer tax assessment will become effective in 2015. *See* Notice 2013-45, 2013-31 I.R.B. 116.

D. The Minimum Coverage Provision

Congress added the minimum coverage provision to the Internal Revenue Code, which, beginning in 2014, requires non-exempted individuals to maintain a minimum level of health insurance or else pay a tax penalty that is reported with their annual income tax return. 26 U.S.C. § 5000A. An individual may satisfy this provision through enrollment in an employer-sponsored health plan, an individual market plan, including a plan offered through the new Exchanges, a grandfathered health plan, certain government-sponsored health coverage programs such as Medicare, Medicaid, or TRICARE, or other coverage recognized by the Secretary of Health and Human Services in coordination with the Secretary of the Treasury. 26 U.S.C. § 5000A(f). The penalty does not apply to, among others, individuals whose household income is insufficient to require them to file a federal income tax return, who would need to contribute more than 8% of their household income toward coverage (after taking into account any allowable Section 36B premium tax credits), who establish that the requirement imposes a hardship, or who satisfy certain religious exemptions. 26 U.S.C. § 5000A(d), (e). For 2014, the penalty for an individual under the minimum coverage provision will be the greater of $95 or 1.0% of the taxpayer's household income, subject to a cap equal to the cost of qualifying insurance. 26 U.S.C. § 5000A(c).

The Exchanges will administer some applications for certifications of exemption from the minimum coverage provision. 42 U.S.C. § 18031(d)(4)(H). In particular, the Exchanges will provide a certificate of exemption to an applicant who demonstrates that, based on his or her projected annual household income, his or her contributions toward coverage would exceed 8% of his or her household income. 45 C.F.R. § 155.605(g)(2); *see* 45 C.F.R. § 155.615(f)(2)

(describing procedures for verification of exemption applications on account of lack of affordable coverage based on projected income). An applicant for a certificate of exemption under this unaffordability provision must apply before the last date on which he is eligible to enroll in a qualified health plan offered on the Exchange. 45 C.F.R. § 155.605(g)(2)(vi). The Exchanges will also provide a certificate of exemption to individuals who demonstrate financial hardship, such as “a significant, unexpected increase in essential expenses that prevented him or her from obtaining coverage under a qualified health plan.” 45 C.F.R. § 155.605(g)(1). An applicant who is denied a certificate of exemption may pursue an administrative appeal of that denial. 45 C.F.R. § 155.635. That appeals process has not yet been finalized, but will be addressed in future rulemaking. *See* 78 Fed. Reg. 39,494, 39,514 (July 1, 2013). This process is independent of the IRS’s process for assessment of any penalty under the minimum coverage provision, however. The IRS will follow the same procedures with respect to the assessment and collection of the penalty under the minimum coverage provision as those that apply to other taxes and penalties under the Internal Revenue Code, subject to limitations on levies and the filing of notices of liens. *See* 26 U.S.C. § 5000A(g).

II. This Litigation

The plaintiffs filed this suit on May 2, 2013. Compl. (ECF 1). They contend that the Act extends premium tax credits only to participants in state-based Exchanges, and not to participants in federally-facilitated Exchanges. *But see* 42 U.S.C. § 18041(c)(1) (clarifying that the federally-facilitated Exchange stands in the shoes of the Exchange that a state chooses not to establish). The plaintiffs contend that the Treasury Department has incorrectly interpreted the Internal Revenue Code to provide that premium tax credits are available to participants in both

state-based and federally-facilitated Exchanges, *see* 26 C.F.R. § 1.36B-1(k), and they seek to challenge the validity of that regulation under the APA.

The four individual plaintiffs contend that, under this regulation, they will qualify for premium tax credits under 26 U.S.C. § 36B. Compl., ¶¶ 12-15. They contend that they reside in states in which a federally-facilitated Exchange will operate, and thus, under their reading of the Internal Revenue Code, they should not qualify for the Section 36B premium tax credits. *Id.* They contend that, absent the premium tax credits, they would be exempt from the penalty under the minimum coverage provision because they would be unable to obtain affordable insurance coverage. *Id.* They contend that they would not qualify for this exemption if they are eligible to receive premium tax credits, and that therefore under the minimum coverage provision they "will be forced to either pay a penalty or purchase more insurance than [they] want[]." *Id.*

The three employer plaintiffs contend that each employer employs more than 50 full-time employees, and that each employer operates in a state in which a federally-facilitated Exchange will operate. Compl., ¶¶ 16-18. Innovare Health Advocates contends that it would prefer to offer a "consumer-driven health insurance plan" to its full-time employees, but that plan "would very likely not comply with the ACA." *Id.*, ¶ 16. GC Restaurants SA, LLC, along with six companies or partnerships under its common control, contend that they "do not offer health insurance to many full-time employees and do not want to offer it to them in 2014." *Id.*, ¶ 17. Community National Bank contends that it would prefer to "drop the health insurance it offers to its full-time employees" because of its directors' moral objections to regulations requiring health plans to cover contraceptive services. *Id.*, ¶ 18. Each employer plaintiff contends that, if its

employees are eligible to receive premium tax credits, it will be "threatened" by the possibility that it will be subject to the Section 4980H tax assessment. *Id.*, ¶¶ 16-18.

The plaintiffs ask the Court to declare that 26 C.F.R. § 1.36B-1(k) is invalid and to prohibit the "application or enforcement" of the regulation. Compl., p. 14.

Argument

I. The Plaintiffs Lack Article III Standing to Pursue This Action

A. The Plaintiffs Must Adequately Allege a Redressable Injury-in-Fact

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (internal quotation omitted). "One element of the case-or-controversy requirement" is that plaintiffs "must establish that they have standing to sue." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013).

To establish Article III standing, an injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010). A plaintiff may not establish standing by speculating that he may be subject to some injury in the future. "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending. Thus, [the Supreme Court has] repeatedly

reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient." *Clapper*, 133 S. Ct. at 1147 (Supreme Court's emphasis; internal quotations omitted).

B. The Individual Plaintiffs Lack Article III Standing

Under these standards, the individual plaintiffs have failed to allege that they have standing to challenge the Treasury Department's interpretation of Section 36B. Their theory of standing is that, without the premium tax credits, they would be unable to obtain affordable insurance coverage, and that they therefore would be exempt from the penalty under the minimum coverage provision for a failure to maintain qualifying coverage, *see* 26 U.S.C. § 5000A(e), but that the availability of premium tax credits will render insurance affordable for them, thereby subjecting them to the minimum coverage provision. Compl., ¶¶ 12-15. The individual plaintiffs' theory turns on multiple levels of speculation, and thus does not suffice to allege an injury in fact.

First, it is speculative, based on the allegations in the complaint, what the individual plaintiffs' household income levels will be in 2014 and later years. Second, it is speculative what insurance options will be available to the individual plaintiffs, and what the cost of insurance will be for those various options. For example, the plaintiffs may have an offer of coverage through an employer, or they may be eligible for coverage through a spouse's employer, in addition to the plans offered on the Exchange that will operate in the state in which each plaintiff resides. Third, it is speculative what the cost of the "applicable second lowest cost silver plan with respect to the taxpayer," 26 U.S.C. § 36B(b)(2), available in each plaintiff's Exchange will be. As noted above, the amount of the taxpayer's premium tax credit, and thus

the net cost of any of the health plans available on the Exchange for that taxpayer, is calculated on the basis of the cost of that plan. In order to determine whether any of the plaintiffs would be unable to obtain affordable coverage in 2014 or future years for purposes of the Section 5000A(e) exemption, highly debatable assumptions would need to be made with respect to each of these points.

The plaintiffs cannot base their claim of standing on this sort of conjecture. "An Article III injury in fact must be "(i) 'concrete and particularized' rather than abstract or generalized, and (ii) 'actual or imminent' rather than remote, speculative, conjectural or hypothetical." *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 175 (D.C. Cir. 2012), *reh'g denied*, 704 F.3d 1005 (D.C. Cir. 2013), *cert. denied*, 133 S. Ct. 2880 (2013). Moreover, a plaintiff "alleging only future injuries confronts a significantly more rigorous burden to establish standing." *Chamber of Commerce of United States v. EPA*, 642 F.3d 192, 200 (D.C. Cir. 2011) (internal quotation omitted). "To qualify for standing, the [plaintiffs] must demonstrate that the alleged future injury is imminent." *Id.* (internal quotation omitted). In other words, the "threatened injury must be *certainly impending* to constitute injury in fact." *Clapper*, 133 S. Ct. at 1147 (emphasis in original). The plaintiffs' unadorned speculation that they would qualify for an unaffordability exemption does not carry their burden to allege an injury that is certainly impending.

In subsequent filings (albeit not in their complaint), the plaintiffs have asserted that some of the individual plaintiffs plan to apply for certificates of exemption so that they can purchase catastrophic coverage. *See* Pls.' Opp. to Mot. to Defer S.J. Briefing (ECF 19) at 2. Such an allegation, even if it had been raised in the complaint, would not suffice to show an injury-in-fact either. Even greater speculation would be required to determine the plaintiffs' standing under

such a theory. In addition to guessing at the plaintiffs' income, available insurance options, and the cost of silver plans on the Exchange, as described above, one would also have to assume facts as to the cost of bronze plans on the Exchange (to evaluate the net cost of qualifying coverage that the plaintiffs could obtain with the assistance of premium tax credits) and the cost of catastrophic plans on the same Exchange. Because premium tax credits may be applied for the purchase of bronze plans but not for the purchase of catastrophic plans, *see* 26 U.S.C. § 36B(c)(3)(A), it is entirely speculative whether the cost of (subsidized) bronze coverage will be greater than the cost of (unsubsidized) catastrophic coverage – even before one takes into account the substantially greater out-of-pocket costs that the plaintiff would incur under a catastrophic plan. Such a "highly attenuated chain of possibilities … does not satisfy the requirement that threatened injury must be certainly impending." *Clapper*, 133 S. Ct. at 1148.

In an apparent attempt to cure this defect in their standing allegations, the individual plaintiffs have alleged that their "financial strength and fiscal planning are immediately and directly affected by this exposure to costs and/or liabilities" from the possibility that they may later be assessed a penalty under the minimum coverage provision. *E.g.*, Compl., ¶ 12. The plaintiffs cannot evade the Article III requirement of a certainly impending injury in fact in this manner. A plaintiff "cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending." *Clapper*, 133 S. Ct. at 1143. In other words, if a plaintiff does not show that a future harm is certainly impending, his "contention that [he has] standing because [he] incurred certain costs as a reasonable reaction to a risk of harm is unavailing." *Id.* at 1151. In sum, the individual plaintiffs can offer only speculation that they will be harmed in the future by the possibility that they will be unable to

obtain an exemption from the minimum coverage provision. The plaintiffs cannot establish their standing to sue through such conjecture.

Plaintiff David Klemencic is a case in point. Mr. Klemencic was also a plaintiff in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), which upheld the constitutionality of the minimum coverage provision. In that litigation, he alleged that he *would* be subject to the minimum coverage provision. *See* Declaration of David Klemencic (ECF 80-6), *Florida v. U.S. Dep't of Health & Human Servs.*, No. 3:10-cv-00091, ¶ 8 (N.D. Fla. Nov. 4, 2010) (attached as Exhibit A).[3] In this litigation, however, Mr. Klemencic alleges that he *would not* be subject to the minimum coverage provision, in the absence of what he contends to be a new and illegal interpretation of the Act by the Treasury Department to extend premium tax credits to him. Compl., ¶ 13. Mr. Klemencic's allegations are logically inconsistent; an injury could not be "certainly impending" against him both because he was certain to be subject to the minimum coverage provision and because he was certain *not* to be subject to the same provision absent later, allegedly illegal action by the defendants. Mr. Klemencic's allegations underscore the endless malleability of claims of a future injury like those that the plaintiffs assert here. They also underscore the importance of the Article III requirement that a plaintiff must demonstrate that an injury in fact is certainly impending. Because the individual plaintiffs cannot make such a showing here, they therefore lack Article III standing.

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[3] Mr. Klemencic initially participated in that litigation as a member of NFIB. While the case was pending in the Supreme Court, that Court granted his motion to intervene as a plaintiff in his own right to cure a defect in the standing of another plaintiff. *Nat'l Fed'n of Indep. Business v. Sebelius*, 132 S. Ct. 1133 (2012) (mem.).

C. The Employer Plaintiffs Lack Article III Standing

The employer plaintiffs fare no better. These plaintiffs contend that they are "threatened" by Section 4980H, in that they face the possibility of assessment of the tax for applicable large employers that fail to offer adequate coverage to their full-time employees. *E.g.*, Compl., ¶ 16. An allegation of a "threat" of a future tax assessment in 2015 or later years does not satisfy the plaintiffs' burden to show that an injury is certainly impending. Whether or not these plaintiffs will in fact incur a Section 4980H tax assessment turns on facts that are not pled in the complaint. In particular, the likelihood of a Section 4980H assessment will turn in part on the future actions of these plaintiffs' employees, namely, whether those employees obtain coverage under a plan offered in the Exchanges, and whether those employees receive premium tax credits to assist with the purchase of that coverage. *See* 26 U.S.C. § 4980H(a), (b). The complaint is entirely devoid of any allegations as to whether any of the employer plaintiffs' employees will obtain such coverage on the Exchanges. If those employees do obtain such coverage, their eligibility for premium tax credits would turn on a variety of circumstances, such as their income, 26 U.S.C. § 36B(c)(1)(A), their filing status, 26 U.S.C. 36B(c)(1)(C), (D), and their eligibility for other qualifying coverage, such as eligibility for affordable coverage offered by the taxpayer's spouse's employer, *see* 26 U.S.C. § 36B(c)(2)(B).

Because the employer plaintiffs' allegation of an injury in fact depends on speculation as to "the acts of third parties not before the court," they have failed to allege an Article III injury. *See Grocery Mfrs. Ass'n*, 693 F.3d at 176. Where, as here, "a plaintiff's asserted injury arises from the Government's regulation of a third party that is not before the court, it becomes 'substantially more difficult' to establish standing." *Nat'l Wrestling Coaches Ass'n v. Dep't of*

Educ., 366 F.3d 930, 938 (D.C. Cir. 2004) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992)). In such a case, "it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 562. The employer plaintiffs have not attempted to fulfill this burden, and consequently have failed to plead a concrete injury.

The employer plaintiffs also lack standing for a more fundamental reason. Any injury that the employer plaintiffs might incur would not be redressable in this action. No judgment in this action could bind the parties who are not present here, namely, the employees of the employer plaintiffs. Thus, even if this Court were to accept the plaintiffs' reading of the Internal Revenue Code and attempt to award relief in the employer plaintiffs' favor, it could not prevent those plaintiffs' employees from seeking premium tax credits. *See, e.g.*, *Youngin's Auto Body v. District of Columbia*, 775 F. Supp. 2d 1, 5 (D.D.C. 2011) (claim preclusion only bars litigation by a person in privity with a party in the prior case). Nothing would prevent the employees from seeking premium tax credits for the purchase of insurance, or from obtaining such credits from the IRS, through tax refund litigation or otherwise. And because the large employer tax assessment under Section 4980H turns on whether such a credit is allowed or paid for at least one of the employer's full-time employees, *see* 26 U.S.C. § 4980H(a), (b), the future conduct of those employees would trigger the large employer assessment, whether or not the employer gains an advance declaration of those employees' rights under the Internal Revenue Code in this proceeding. The employer plaintiffs cannot carry their burden to show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable

decision," *Lujan*, 504 U.S. at 561 (internal quotation omitted), and consequently they lack standing to pursue this action.[4]

II. The Plaintiffs Lack Prudential Standing to Pursue this Action

A. The Plaintiffs Must Show that Their Suit May Proceed under Principles of Prudential Standing

In addition to the requirement of Article III standing, a plaintiff must also demonstrate that he or she has prudential standing to invoke the jurisdiction of a federal court. The doctrine of prudential standing "embodies judicially self-imposed limits on the exercise of federal jurisdiction." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (internal quotation omitted). "Without such limitations – closely related to Art. III concerns but essentially matters of judicial self-governance – the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Id.* at 12 (internal quotation omitted). The

[4] The employer plaintiffs' claims accordingly are unlike those that were at issue in *Liberty University v. Lew*, --- F.3d ---, 2013 WL 3470532 (4th Cir. July 11, 2013). That case involved a facial challenge to the constitutionality of Section 4980H. The court reasoned that the university's allegation that it "could be subjected" to an assessment under Section 4980H did not establish its standing to challenge the provision. *Id.* at *6 n.5. The court held, however, that the university had adequately alleged an injury, at the motion to dismiss stage, by alleging that it would incur costs from "the administrative burden of assuring compliance with" Section 4980H, or by alleging that it would incur an increased cost of care. *Id*. at *7. To the extent that the court reasoned that Liberty University could create standing for itself by incurring expenses as a reasonable reaction to a risk of a possible future tax assessment, its reasoning is inconsistent with *Clapper*, 133 S. Ct. at 1151. In any event, the employer plaintiffs here could not allege a redressable injury by asserting that they would suffer an "administrative burden" of monitoring compliance with Section 4980H. The Act's recordkeeping and reporting requirements for applicable large employers, 26 U.S.C. § 6056, apply whether or not any of the employer's employees receives a premium tax credit, and thus the employer plaintiffs would not gain relief from those requirements even if they prevail on the theory that they advance here.

plaintiffs' complaint runs afoul of two principles of prudential standing. First, their claims do not "fall[] within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for [their] complaint." *Air Courier Conf. of Am. v. Am. Postal Workers Union AFL-CIO*, 498 U.S. 517, 523-24 (1991) (internal quotation omitted). Second, the claims brought by the employer plaintiffs violate "the principle that a party may not challenge the tax liability of another." *United States v. Williams*, 514 U.S. 527, 539 (1995).

B. The Plaintiffs Do Not Fall Within the Zone of Interests Protected by Section 36B of the Internal Revenue Code

The APA allows judicial review of agency action by a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. An "adversely affected or aggrieved" plaintiff must be trying to protect an interest of his or hers that is "arguably within the zone of interests to be protected" by the statutory provision that is in question. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998). Although this test "is not meant to be especially demanding," it forecloses suit when "a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (internal quotation omitted).

To analyze prudential standing, the court looks "to the particular provision of law upon which the plaintiff relies," *Bennett v. Spear*, 520 U.S. 154, 175-76 (1997), or to an "integrally related" provision, *Grocery Mfrs. Ass'n*, 693 F.3d at 179. In this case, the plaintiffs assert that the Treasury Department has violated the terms of 26 U.S.C. § 36B by extending premium tax credits to persons whom the plaintiffs contend should not be eligible for such tax relief.

Congress's purpose in enacting Section 36B is obvious: "[t]o ensure that health coverage is affordable," and "to help offset the cost of private health insurance premiums." S. REP. NO. 111-89, at 4 (2009); *see also* H. REP. NO. 111-443, vol. II, at 989 (2010). The plaintiffs here, however, are seeking to ensure that health coverage is *unaffordable*, and to ensure that the cost of private health insurance premiums is *not* offset. *See* Compl., ¶ 5 (objecting to Treasury Department's interpretation of Section 36B because it "mak[es] insurance less 'unaffordable'"). Because the plaintiffs' "interests are not consistent with the purposes of the statute in question," *Amgen, Inc. v. Smith*, 357 F.3d 103, 108-09 (D.C. Cir. 2004) (internal quotation omitted), they may not proceed under the APA to challenge the Treasury Department's reading of the statute.

Nor may the plaintiffs assert that they have prudential standing because they may be affected by provisions of the Internal Revenue Code other than Section 36B, such as Section 5000A or Section 4980H. In the context of tax litigation, the D.C. Circuit has required litigants to show that they fall within the zone of interests of the specific provision that they allege has been violated:

> The Internal Revenue Code is [an] extraordinarily complex statute which does not have a single, unified purpose. Rather, the Code is intended to accomplish a wide variety of economic and social goals and purposes. If litigants are allowed to transfer the Congressional purpose and intent embodied in one section of the Code into other contexts and situations regulated by different provisions of the Code, the possibilities for litigation would indeed be endless. We do not therefore believe that litigants can 'borrow' the arguable regulatory or protective intent embodied in one provision of the Code, and apply it to a provision where that intent is not evident, in order to satisfy the zone test. A contrary decision in this context would distort the role of the courts in relation to the legislative branch, precisely what the zone test serves to prevent, in the area of revenue collection.

Tax Analysts & Advocates v. Blumenthal, 566 F.2d 130, 141 (D.C. Cir. 1977).

Even apart from the special limitations on the zone of interests test that apply in the field of taxation, the plaintiffs do not assert an interest under any provision that is "integrally related" to Section 36B. The most that the plaintiffs can assert is that they may face assessments under Section 5000A or Section 4980H; that is, that they (arguably) would suffer an injury-in-fact from the Treasury Department's application of its interpretation of Section 36B. "But more is required to establish an 'integral relationship' … otherwise, 'the zone-of-interests test could be deprived of virtually all meaning.'" *Grocery Mfrs. Ass'n*, 693 F.3d at 179 (quoting *Fed'n for Am. Immigration Reform v. Reno*, 93 F.3d 897, 903 (D.C. Cir. 1996) (internal quotation and alterations omitted)).

In sum, the plaintiffs do not assert an interest that is protected by Section 36B, but instead an interest that is diametrically opposed to the purpose that the provision serves. They therefore lack prudential standing to bring an action under the APA to challenge the Treasury Department's interpretation of that provision.

C. The Claims of the Employer Plaintiffs Violate the Principle that a Party May Not Challenge the Tax Liability of Another

"It is well-recognized that the standing inquiry in tax cases is more restrictive than in other cases." *Nat'l Taxpayers Union v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995). The standing inquiry becomes particularly "restrictive" where a plaintiff seeks to litigate the tax liabilities of third parties who are not before the court. In that context, the courts have recognized "the principle that a party may not challenge the tax liability of another," apart from circumstances where the party stands in the shoes of the absent taxpayer. *Williams*, 514 U.S. at 539. Accordingly, the Supreme Court has expressed doubt (without directly deciding) "whether a third party ever may challenge IRS treatment of another." *Simon v. E. Ky. Welfare Rights*

Org., 426 U.S. 26, 37 (1976); *see Am. Soc'y of Travel Agents v. Blumenthal*, 566 F.2d 145, 150 n. 3 (D.C. Cir. 1977) (same). At most, the door is "barely ajar" for third party challenges in tax litigation. *Wright v. Regan*, 656 F.2d 820, 828 (D.C. Cir. 1981), *rev'd sub nom. Allen v. Wright*, 468 U.S. 737, 748-49 (1984) (closing the door). *See also Women's Equity Action League v. Cavazos*, 879 F.2d 880, 885 n.3 (D.C. Cir. 1989) (recognizing "the well-established position that, ordinarily, one may not litigate the tax liability of another").

Congress has consistently legislated with this understanding. For example, a person who is subject to a levy by the IRS to satisfy a third party's tax debt may bring a wrongful levy action to challenge the procedural validity of the IRS's action. In such a proceeding, however, "the assessment of tax upon which the interest or lien of the United Sates is based shall be conclusively presumed to be valid." 26 U.S.C. § 7426(c). Similarly, a person who owns property subject to a tax lien arising from a third party's tax debt may bring a quiet title action under 28 U.S.C. § 2410 to litigate the validity of the tax lien; the validity of the underlying tax assessment may not be questioned in that proceeding. *See, e.g., Arford v. United States*, 934 F.2d 229, 232 (9th Cir. 1991). And, in limited circumstances, a person who owns property subject to the federal tax lien may pay a third party's tax debt and bring a refund action to litigate the validity of the lien. The limitations of 26 U.S.C. § 7426(c) apply to such a suit, and consequently the plaintiff is "bound by the assessment on the property." *First Am. Title Ins. Co. v. United States*, 520 F.3d 1051, 1054 (9th Cir. 2008). In short, it is "crystal clear," even in circumstances where the challenge would affect the plaintiff's own liability to the government, that "only the taxpayer may question the assessment." *United States v. Formige*, 659 F.2d 206,

208 (D.C. Cir. 1981); *see also In re Campbell*, 761 F.2d 1181, 1185 (6th Cir. 1985) (collecting cases).

This principle applies with special force where, as here, a plaintiff seeks to *increase* the tax liabilities of third parties who are not before the court. Even if the door is "barely ajar" for plaintiffs to seek to decrease a third party's tax liability, the door should remain firmly shut for those plaintiffs who ask a federal court to impose *additional* federal tax obligations on absent parties. A court could not award such relief to a plaintiff in an APA action without inserting itself inappropriately into the process of tax administration:

> Congress has erected a complex structure to govern the administration and enforcement of the tax laws, and has established precise standards and procedures for judicial review of tax matters. Even if the plaintiffs succeeded in gaining the relief they seek [to prohibit favorable tax treatment for third parties] … the affected taxpayers, who are not parties, would remain free to challenge any deficiencies asserted. … It is obvious that the relief the plaintiffs seek, if granted, would seriously disrupt the entire revenue collection process.

Apache Bend Apartments, Ltd. v. United States, 987 F.2d 1174, 1177 (5th Cir. 1993). *See also Louisiana v. McAdoo*, 234 U.S. 627, 632 (1914) (declining to adjudicate third-party challenge to favorable tax treatment for another taxpayer, because the maintenance of such actions "would operate to disturb the whole revenue system of the government").[5]

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[5] The Internal Revenue Code expressly directs that only the Secretary of the Treasury (with the approval of the Attorney General) may institute a "civil action for the collection or recovery of taxes." 26 U.S.C. § 7401. *See also* 26 U.S.C. §§ 6402 (refund authority), 6404 (authority to abate assessments), 6406 (rendering Secretary's treatment of assessment to be final); 7121 (closing agreement authority), 7122 (compromise authority). The Code thus demonstrates a textual commitment that matters concerning the validity or amount of a taxpayer's tax debt are reserved for litigation between that particular taxpayer and the government, without interposition by third parties. Applying this principle, for example, the courts have prohibited plaintiffs from bringing *qui tam* actions to litigate other parties' tax liabilities to the federal government. *See United States ex rel. Roberts v. W. Pac. R.R. Co.,* 190 F.2d 243, 247 (9th Cir. 1951); *see also* 31 U.S.C. § 3729(d).

The employer plaintiffs, therefore, may not bring an action under the APA to seek to increase the federal tax liabilities of their employees. The employer plaintiffs' claims would impose the same logistical challenges on the federal courts as did the claim at issue in *Apache Bend Apartments*. This Court could adjudicate the employer plaintiffs' claims only by taking jurisdiction over absent parties and by adjusting the Treasury Department's treatment of those parties on a wholesale basis. Any such effort would "seriously disrupt the entire revenue collection process," 987 F.2d at 1177, and thus there are sound prudential reasons that this Court should decline to permit an APA action to proceed in this manner. Indeed, if the employer plaintiffs could bring an APA action to litigate their employees' tax liabilities, there would be no reason that they could not bring a similar action to litigate other reasons why their employees should not be eligible for Section 36B premium tax credits, such as the employees' potential eligibility for coverage under a spouse's employer-sponsored plan, 26 U.S.C. § 36B(c)(2)(B), their status as the dependent of another taxpayer, 26 U.S.C. § 36B(c)(1)(D), or any other reason. The APA does not contemplate such interference with the "administration and enforcement of the tax laws," *Apache Bend Apartments*, 987 F.2d at 1177, and consequently the employer plaintiffs lack prudential standing to seek to litigate the tax liabilities of parties not before this Court.

III. This Action Is Not Ripe

Even if the plaintiffs could show that they had both constitutional and prudential standing, they could not justify bringing suit at this time, given that the Treasury Department has promulgated a regulation, but has not yet applied that regulation to the plaintiffs' circumstances. Their claims therefore are not ripe. The ripeness doctrine is "'drawn both from Article III

limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'" *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) (quoting *Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 57 n.18 (1993)). The doctrine serves "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967). The doctrine recognizes the principle that "federal courts may exercise power only in the last resort and as a necessity." *Allen v. Wright*, 468 U.S. 737, 752 (1984) (internal quotation omitted). Thus, "[r]efusing to involve the courts in ongoing administrative matters both protects judicial resources and comports with the judiciary's role as the governmental branch of last resort." *In re Aiken County*, 645 F.3d 428, 434 (D.C. Cir. 2011); *see also Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 386-87 (D.C. Cir. 2012). "Put simply, the doctrine of prudential ripeness ensures that Article III courts make decisions only when they have to, and then, only once." *Am. Petroleum Inst.*, 683 F.3d at 387.

In determining whether a case is prudentially ripe, the court looks to two issues: first, the "'fitness of the issues for judicial decision,'" and, second, "the extent to which withholding a decision will cause 'hardship to the parties.'" *Id.* (quoting *Abbott Labs*., 387 U.S. at 149). "The fitness requirement is primarily meant to protect the agency's interest in crystallizing its policy before that policy is subjected to judicial review and the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting." *Id.* The fitness element looks to "'(1) whether the issue is purely legal, rather than one reliant on agency

expertise, (2) whether the challenged action is final, and (3) whether the impact upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review.'" *Marcum v. Salazar*, 694 F.3d 123, 129 (D.C. Cir. 2012) (quoting Harry T. Edwards & Linda A. Elliott, *Federal Standards of Review* 119–20 (2007)) (internal quotations omitted). "In other words, the fitness of the issue for judicial review turns on whether a court's consideration of the case would benefit from further factual development and whether judicial intervention would inappropriately interfere with further administrative action." *Id.* If a case is not fit for resolution, a plaintiff can proceed under the second element of the ripeness test only by demonstrating that the hardship caused by the deferral of review is "immediate and significant." *Devia v. NRC*, 492 F.3d 421, 427 (D.C. Cir. 2007) (internal quotation marks omitted).

Under these principles, the plaintiffs have failed to show that their claims are ripe. The plaintiffs have not yet been subject to any tax assessments. No "administrative decision has been formalized" with respect to the plaintiffs, and it is possible that the question they seek to litigate here will never arise with respect to them. *Abbott Labs.*, 387 U.S. at 148-49. This is a case where the "administrative process" of any potential tax assessments should be permitted "to reach its end [to] solidify or simplify the factual context and narrow the legal issues at play, allowing for more intelligent resolution of any remaining claims and avoiding inefficient and unnecessary piecemeal review." *Am. Petroleum Inst*., 683 F.3d at 387 (internal quotations omitted).

Nor can the plaintiffs demonstrate hardship. As to the employer plaintiffs, Section 4980H will not take effect until 2015, twenty months after this suit was filed. The employer

plaintiffs thus do not face any "immediate and significant" hardship from the deferral of review. *Devia*, 492 F.3d at 427.[6] Although these plaintiffs assert that they need to engage in financial planning given the possibility of a future Section 4980H tax assessment, any such expenses "are not expenses of the kind sufficient by itself to justify review in a case that would otherwise be unripe." *Sprint Corp. v. FCC*, 331 F.3d 952, 958 (D.C. Cir. 2003) (internal quotation omitted).

The individual plaintiffs cannot demonstrate any hardship, either, because their claims concern a request for a benefit, an exemption from the minimum coverage provision. The Supreme Court has prohibited plaintiffs from seeking pre-application review of rules governing the conditions for the award of such benefits. *See Catholic Social Servs.*, 509 U.S. at 57-61. In other words, the Court has precluded "pre-application judicial review of any rule that purports to describe criteria for obtaining any form of government benefit, *e.g.*, social security, veterans benefits, any license, *or exemption from any regulatory obligation*." 2 Richard J. Pierce, Jr., *Administrative Law Treatise* § 15.14 (5th ed. 2010) (emphasis added). The individual plaintiffs thus do not suffer any hardship that is cognizable under ripeness doctrine that could permit them to pursue their claims now.

IV. The Plaintiffs Must Proceed Under the Form of Proceeding That Congress Specified

Although the APA generally provides for judicial review of agency action, it does not create a cause of action in cases where Congress has specified other judicial review procedures. In such cases, "[t]he form of proceeding for judicial review is the special statutory review

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[6] Indeed, the plaintiffs themselves expressed their understanding of this point, in a filing that they made in this case at a time when they understood that Section 4980H would take effect in 2014. "But, of course, no plaintiff could have established standing in *May 2012* to challenge a regulation that does not take effect until *January 2014*." Pls.' Opp. to Mot. to Defer S.J. Briefing (ECF 19) at 5 (emphasis in original).

proceeding relevant to the subject matter in a court specified by statute," unless the statutorily specified review proceeding is "inadequa[te]." 5 U.S.C. § 703. Similarly, under 5 U.S.C. § 704, "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. Congress has specified the judicial remedy that is available for the plaintiffs here – an action for a tax refund. That remedy is adequate, and as a result, the plaintiffs must bring their claims in that proceeding, and not in this APA action.

The APA "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) (quoting Attorney General's Manual on the Administrative Procedure Act 101 (1947)). "When Congress enacted the APA to provide a general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies." *Id.*; *see also Darby v. Cisneros*, 509 U.S. 137, 146 (1993).

The plaintiffs here seek to preclude the possibility that they will be assessed for a liability under Section 5000A or Section 4980H of the Internal Revenue Code. Congress has specified that a tax refund suit is the form of proceeding that a plaintiff must follow to dispute his or her liability for such assessment. The district courts have jurisdiction to hear "[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. Before bringing such a suit, the

taxpayer "must comply with the tax refund scheme established in the Code," *United States v. Clintwood Elkhorn Mining Co*., 553 U.S. 1, 4 (2008), including the requirements that the tax has been assessed, that the taxpayer has made payment in full, and that he or she has filed an administrative claim for a refund before bringing suit. *See United States v. Dalm*, 494 U.S. 596, 609-10 (1990). Congress thus has specified the form of proceeding that the taxpayer must follow "in an unusually emphatic form." *Clintwood Elkhorn Mining Co*., 553 U.S. at 7 (internal quotation omitted). Indeed, the Supreme Court has observed that "we cannot imagine what language could more clearly state that taxpayers seeking refunds of unlawfully assessed taxes must comply with the Code's refund scheme before bringing suit[.]" *Id*. at 8.[7]

Moreover, Congress took care to specify that the sort of claims that the employer plaintiffs seek to advance here should be brought instead in the context of a refund action. "The Secretary shall prescribe rules … for the *repayment* of any assessable payment (including interest) if such payment is based on the allowance or payment of an applicable premium tax credit or cost-sharing reduction with respect to an employee, such allowance or payment is subsequently disallowed, and the assessable payment would not have been required to be made but for such allowance or payment." 26 U.S.C. § 4980H(d)(3) (emphasis added). The statute

[7] As noted, the plaintiffs have suggested (but have not pled in their complaint) that some unnamed individual plaintiffs wish to receive a certificate of exemption from the minimum coverage provision in order to obtain coverage under a catastrophic plan. Pls.' Opp. to Mot. to Defer S.J. Briefing (ECF 19) at 2. Those plaintiffs must at least follow the procedures specified by statute, 42 U.S.C. § 18081, to present their request for a certificate of exemption to the Exchange, and to take an administrative appeal of any denial of their request, under administrative appeal procedures that have not yet been finalized, before proceeding in federal court on that claim. "[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Ass'n of Flight Attendants-CWA v. Chao*, 493 F.3d 155, 158 (D.C. Cir. 2007) (quoting *Myers v. Bethlehem Shipbuilding Corp*., 303 U.S. 41, 50-51 (1938)).

thus directly contemplates that the employer's remedy, in a case where its employee's Section 36B tax credit is disallowed, will arise after the employer's *payment* of the tax owed. That is, the employer must proceed in a refund action, as would any other taxpayer.

Moreover, a tax refund action plainly would afford the plaintiffs here adequate relief – payment in full, with interest, of any overpayment of their federal tax obligations, if they ultimately prevail. "[T]he alternative remedy need not provide relief identical to relief under the APA, so long as it offers relief of the same genre." *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009) (internal quotation omitted). And "where a statute affords an opportunity for *de novo* district-court review, the court has held that APA review was precluded because Congress did not intend to permit a litigant challenging an administrative denial to utilize simultaneously both the review provision and the APA." *El Rio Santa Cruz Neighborhood Health Ctr. v. U.S. Dep't of Health & Human Servs.*, 396 F.3d 1265, 1270 (D.C. Cir. 2005) (internal quotation and alterations omitted). Tax refund actions are *de novo* proceedings in the district courts. *See Democratic Leadership Council v. United States*, 542 F. Supp. 2d 63, 70 (D.D.C. 2008). Thus, it may not be presumed that Congress intended a taxpayer to proceed both in a refund action and in a pre-enforcement APA action, and this APA suit is barred.

The D.C. Circuit has reasoned that a tax refund action was not an adequate remedy in a "*sui generis*" suit where the plaintiffs challenged the "adequacy of the agency procedure itself, such that the question of the adequacy of the administrative remedy is for all practical purposes identical with the merits of the plaintiff's lawsuit." *Cohen v. United States*, 650 F.3d 717, 732, 733 (D.C. Cir. 2011) (internal quotation and alterations omitted). The court, clarified, however, that its reasoning could apply only in "cases pertaining to final agency action unrelated to tax

assessment and collection." *Id.* at 733. The plaintiffs here do not bring any procedural challenge to the adequacy of the IRS's refund procedures, but instead directly challenge the substantive standards for the assessment and collection of taxes. Their claims accordingly may not proceed under the APA.

V. The Anti-Injunction Act Bars the Employer Plaintiffs' Claims

This Court lacks jurisdiction over the employer plaintiffs' claims for an additional reason. The employer plaintiffs bring their claims for the purpose of precluding the assessment or collection of any Section 4980H tax assessment against them. The Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421, divests this Court of jurisdiction to award such relief. The AIA provides that, with statutory exceptions inapplicable here, "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 principal purpose of the Act is to protect the federal government's ability to assess and collect taxes expeditiously with "a minimum of preenforcement judicial interference" and "'to require that the legal right to the disputed sums be determined in a suit for refund.'" *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974) (quoting *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7 (1962)). "Because of the Anti-Injunction Act, taxes can ordinarily be challenged only after they are paid, by suing for a refund." *NFIB*, 132 S. Ct. at 2582.[8]

In *NFIB*, the Supreme Court held that the Anti-Injunction Act does not bar a pre-enforcement challenge to the minimum coverage provision. In so ruling, the Court relied

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[8] The Declaratory Judgment Act also excepts from its coverage suits for declaratory relief "with respect to Federal taxes." 28 U.S.C. § 2201. The D.C. Circuit interprets the tax exception in the Declaratory Judgment Act to be "co-terminous" with the AIA. *Cohen*, 659 F.3d at 730.

on the "text of the pertinent statutes." *NFIB*, 132 S. Ct. at 2582. The Court stressed that the AIA "applies to suits 'for the purpose of restraining the assessment or collection of any *tax*.'" *Id.* (quoting 26 U.S.C. § 7421(a)) (Supreme Court's emphasis). "Congress, however, chose to describe the '[s]hared responsibility payment' imposed on those who forgo health insurance not as a 'tax,' but as a 'penalty.'" *Id.* at 2583 (quoting 26 U.S.C. § 5000A(b), (g)(2)). The Court reasoned that "Congress's decision to label this exaction a 'penalty' rather than a 'tax' is significant because the Affordable Care Act describes many other exaction it creates as 'taxes.'" *Id.* (citation omitted).

This reasoning leaves no doubt that the AIA bars the employer plaintiffs' pre-enforcement challenge to the application of Section 4980H against them. In contrast to the minimum coverage provision, Congress repeatedly used the term "tax" to describe the amount that an applicable large employer will owe the IRS under the conditions described in the statute. Section 4980H(b)(2) places a cap on the "aggregate amount of tax" that an employer may owe under that provision. Section 4980H(c)(7) provides that the "tax imposed by" Section 4980H is "nondeductible." And Section 4980H(c)(7) cross-references 26 U.S.C. § 275(a)(6), which provides that no tax deduction is allowed for "[t]axes imposed by chapters 41, 42, 43, 44, 45, 46, and 54" of the Internal Revenue Code. The "tax" imposed by the employer responsibility provision is nondeductible because it is one of the "[t]axes imposed by" chapter 43. *Id.* Moreover, elsewhere in the Affordable Care Act, Congress again explicitly referred to the "tax imposed by section 4980H of Title 26." 42 U.S.C. § 18081(f)(2). Given that the Anti-Injunction Act applies to "any tax," 26 U.S.C. § 7421(a), the express characterization of the

large employer tax as a "tax" leaves no doubt that the Anti-Injunction Act precludes the employer plaintiffs' claims here.

Section 4980H does also use the term "assessable payments," and in one instance the term "assessable penalties," to refer to the amounts that may be owed under that provision. One court has relied on these terms to conclude that "Congress did not intend the exaction to be treated as a tax for purposes of the AIA." *Liberty Univ.*, --- F.3d ---, 2013 WL 3470532, at *5. But Congress's use of synonymous terms does not erase the fact that Congress explicitly described the Section 4980H exaction as a "tax," thereby demonstrating its understanding that the exaction would be treated as a "tax" for other statutory purposes under the Internal Revenue Code, including the AIA. The Fourth Circuit in *Liberty University* also reasoned that it could not find a reason why the minimum coverage provision and Section 4980H should be treated differently for purposes of the AIA. *Id.* at *6. But Section 4980H, unlike the minimum coverage provision, is enforceable by levies and by the filing of notices of liens. *Compare* 26 U.S.C. § 5000A(g) (limiting summary collection powers for the minimum coverage provision penalty) *with* 26 U.S.C. § 4980H(d) (imposing no similar limitations). Certainly, where Congress intended that an exaction be collectible by these summary administrative measures, it did not intend also to defeat that purpose by permitting pre-enforcement suits to restrain that collection. *See generally United States v. Am. Friends Serv. Comm.*, 419 U.S. 7, 10 (1974).

A ruling in the employer plaintiffs' favor "would necessarily preclude" the Treasury Department from assessing or collecting the Section 4980H tax penalty. *Bob Jones Univ.*, 416 U.S. at 731-732. Accordingly, the Anti-Injunction Act bars the employer plaintiffs' premature effort here to restrain the enforcement of the Section 4980H tax assessment.

VI. In the Alternative, the Employer Plaintiffs' Claims Should Be Dismissed for Failure to Join Indispensable Parties

In the alternative, even if the employer plaintiffs could demonstrate that they have alleged a redressable injury-in-fact, and if they could overcome the numerous other threshold barriers to their claims, those claims should be dismissed under Rule 12(b)(7), given the absence of parties who are indispensable to the adjudication of the employer plaintiffs' claims here – the employees of those plaintiffs. The employer plaintiffs seek to extinguish the rights of their employees to receive premium tax credits under 26 U.S.C. § 36B. Those employees have an obvious interest in a proceeding that seeks to determine their future eligibility to receive those premium tax credits. Because those employees are absent from this forum, and because they cannot be joined to an action in this forum, the complaint cannot proceed here for the absence of indispensable parties under Federal Rule of Civil Procedure 19.

Under Rule 19, the court engages in a three-part inquiry. First, the court must find whether a party is required to be joined under Rule 19(a). Second, the court must determine whether that party can feasibly be joined. Third, the court must determine "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). *See Republic of Philippines v. Pimentel*, 553 U.S. 851, 862 (2008). The employees of the employer plaintiffs are indispensable under this test.

First, the employees are required to be joined because "the court cannot accord complete relief" to the employer plaintiffs in their absence. Fed. R. Civ. P. 19(a)(1)(A). As noted, the large employer tax assessment will apply to applicable large employers that fail to offer adequate coverage to their full-time employees and their dependents, if one or more of their full-time employees is allowed a premium tax credit for the purchase of coverage on an Exchange. *See*

26 U.S.C. § 4980H(a)(2), (b)(1). The employer plaintiffs' claims depend, then, on a ruling that their full-time employees are not eligible to receive these premium tax credits. Those employees must be joined in this action in order for the plaintiffs to gain complete relief under their theory because, in their absence, this Court may not deny them their right to obtain premium tax credits. For the same reason, the defendants would be "subject to a substantial risk of incurring … inconsistent obligations" in those employees' absence. Fed. R. Civ. P. 19(a)(1)(B)(ii). One or more of the plaintiffs' employees could separately sue, in a forum where jurisdiction and venue is proper, to recover premium tax credits to which they contend they are entitled. As noted above, any judgment in this action would not bind those employees. Accordingly, the defendants could face conflicting obligations from different courts. *See, e.g., Wach v. Byrne, Goldenberg & Hamilton, PLLC*, 910 F. Supp. 2d 162, 169 (D.D.C. 2012).

Second, the employees cannot feasibly be joined in this Court, as it appears that personal jurisdiction is lacking here. The employees lack the requisite minimum contacts with this district that could support personal jurisdiction under either the specific jurisdiction test or the general jurisdiction test. The employer plaintiffs and their employees are located in Texas, Kansas, and Missouri. Compl., ¶¶ 16-18. There is no reason to believe that those employees have "purposefully directed [their] activities at residents of [this] forum," let alone that this suit resulted from an "alleged injury that arises out of or relates to those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (internal quotation omitted). Thus, specific jurisdiction is lacking. Nor is there any reason to believe that the employees have contacts with the District of Columbia that are "so continuous and systematic as to render them essentially at home [here]." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011)

(internal quotation omitted). Thus, general jurisdiction is lacking. Because there is no personal jurisdiction over these employees, then, they cannot feasibly be joined here.

Third, the employees are so important to the employer plaintiffs' claims that the action cannot in equity and good conscience proceed in their absence. For the reasons described above, a judgment rendered in the employees' absence might prejudice them. *See, e.g., Kickapoo Tribe v. Babbitt*, 43 F.3d 1491, 1497-98 (D.C. Cir. 1995). The employees would certainly suffer prejudice from any judgment that purports (incorrectly, in the defendants' view) to determine their eligibility for substantial federal tax credits, without their participation. Further, that prejudice cannot be lessened or avoided. Because the employer plaintiffs' liability (if any) for the large employer tax assessment is triggered when one or more of their full-time employees receives a premium tax credit, those plaintiffs cannot gain relief under their theory without extinguishing those employees' eligibility for the premium tax credits. The judgment could not be adequate, given that the employees could relitigate their claims for the premium tax credits without being bound by a judgment in this action. Finally, as noted, Congress has provided a different, exclusive, and adequate remedy for the employer plaintiffs to litigate their federal tax liabilities, namely, a tax refund action under 28 U.S.C. § 1346. Each of the four factors identified in Rule 19(b) thus weighs in favor of a finding that the employees are indispensable parties, without whom this action could not proceed.[9] Because those employees could not be joined to an action in this district, the complaint should be dismissed.

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[9] Indeed, one set of plaintiffs has already been warned by a federal court that their claims likely could not proceed in the absence of their employees. GC Restaurants and its affiliated entities attempted to intervene in another pending action raising similar claims. The court in that action denied the motion for intervention on timeliness and venue grounds, and also cautioned that the plaintiffs' employees (who were absent there as they are here) would likely be

Conclusion

For the foregoing reasons, the defendants respectfully request that the complaint be dismissed for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rule of Civil Procedure and for failure to state a claim pursuant to Rule 12(b)(6) of those rules. In the alternative, the defendants respectfully request that the complaint be dismissed for failure to join indispensable parties pursuant to Rule 12(b)(7) of the Federal Rules of Civil Procedure.

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necessary to a resolution of the plaintiffs' claims. Order (ECF 59), *Oklahoma v. Sebelius*, No. 6:11-cv-00030, at 3-4 (E.D. Okla. Mar. 4, 2013). These plaintiffs' second attempt to proceed in the absence of their employees should be rejected.