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

FAULK COMPANY, INC.,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	**CIVIL ACTION NO. 4:24-CV-00609-P**
	§	
UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, XAVIER BECERRA, in his official capacity as Secretary of HHS, and CHIQUITA BROOKS-LASURE, in her official capacity as Administrator of CMS,	§	
	§	
Defendants.	§	

PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION TO DISMISS AND BRIEF IN SUPPORT

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Plaintiff Faulk Company, Inc. ("Faulk Company") files this Response to Defendants' Motion to Dismiss and Brief in Support and would show the Court as follows:

WITHDRAWAL OF COUNT II

Faulk Company concedes the Government's arguments with respect to Count II and will amend its complaint to remove it. As for the rest of Defendant's Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim Upon Which Relief Can be Granted (ECF No. 15), Faulk Company would respectfully request that the Court deny the Motion.

INTRODUCTION

While the full story is yet to be told, the narrative of Faulk Company's complaint is presented in two chapters. Those chapters are related, for sure, but the storylines, the characters and the resolutions of those chapters are different. In evaluating the United States' and the United States Department of Health and Human Services' motion to dismiss, we urge this Honorable Court to take in and consider each chapter separately.

The central character in both chapters is Faulk Company, which, like other medium-sized businesses in low-margin service industries, suffered a grave injustice brought about by two other characters, the United States Department of Health and Human Services ("HHS") and the United States Treasury Department ("Treasury"). While they conspired together on the scheme, HHS and Treasury acted independently. *See* 78 Fed. Reg. 4593, 4636 (Jan. 22, 2013); 79 Fed. Reg. 8544, 8566 (Feb. 12, 2014). HHS laid the trap, and Treasury sprung it. By and through its complaint, Faulk Company asks this Court to hold each agency accountable within the framework for such accountability established by the Founders in the Constitution, by Congress in the United States Code and by the Supreme Court of the United States in the judicial precedents it has set.

ARGUMENTS AND AUTHORITIES

I. Congressional Mandates, a Bogus HHS Regulation and Abandonment of Due Process (Counts III & IV)

The Affordable Care Act is an enormous piece of legislation with a difficult, and in many respects absent, legislative history. *See* John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 105 L. Libr. J. 131, 133-35 (2013). It is not, however, lacking in detail. Among its provisions was (1) the creation of a health insurance exchange (sometimes referred to in the literature as a "marketplace") offering individual health insurance policies; (2) government-funded subsidies for certain qualifying individuals seeking coverage on the exchange in the form of both advance tax credits for exchange coverage premiums and cost-sharing reductions paid directly to insurance carriers; (3) a mandate that individuals have health insurance or else pay a tax (which Congress later defunded in 2017 effective January 1, 2019); and (4) a mandate that businesses as small as those employing only 50 full-time equivalent employees provide their full-time employees health insurance or else pay an excise tax if one or more of them obtain coverage from the aforementioned health insurance exchange and receive an aforementioned government-funded subsidy. *See* 42 U.S.C. §18031; Vanessa C. Forsberg, *Overview of Health Insurance Exchanges,* C.R.S. Doc. No. R44065, at 1, 16-17 (2023); Bernadette Fernandez, *Health Insurance Premium Tax Credit and Cost-Sharing Reductions*, C.R.S. Doc. No. R44425, at 2-4 (2024); Ryan J. Rosso, *The Individual Mandate for Health Insurance Coverage: In Brief*, C.R.S. Doc. No. R44438, at 1-4 (2020); Ryan J. Rosso, *The Affordable Care Act's (ACA's) Employer Shared Responsibility Provisions (ESRP)*, C.R.S. Doc. No. R45455, at 1 (2019).

The employer mandate—more technically referred to as the employer shared responsibility provisions or "ESRP"—drives certain behavior through an excise tax. 26 U.S.C. § 4980H. The

ESRP excise tax is potentially huge, and what's more, Treasury's implementation of the ESRP excise tax is incredibly complicated. Today, if a business with only 50 full-time equivalent employees fails to provide just the right kind of health insurance (*see* 26 C.F.R. § 1.5000A-2) in just the right way (*see id.* § 54.4980H-4(b)) to 95% of just the right kind of employees—i.e., those qualifying under Treasury's 16,663-word[1] definition of the 3-word phrase, "full-time employees" (*see id.* § 54.4980H-3)—the employer would owe an excise tax of $12,375 per month or $148,599 for the 12 months of 2024.[2] An employer with 500 employees would owe nearly $1.5 million. While those figures may not seem like a lot, for a low-margin service-industry business that cleans schools or supplies nurses for hospitals or provides home health care, it is enough to put that business out of business.

Crafting the employer mandate in the form of an excise tax, and cognizant of the magnitude of this new excise tax it authored,[3] Congress mandated two sets of strict due process for the benefit of employers. 42 U.S.C. § 18081(f)(2)(A). (Section 1411 of the ACA was codified at 42 U.S.C. § 18081.) Congress created one set of due process requirements for employers when their employees sought advance determination and payment of government-funded subsidies for individual coverage, which process was to be administered by HHS and by the state exchanges under HHS's ultimate authority. *Id.* §§ 18081(e)(4)(C); 18081(f)(2)(A)(i), (ii). Congress then mandated a second set of due process requirements for the assessment and collection of the excise tax itself, which is to be administered by Treasury. *Id.* § 18081(f)(2)(A); *see also, e.g.*, 26 U.S.C. § 7803(a)(3)(E),

[1] Word count excludes headings and subsection numbers, which account for an additional 1,000 words.

[2] The statutory penalty is inflation-adjusted. 26 U.S.C. § 4980H(c)(5); Rev. Proc. 2023-17.

[3] The Congressional Budget Office score provided to Congressional leadership for the ACA legislation that Congress would pass just 3 days later estimated that the employer mandate would generate approximately $10 billion per year after the first few years of exchange operation. Congressional Budget Office, Letter to Speaker of the House Nancy Pelosi (Mar. 20, 2010), *available at* https://www.cbo.gov/sites/default/files/111th-congress-2009-2010/costestimate/amendreconprop.pdf.

(e)(4). In Section 1411, Congress made it exceptionally clear that the HHS- and exchange-administered due process required in Section 1411 was to be separate from the Treasury-administered due process for excise taxes. Congress did not make provision for any agency to combine or delegate them.

The due process required by Section 1411 of the ACA was extremely important to Congress. More than just mandate that it happen, Congress commanded HHS to study it and report back no later than January 1, 2013, specifically requiring that the rights of employers be studied separate and apart from the rights of employees. *Id.* §§ 18081(i)(1)(B), (i)(2). It appears HHS never conducted such a study and never reported back.

Employer due process was apparently so important to Congress that it not only mandated two separate sets of due process and required that HHS study and report back on the employer notice and appeal process of Section 1411, but it also took the extraordinary step of making that due process part of the corporate privilege that it decided to tax as an excise. 26 U.S.C. §§ 4980H(a)(1), 4980H(b)(1)(A) (both stating that the excise tax is assessable upon a corporate privilege only when there has been a "certifi[cation] to the employer under Section 1411" of the ACA). Congress chose to put the employer mandate, Code Section 4980H, under Subtitle D of Title 26, which is the subtitle for excise taxes. *See generally* 26 U.S.C. §§ 4001-5000D, et seq. (titled, "Miscellaneous Excise Taxes"). This drafting choice is important. "Excises are taxes laid upon the manufacture, sale, or consumption of commodities within the country, upon licenses to pursue certain occupations and upon corporate privileges; the requirement to pay such taxes involves the exercise of the privilege, and if business is not done in the manner described, no tax is payable." *Flint v. Stone Tracy Co.*, 220 U.S. 107, 110 (1911).

An excise tax is only assessable if certain widgets are made or a certain privilege is exercised, and here Congress chose to describe the taxable privilege—the manner of doing business—through two straightforward if-then statements, each with two antecedent conditions.

> If (1) any applicable large employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and (2) at least one full-time employee of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act 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, then there is hereby imposed on the employer an assessable payment equal to the product of the applicable payment amount [(i.e., 1/12 of $2,000)] and the number of individuals employed by the employer as full-time employees during such month.

26 U.S.C. § 4980H(a).

> If (A) an applicable large employer offers to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and (B) 1 or more full-time employees of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act 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, then there is hereby imposed on the employer an assessable payment equal to the product of the number of full-time employees of the applicable large employer described in subparagraph (B) for such month and an amount equal to 1⁄12 of $3,000.

Id. § 4980H(b)(1). In both parts of the ESRP excise tax, Congress described the taxable manner of doing business as having two components. Only the first—whether to offer minimum essential coverage (*id.* § 4980H(a)(1)) or not (*id.* § 4980H(b)(1)(A))—concerns the business itself. The second—whether "1 or more full-time employees … has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled [in exchange coverage] with respect to which a [subsidy] is allowed or paid with respect to the employee"—concerns the conduct of HHS. This is because Section 1411, codified in Title 42, The Public Health

and Welfare, expressly provides that HHS, and the exchanges under HHS' ultimate authority, is to carry it out.

Instead of carrying out the Congressionally-mandated due process, though, HHS took it upon itself to ignore Congress and rewrite the ACA so as to absolve itself of any responsibility for employer due process, all while encouraging Treasury to assess the excise taxes anyway. On July 15, 2013, HHS issued a second set of final regulations implementing the exchanges, adding a new subsection to the regulation that implemented, among other things, the employer notice and appeal requirements of Section 1411:

> As part of its determination of whether an employer has a liability under section 4980H of the Code, the Internal Revenue Service will adopt methods to certify to an employer that one or more employees has enrolled for one or more months during a year in a QHP for which a premium tax credit or cost-sharing reduction is allowed or paid.

45 C.F.R. § 155.310(i). In its explanation of this new subsection, HHS made it very clear that the purpose of this new subsection was to sidestep the employer due process requirements Congress created in Section 1411:

> Section 4980H of the Code limits the employer's liability for payment under that provision when the employer offers coverage to one or more full-time employees who are "certified to the employer under section 1411" as having enrolled in a QHP through the Exchange and for whom an applicable premium tax credit or cost-sharing reduction is allowed or paid. We propose to add new paragraph (i) regarding a certification program pursuant to the Secretary's program for determining eligibility for advance payments of the premium tax credit and cost-sharing reductions in accordance with section 1411(a) of the Affordable Care Act. *This certification program is distinct from the notification specified in section 1411(e)(4)(B)(iii) and paragraph (h).*
>
> In new § 155.310(i), we propose that the certification to the employer will consist of methods adopted by the Secretary of Treasury as part of the determination of potential employer liability under section 4980H of the Code. In this manner, the certification program will address not only individuals on whose behalf advance

> payments of the premium tax credit and cost-sharing reductions are provided, but also individuals claiming the premium tax credit only on their tax returns.

78 Fed. Reg. 4593, 4636 (Jan. 22, 2013) (emphasis supplied).

Congress did not give HHS the authority to "add … a certification program pursuant to the Secretary [of HHS]'s program … consisting of methods adopted by the Secretary of Treasury." *Id.* In crafting Section 1411, Congress began by establishing that the buck stops with HHS. 42 U.S.C. §§ 18081(a) ("The Secretary [of HHS] shall establish a program meeting the requirements of this section"). Then, Congress permitted HHS to make certain specific delegations to state agencies running state-based exchanges, and Congress vested other, limited direct authority in those exchanges. 42 U.S.C. §§ 18081(d), (e)(4), (f)(2)(A)(i). The only conceivable delegation that Congress permitted HHS to make to Treasury is the hearing of appeals of an *individual's* eligibility for government-funded exchange subsidies, which can be heard by "one of such other Federal officers.". *Id.* § 18081(f)(1). Congress did not permit HHS or any exchange to make any delegation of their employer-related functions whatsoever. This regulation was, quintessentially, a delegation, and the statute Congress wrote does not allow for it.

Moreover, this HHS regulation is contrary to both 4980H and ACA Section 1411. Nothing in Section 1411—or any other provision of the ACA in Title 42—authorizes HHS to create a certification program that is outside of the functions Congress gave to HHS in Section 1411. Neither is it authorized under Code Section 4980H because Congress never gave HHS any rulemaking or administrative authority with respect to Title 26.

Now the story takes an interesting turn. Only a few months after HHS finalizes its due-process-sidestepping regulation, Congress doubled down on ACA subsidy due process, going so far as to prohibit HHS from doling out subsidies until it certifies to Congress that it had properly implemented all the due process requirements of Section 1411. In the Continuing Appropriations

Act, 2014, Congress commanded HHS (again) to "ensure [exchanges] verify that individuals applying for [subsidies] are eligible … consistent with the requirements of section 1411 of [the ACA]." Continuing Appropriations Act, 2014, Pub. L. 113-46 (Oct. 17, 2013), at § 1001(a). Congress went further, though: "prior to making such [subsidies] available, the Secretary [of HHS] shall certify to the Congress that the Exchanges verify such eligibility consistent with the requirements of such Act." *Id.* As before, Congress required HHS to provide to Congress no later than January 1, 2014, "a report that details the procedures employed by [exchanges] to verify eligibility for [subsidies] described in subsection (a)," which is doubtless a reference to the prior subsection's statement, "consistent with the requirements of section 1411 of [the ACA]." *Id.* § 1001(b). What's more, Congress also commanded the Inspector General of HHS to "submit to the Congress a report regarding the effectiveness of the procedures and safeguards provided under the [ACA] for preventing the submission of inaccurate or fraudulent information by applicants." *Id.* § 1001(c).[4] The integrity of the exchange subsidy program was clearly a concern of Congress, and from a very basic review of the entire text of Section 1411 it is similarly clear that Congress considered the employer notice and appeal processes to be an integral part of ensuring that integrity.

Rather than take its cue, HHS again thumbed its nose at Congress. Not only does it appear HHS never certified anything to Congress and never reported back, but HHS also continued to charge forward with enabling Treasury to penalize employers notwithstanding the complete lack of required due process. In late 2015, CMS announced in subregulatory FAQ guidance that it

[4] OIG did issue this report, and in addition to laying bare the incredible failures of HHS to ensure exchange subsidies were being administered properly, it details the exchanges' subsidy eligibility determination processes. Upon close review, there are *no employer notice or appeal processes whatsoever. See* Daniel R. Levinson, Not All Internal Controls Implemented by the Federal, California and Connecticut Marketplaces Were Effective in Ensuring that Individuals Were Enrolled in Qualified Health Plans According to Federal Requirements, Dept. of Health and Human Services Office of Inspector General (Jun. 2014), *available at* https://oig.hhs.gov/documents/audit/9388/A-09-14-01000-Complete%20Report.pdf.

would not be sending the notices to employers required by Section 1411 for 2015 with respect to the federal exchange and it would only be issuing those notices in 2016 to "certain employers,"[5] all the while suggesting that employers would nevertheless be liable for excise taxes under 4980H. *See* Centers for Medicare & Medicaid Services, U.S. Dept. of Health and Human Services, "Frequently Asked Questions Regarding the Federally-Facilitated Marketplaces' (FFM) Employer Notice Program" (Sept. 18, 2015), *available at* https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/Employer-Notice-FAQ-9-18-15.pdf ("The IRS will independently determine any liability for an employer shared responsibility payment *without regard to whether the [exchange] issued a notice or the employer engaged in any appeals process*" (emphasis supplied)).

Entirely ignoring its multiple Congressional mandates and unlawfully punting to Treasury any "certifi[cation] to the employer under Section 1411," HHS and the exchanges marched along handing out subsidies that would eventually trigger employer excise taxes under 4980H, all without any notice or opportunity for appeal. For Faulk Company, HHS started laying the trap in November 2018 when Faulk Company employees first began applying for and receiving subsidized exchange coverage, but Faulk Company would only learn of this 3 years later in December of 2021 when it received IRS Letter 226-J. Appendix in Support of Defendant's Motion to Dismiss, pp. APP-001, APP-004.[6] Despite having been provided no prior notice or opportunity for appeal, IRS Letter 226-J made the bold statement that it constituted a certification "under

[5] A Congressional Research Service report shows that in fact only 470,000 notices were issued to employers in 2016. Julie M. Whittaker, *The Affordable Care Act (ACA): Notifying an Employer of a Potential Shared Responsibility Payment (ESRP)*, C.R.S. Doc. No. IN10904, at 2 (2018). We believe the federal exchange employer notice and appeal program was completely shut down after 2016.

[6] Letter 226-J disclosed that 8 employees had subsidized coverage in January 2019, and presumably at least some of them applied for this coverage during exchange open enrollment that occurred between November 1 and December 15, 2018. *See* Centers for Medicare & Medicaid Services, Fact Sheet: Federal Health Insurance Exchange 2019 Open Enrollment, *available at* https://www.cms.gov/newsroom/fact-sheets/federal-health-insurance-exchange-2019-open-enrollment.

Section 1411 of the Affordable Care Act" (*id.* at p. APP–001), which, as has been discussed previously, was codified in Title 42, not Title 26, and which requires extensive due process administered by HHS and the exchanges that Congress did not authorize HHS to delegate to Treasury. In later correspondence, IRS would expressly state that its authority for asserting that Letter 226-J constituted "certifi[cation] to the employer under Section 1411" was the due-process-sidestepping HHS regulation 45 C.F.R. § 155.310(i). Appendix in Support of Plaintiff's Response to Defendant's Motion to Dismiss, p. APP-009.

HHS had no authority to issue that regulation; it is contrary to Section 1411; and in issuing it HHS provided no cogent rationale, utterly failing to consider important aspects of the problem—namely all the due process Congress made clear was important. Accordingly, Counts III and IV of Faulk Company's complaint ask this Court to set aside the regulation as invalid.

A. Faulk Company Has Article III Standing

HHS has countered by asking the Court to dismiss these counts for lack of Article III standing. Article III standing requires "injury in fact, causation, and redressability." *Inclusive Communities Project, Inc. v. Dep't of Treasury*, 946 F.3d 649, 655 (5th Cir. 2019) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-04 (1998)). "When seeking review of agency action under the APA's procedural provisions, Plaintiffs are also operating under a favorable presumption. They are presumed to satisfy the necessary requirements for standing." *Texas v. United States*, 86 F. Supp. 3d 591, 615 (S.D. Tex. 2015) (citing *Mendoza v. Perez*, 754 F.3d 1002, 1012, 410 U.S. App. D.C. 210 (D.C. Cir. 2014)). Redressability requires that a plaintiff demonstrate that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* HHS claims that "even if the Court issues an order declaring the HHS regulation at issue void and unenforceable, such relief is not likely to result in a change in the IRS's certification and assessment process under I.R.C. § 4980H …[because] it will not preclude

the IRS from issuing certifications under § 4980H and assessing ESRPs." Brief in Support of Defendant's Motion to Dismiss, at 18.

Given the lengths to which Congress has gone to ensure adequate due process for employers, this continued commitment by administrative agencies to refuse to abide by it is disappointing. It also misses the point.

Faulk Company does not seek to preclude Treasury from assessing ESRP excise taxes. It seeks the process it is due from HHS, and HHS regulation 45 C.F.R. § 155.310(i) is the primary, if not sole, source of HHS' and Treasury's purported authority to deny Faulk Company those rights. By ensuring that HHS follows the notice-and-appeal certification process mandated by Congress in Section 1411, this Court will restore Faulk Company's right to due process and ability to gauge potential tax liabilities in near-real time, giving it and employers like it the ability to relieve themselves of substantially massive potential liabilities. Section 1411 provides that employers must receive notice within a "reasonable time" after an employee is initially given an advance determination of eligibility for subsidies and be informed of their right to appeal eligibility determinations. 42 U.S.C. § 18081(e)(4)(C). HHS—not Treasury or any other entity—must establish an appeals process to

> provide an employer the opportunity to–(i) present information to the Exchange for review of the determination either by the Exchange or the person making the determination, including evidence of the employer-sponsored plan and employer contributions to the plan; and (ii) have access to the data used to make the determination to the extent allowable by law.

Id. at § 18081(f).

This notice-and-appeal certification process—which is currently nonexistent—is meant to provide employers like Faulk Company the ability to resolve exchange subsidy eligibility issues before Treasury or the IRS is even involved. As demonstrated in CMS' initial FAQ guidance, employers should receive notices within just a few months of an employee's application for

subsidized health insurance, not 3 years as happened to Faulk Company. *See* Centers for Medicare & Medicaid Services, U.S. Dept. of Health and Human Services, "Frequently Asked Questions Regarding the Federally-Facilitated Marketplaces' (FFM) Employer Notice Program" (Sept. 18, 2015), *available at* https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/Employer-Notice-FAQ-9-18-15.pdf ("The FFM will send notices in batches. We expect to send the first batch in spring of 2016, following the close of Open Enrollment for the 2016 coverage year. This will likely be the largest batch of notices as it will include employers whose employees enrolled in Marketplace coverage with APTC during Open Enrollment which ends on January 31, 2016. The FFM will send additional batches of notices throughout 2016.")

There is not only redressability with respect to employee applications for subsidized exchange coverage in the future; there is more immediate redressability. The authority IRS cites in Letter 227-M for its ability to issue Section 1411 certifications is the due-process-sidestepping HHS regulation 45 C.F.R. § 155.310(i). Should the Court grant the relief Faulk Company seeks in Counts III and IV, IRS will have no basis whatsoever for taking the position that Letter 226-J constitutes a "certifi[cation] to the employer under Section 1411," making it far less likely that IRS continues to do so for tax years for which it has not yet issued such letters. The Court's invalidation of HHS regulation 45 C.F.R. § 155.310(i) also makes it far more likely that the IRS Independent Office of Appeals (another key aspect of Congressionally-mandated due process) will grant pre-enforcement taxpayer appeals of ESRP excise tax assessments for tax years for which IRS has issued letters 226-J but that have not been finalized (such as Faulk Company's pending appeals).

B. Counts III and IV Against HHS Are Not Barred by the Declaratory Judgment Act

HHS further counters by contending that Faulk Company's requested relief is barred by the Declaratory Judgment Act, which does not permit declaratory relief "with respect to Federal taxes." 28 U.S.C. § 2201(a). Indeed, the Fifth Circuit previously barred a challenge to the employer mandate of Section 4980H on similar Anti-Injunction Act-related grounds. *Hotze v. Burwell*, 784 F. 3d 984, 999 (5th Cir. 2015). That Court concluded that "the AIA bars [the Plaintiff's] challenge because it constitutes a 'suit for the purpose of restraining or collection of a tax' under 26 U.S.C. § 7421(a); and, as such, we lack subject-matter jurisdiction to entertain it." *Id.* at 991. *Hotze* is inapplicable here, though, because the plaintiff brought a direct pre-enforcement challenge to the tax itself on Constitutional grounds. Faulk Company's claims in Counts III and IV are entirely different.

The Anti-Injunction Act ("AIA") and Declaratory Judgment Act ("DJA") apply "when the target of a requested injunction is a tax obligation." *CIC Servs., LLC v. Internal Revenue Serv.*, 593 U.S. 209, 218 (2021). To determine the purpose of a suit, "we inquire not into a taxpayer's subjective motive, but into the action's objective aim—essentially, the relief the suit requests." *Id.* at 217. In *CIC Services, LLC*, the Supreme Court characterized the purpose of the plaintiff's challenge to the IRS Notice in question by looking at the remedy sought—setting aside the Notice, enjoining its enforcement, and declaring it unlawful—rather than the eventual "downstream" effect of avoiding a future tax penalty. *CIC Servs., LLC*, 593 U.S. at 218. Declaratory and injunctive relief of the sort requested in the case is the standard remedy under the APA when agency pronouncements are procedurally invalid or arbitrary and capricious for lack of reasoned decision-making. *See id.* Noting the government's concession that a pre-enforcement challenge to Environmental Protection Agency regulations governing the resale of diesel fuel and enforced

partly through a tax penalty would not be precluded by the AIA, the Court rejected the idea that the AIA should apply merely because the IRS rather than the EPA administers a regulatory mandate. *Id.* at n.2.

Similarly, the "[a]ssessment and collection of taxes does not include all activities that may improve the government's ability to assess and collect taxes" however. *Chamber of Commerce et al. v. I.R.S. et al.*, No. 1:16-cv-944 (D.Tex. 2017) (citing *Direct Mktg. Ass'n v. Brohl*, 135 S.Ct. 1124, 1131 (2015)). The court in this case held that "Plaintiffs do not seek to restrain assessment or collection of a tax…. Rather, Plaintiffs challenge the validity of the Rule. [T]he Rule is not a tax, but a regulation determining who is subject to taxation under provisions of the Internal Revenue Code. Enforcement of the Rule precedes any assessment or collection of taxes. Although the Rule may improve the government's ability to assess and collect taxes, enforcement of the Rule does not involve assessment or collection of a tax." *Id.* (internal citations omitted).

Here, Faulk Company is requesting that the Court enter judgment against HHS (not Treasury) declaring a public health regulation (not a Treasury regulation) invalid. The effect of the Court declaring invalid the due-process-sidestepping HHS regulation 45 C.F.R. § 155.310(i) is primarily to restore due process rights created by Congress in Title 42. HHS regulation 45 C.F.R. § 155.310(i) is not a tax. At most, the downstream tax effect of setting aside this regulation might be to limit IRS' ability to claim (erroneously and unlawfully) that Letter 226-J constitutes a "certifi[cation] to the employer under Section 1411," but the AIA and DJA do not prohibit this. Employer mandate ESRP taxes are excise taxes; the "certifi[cation] to the employer under Section 1411" is not part of the tax itself, but rather part of the corporate privilege that Congress decided to tax. The excise tax itself is still further downstream from the manner of doing business described in the statute. The "certifi[cation] to the employer under Section 1411" is part of determining who or what is subject to taxation; it is not the tax itself.

Ultimately, Plaintiff's requested relief is about ensuring the rule of law is upheld. Congress was exceedingly clear about its aims, and HHS repeatedly ignored it.

II. Treasury Acquiesces to HHS and Illegally Collects Billions in ESRP Excise Taxes (Count I)

While it was HHS that robbed employers of their due process rights, and while HHS invited Treasury to go along with the scheme, Treasury did not have accept the invitation. It did, however, and now the United States owes Faulk Company (and a host of other employers) a refund.

The United States has asked the Court to dismiss its refund claim, though, on the grounds that its so-called "4908H certification" and resulting assessment and collection of the 2019 ESRP excise tax Faulk Company paid were proper as a matter of law. The United States is incorrect.

First and foremost, there is no such thing as a "4980H certification." Code Section 4980H creates no process for issuance of a certification. It makes no command that any agency issue any certification. The only reference to a certification is the present perfect verb "has been certified" followed by the successive prepositional phrases, "to the employer under Section 1411 of the [ACA]." That the verb is written in the passive voice does not give Treasury free reign to decide whether, when and how such certifications are to occur. Instead, we must look to the words Congress used and carefully parse the sentence.

Simply taking the text at face value, the United States' argument cannot stand. The relevant portion of Code Section 4980H is as follows:

> If … 1 or more full-time employees of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act 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, then [the employer owes an excise tax].

26 U.S.C. § 4980H(a), (b)(1).

The subject of the sentence is "employees"—more specifically, one or more full-time employees. The verb is the present perfect form of "certify"—i.e., "has been certified"—which is a verb construction that expresses an ongoing activity that started in the past and continues into the present. *The Perfect Progressive Tenses*, The Britannica Dictionary, https://www.britannica.com/dictionary/eb/qa/The-Perfect-Progressive-Tenses (last visited Dec. 5, 2024). It utilizes the present perfect progressive to suggest a past point in time that remains open and unfinished—that is, something happened in the past that has a continuing and present effect. *Id.* Courts frequently look to grammatical structures to determine the meaning of statutes. *See, e.g.*, *Carr v. United States*, 560 U.S. 438, 448 (2010) ("Consistent with normal usage, we have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach.").

To apply this canon to the certification requirement, it makes perfect sense that Congress intended for Code Section 4980H to look to Section 1411 of the ACA. The continuing and present effect is obviously the assessment of an excise tax. The thing that must have happened in the past is the certification, and the thing that has been certified in the past is that the employee "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." The certification must have been provided (again, in the past) to the employer because the prepositional phrase, "to the employer," immediately follows "has been certified."

The only question is what to do with the next prepositional phrase, "under Section 1411." The United States goes to great lengths to separate and distinguish Code Section 4980H from Section 1411, but that only demonstrates why the United States' reading is so very wrong. Congress intentionally wrote the words, "under Section 1411," and they must be given effect. "Under Section 1411" immediately follows "to the employer," so it follows quite naturally that the certification must have been given to the employer in some way that is provided for in Section

1411. If it were merely the employee eligibility or enrollment that was "under Section 1411," Congress would have indicated that, such as by placing "under Section 1411" somewhere else—e.g., "certified to the employer 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 under section 1411 of the Patient Protection and Affordable Care Act"—or by not including the phrase "to the employer"—i.e., "certified under section 1411 of the Patient Protection and Affordable Care Act 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."

That is not what Congress wrote, though. Congress described the corporate privilege being taxed as the employee having been certified to the employer under Section 1411. "Under Section 1411" modifies "to the employer."

The Supreme Court has previously opined on how to interpret language similar to that at issue here:

> This Court has acknowledged that the word "under" is a "chameleon" that 'must draw its meaning from its context." With respect to subparagraph (E), the statutory context makes clear that the prepositional phrase—"under section 1311"—is most naturally read to mean that the effluent limitation or other limitation must be approved or promulgated "pursuant to" or "by reason of the authority of" § 1311.

Nat'l Ass'n of Manufacturers v. Dep't of Defense, 583 U.S. 109, 124 (2018) (internal citations omitted). In that case, the Supreme Court reviewed whether a statute granted courts of appeals exclusive jurisdiction to review EPA actions "in approving or promulgating any effluent limitation or other limitation under section 1311…[of the Clean Water Act]." The Court held (among other assertions not relevant here) that the structure of the statute required review of the internal cross references that the rule in question fell "under." *Id.* at 124-25. The phrase, "to the employer under Section 1411" must be given effect, and Section 1411 must be considered when giving it effect.

This is not to say there are no interpretive challenges. There are. For one, the United States is correct that Section 1411 does not use the term "certify" or any of its forms with respect to an employer. Forms of the word "certify" are only used in Section 1411 with respect to the determination that an individual is exempt from the individual mandate. *See* 42 U.S.C. §§ 18081(a)(4), (b)(5), (e)(2)(B), (e)(4)(B)iv). This does not mean the Court should prefer a construction of Code Section 4980H that disregards key phrases or the grammatical structure of the statute. It just means the reconciliation requires a little effort.

The "certified" language used by Congress in Code Section 4980H is presumed to be intentional. *Simmons v. Himmelreich*, 578 U.S. 621, 627 (2016) (Congress "says what it means and means what it says."); *see also Russello v United States*, 464 US 16, 23 (1983). The word "certify" (past tense "certified") is defined as "the act of attesting; especially the process of giving someone or something an official document stating that a specified standard or qualification has been met." Black's Law Dictionary (12th ed. 2024). Code Section 4980H does not create any kind of certification process or certification, but rather it incorporates the past certification under Section 1411 a part of the corporate privilege—the manner of doing business—that is subject to an excise tax under Code Section 4980H. *See* 26 U.S.C. § 4980H(a), (b). Only by delivery of an official document that a qualification has been met has the corporate privilege been exercised such that it becomes taxable.

We tend to agree with the United States that the employer notice requirement of Section 1411 is not, by itself, coterminous with what Congress envisioned when it wrote, "certified to the employer under Section 1411." A notice is defined as simply "legal notification required by law." Black's Law Dictionary (12th ed. 2024). But under Section 1411, employers are given far more than just notice: they have the right to appeal. 42 U.S.C. § 18081(f)(2)(A). Congress was so concerned about employers' due process rights that it twice required a separate study to ensure

"[t]he rights of employers to adequate due process and access to information necessary to accurately determine any payment assessed on employers." *Id.* § 18081(i)(1)(B); Continuing Appropriations Act, 2014, Pub. L. 113-46 (Oct. 17, 2013), at § 1001. That is why Congress deliberately chose to use the word "certified" rather than "notice;" the certification process does not just involve notice, but the due process right to appeal in addition to the notice requirement. The certification that Code Section 4980H requires employers to have received is the result of the notice *and* appeal procedures—the due process—that Congress required in Section 1411.

The United States argues that the Section 1411 notice-and-appeal procedures could not possibly be the certification referred to in Code Section 4980H because Section 1411 uses terms like "eligible" versus the phrase "allowed or paid" used in Code Section 4980H, further arguing that "[w]hether a [premium tax credit] is 'allowed' is not determined by the IRS until after the employee files a tax return claiming the PTC." Brief in Support of Defendant's Motion to Dismiss, at 13. Similarly, The United States argues that the exchanges do not have the information necessary to certify whether a subsidy has been allowed or paid. Both arguments fail because the United States is again looking to the wrong part of the process, and thus the wrong party.

The phrase "allowed or paid" in Code Section 4980H is passive voice, so it is silent as to which agency it is referring to; the only indication as to the proper agency is the phrase "under section 1411." This makes perfect sense because HHS makes "advance determinations" of subsidies and directs the IRS to pay these subsidies directly to health insurers each month. 42 U.S.C. §§ 18082(a)(1)-(3). HHS informs the Exchange and IRS of said "advance determinations." *Id.* § 18082(a)(2)(A). HHS informs IRS (and the Exchange, irrelevant here) when an individual "is enrolling" of the advance determination. *Id.* § 18082(c)(1). At the same time, HHS gives IRS the individual's employer's information. *Id.* § 18082(a)(2)(B). At the point in time when IRS becomes involved in this process, when individuals file their tax returns and IRS reconciles

advance payments, the allowance and payment has already been made through the advance determination process by HHS. The passive construction of the phrase "with respect to which an applicable [PTC] or cost-sharing reduction is allowed or paid" demonstrates that this is a reference to advance determinations *by HHS* under Section 1411, not IRS. *Cf.* 42 U.S.C. § 18081(e)(2)(A)(i) *with* 42 U.S.C. § 18082(a)(2).

The United States also correctly points out that Section 1411 does not afford an employer notice when its employees become eligible for advance payment of subsidies because the employer's offered coverage fails to provide minimum value; notice is provided for when its employees become eligible because the employer failed to offer coverage and when its employees become eligible because the offered coverage is unaffordable, but not on account of minimum value. *Id.* § 18081(e)(4)(B)(iii); Brief in Support of Defendant's Motion to Dismiss, at 14. While it is true that Section 1411 does not provide for notice in all circumstances in which an employer would be liable for an ESRP excise tax, it does not need to. Congress' objective was to provide employers due process, not perfect process; notification when an employee claims to be eligible for having been offered no health insurance and when an employee claims its offered health insurance is enough. Moreover, it would be a very valid exercise of agency authority to issue notices when employees claim an employer's offered of health insurance did not provide minimum value. The employer notice provisions of Section 1411 are very easily read as minimum standards and not exclusive limits. In addition, Section 1411 gives HHS authority to "establish a program meeting the requirements of this section for determining … whether to grant a certification under section 18031(d)(4)(H)"—that is, an exemption from the individual mandate—such as when "there is no affordable *qualified* health plan available through … the individual's employer." *Id.* §§ 18081(a), 18081(a)(4), 18031(d)(4)(H)(i).

The ACA is far from a perfectly drafted piece of legislation. Nevertheless, the Court must assume that Congress means what it says and that every sentence and word of the statute has meaning. *United States v. Menasche*, 348 US 538-39 (1955) (quoting *Montclair v. Ramsdell*, 107 US 147, 152 (1883)). An interpretation of a statute that renders an entire word or clause meaningless should be rejected in favor of an interpretation that gives meaning to every word and clause. *Market Co. v. Hoffman*, 101 US 112, 115 (1879). Therefore, although Section 1411 does not immediately appear to contain an explicit "certification" required by Code Section 4980H, this Court should seek to understand what Congress intended when it required a "certifi[cation] to the employer under Section 1411" in order to give that phrase effect.

CONCLUSION

Faulk Company's story is yet to be fully told, but it begins with these two chapters, and the law does not prevent Faulk Company from telling them. Accordingly, this Court should deny the United States' motion to dismiss Count I of the complaint under Rule 12(b)(6) because the IRS did not, and could not, satisfy the certification requirement of Section 1411 of the ACA. Further, this Court has jurisdiction over Counts III and IV against HHS pursuant to the APA; and neither the Anti-Injunction Act nor the Declaratory Judgment Act are jurisdictional barriers in this case. Therefore, Defendants' Motion to Dismiss (ECF No. 15), should be denied as to Counts I, III, and IV.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

On December 6, 2024, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Taylor J. Winn
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