25-10773

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FAULK COMPANY, INC.,

Plaintiff-Appellee

v.

ROBERT F. KENNEDY, JR., in his official capacity as Secretary of Health and Human Services, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES and its subcomponent CENTERS FOR MEDICARE & MEDICAID SERVICES, MEHMET OZ, in his official capacity as Administrator of the Centers for Medicare & Medicaid Services, and UNITED STATES OF AMERICA,

Defendants-Appellants

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR THE APPELLANTS

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STATEMENT REGARDING ORAL ARGUMENT

At issue in this appeal are the procedures that the Government must follow before an employer shared responsibility payment is imposed in connection with the Patient Protection and Affordable Care Act's employer mandate. This case presents an issue of first impression that will serve as controlling authority in one pending case, *HHS Envtl. Servs. v. United States, et al.*, No. 1:25-cv-00768 (W.D. Tex.), and persuasive authority in another, *Supreme Linen Servs., Inc. v. United States*, No. 1:25-cv-20723 (S.D. Fla.). Due to the administrative importance of this issue, counsel for the Government respectfully inform the Court that oral argument would be helpful.

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GLOSSARY

Abbreviation	**Definition**
ACA	portions of the Affordable Care Act codified in Title 42
Affordable Care Act	Patient Protection and Affordable Care Act, P.L. 111-148, 124 Stat. 119 (Mar. 23, 2010)
AIA	Anti-Injunction Act, I.R.C. §7421(a)
APTC	advance payment of the premium tax credit
CMS	Centers for Medicare & Medicaid Services
DJA	tax exception to the Declaratory Judgment Act, 28 U.S.C. §2201(a)
ESRP	employer shared responsibility payment
Faulk	Faulk Company, Inc.
the Government	United States of America, HHS and its subcomponent CMS, the Secretary of HHS, and the Administrator of CMS
HHS	U.S. Department of Health and Human Services
I.R.C.	Internal Revenue Code (26 U.S.C.)
IRS	Internal Revenue Service
Treas. Reg.	Treasury Regulation (26 C.F.R.)

STATEMENT OF JURISDICTION

On December 1, 2021, the Internal Revenue Service issued Faulk Company, Inc. ("Faulk") a Letter 226-J, which contained the IRS's preliminary determination that Faulk owed an employer shared responsibility payment ("ESRP") for the 2019 year pursuant to Internal Revenue Code ("I.R.C.") (26 U.S.C.) §4980H(a). (ROA.12, 109-114.) Later that month, Faulk paid the proposed ESRP in full. (ROA.10.) In January 2022, Faulk filed an administrative claim requesting a refund. (ROA.10, 425-437.) Following further administrative proceedings, the IRS formally assessed the ESRP liability against Faulk, and Faulk renewed its request for a refund. (ROA.21, 461-472.)

In June 2024, after more than six months had elapsed without a final determination on its refund claim, Faulk filed this suit asserting four claims against the United States, the U.S. Department of Health and Human Services ("HHS") and its subcomponent the Centers for Medicare & Medicaid Services ("CMS"), the Secretary of HHS, and the Administrator of CMS (collectively, "the Government"). (ROA.8-22.) The first two claims sought a refund of the ESRP assessed against Faulk; the third and fourth claims sought a declaratory judgment that

45 C.F.R. §155.310(i), which supported the procedure used by the IRS to assess the ESRP, was invalid and should be set aside. (ROA.17-21.)

With respect to Faulk's refund claims, the District Court had subject matter jurisdiction pursuant to 28 U.S.C. §1346(a)(1) and I.R.C. §§6511 and 7422. With respect to Faulk's claims seeking declaratory relief, Faulk invoked the following potential sources of jurisdiction: 28 U.S.C. §1331, the Administrative Procedure Act, 5 U.S.C. §551, *et seq.*, the Declaratory Judgment Act, 28 U.S.C. §2201, *et seq.*, and the court's "inherent equitable powers." (ROA.10-11.) However, the tax exception to the Declaratory Judgment Act, 28 U.S.C. §2201(a), deprived the court of jurisdiction over the claims seeking declaratory relief. *Infra*, pp. 60-68.

On April 25, 2025, an amended judgment was entered in favor of Faulk and against the Government pursuant to an opinion and order granting Faulk's motion for summary judgment and denying the Government's cross-motion. (ROA.628-644, 650.) The amended judgment disposed of all claims of all parties.

On June 20, 2025, the Government filed a timely notice of appeal. (ROA.726-728); 28 U.S.C. §2107(b); Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction pursuant to 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in holding that Faulk was entitled to a refund of its 2019 ESRP liability because the IRS, rather, than HHS, made the certification contemplated by I.R.C. §4980H.

2. Whether the District Court erred in setting aside 45 C.F.R. §155.310(i), which supports the Government's position that the IRS has the authority to make the certification contemplated by I.R.C. §4980H.

STATEMENT OF THE CASE

A. The nature of the case and course of proceedings in the District Court

The IRS determined that (i) Faulk was an applicable large employer that had not offered qualifying health insurance coverage (*i.e.*, coverage that provides minimum value and is affordable) to its full-time employees and (ii) at least one of those employees was allowed a premium tax credit after purchasing his own coverage through a Health Benefit Exchange. After the IRS certified that the prerequisites to liability were satisfied, it assessed an employer shared responsibility

payment against Faulk for 2019. Faulk then filed this suit, seeking two forms of relief. First, Faulk sought a refund of the approximately $200,000 ESRP that it had paid. Second, Faulk sought a declaratory judgment that a regulation supporting the IRS's authority to make the required certification was invalid.

The Government moved to dismiss Faulk's complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. After the motion was fully briefed, the District Court (Judge Mark T. Pittman) notified the parties that it intended to treat the parties' briefing as cross-motions for summary judgment. The court then issued an opinion and order, reported at 777 F. Supp. 3d 714, granting Faulk's motion for summary judgment and denying the Government's cross-motion. In doing so, the court held that the certification which serves as a prerequisite to the imposition of ESRP liability can be made only by HHS and that the IRS's certification was, therefore, invalid. The court further held that 45 C.F.R. §155.310(i), which states that the IRS is responsible for making the certification, would be set aside.

B. The relevant facts

1. Employer shared responsibility payments under I.R.C. §4980H

a. Introduction: the Affordable Care Act's employer mandate

In 2010, Congress enacted the Patient Protection and Affordable Care Act ("Affordable Care Act"), P.L. 111-148, 124 Stat. 119 (Mar. 23, 2010), "to increase the number of Americans covered by health insurance and decrease the cost of health care." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012); *accord Hotze v. Burwell*, 784 F.3d 984, 986-87 (5th Cir. 2015). Most of the Affordable Care Act's provisions are codified in Title 42 and Title 26. For clarity, we refer to the Title 42 provisions as "ACA" and the Title 26 provisions as "I.R.C." As relevant here, the Affordable Care Act requires applicable large employers (*i.e.*, generally those with at least 50 full-time employees, including full-time equivalent employees) to either offer qualifying health insurance coverage or potentially be subject to an excise tax under I.R.C. §4980H(a) or (b). I.R.C. §4980H(a), (b), (c)(2); *Optimal Wireless LLC v. Internal Revenue Serv.*, 77 F.4th 1069, 1071 (D.C. Cir. 2023).

The requirement that applicable large employers offer health insurance coverage is commonly known as the "employer mandate," and the excise tax backing up the employer mandate is commonly known as the "employer shared responsibility payment" or "ESRP."[1] I.R.C. §4980H. As illustrated below, ESRPs are designed to offset, to some extent, costs passed onto the public when employers do not offer qualifying insurance. *Halbig v. Sebelius*, 27 F. Supp. 3d 1, 15 (D.D.C.), *rev'd on other grounds sub nom.*, *Halbig v. Burwell*, 758 F.3d 390 (D.C. Cir. 2014); *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 98 (4th Cir. 2013) ("the employer mandate exaction is proportionate rather than punitive").

As relevant here, the process of imposing ESRP liability involves three stages. First, HHS makes an advance determination concerning individuals' eligibility for a premium tax credit when they purchase health insurance coverage through a Health Benefit Exchange and apply for financial assistance. Second, individuals claim the premium tax credit on their income tax returns. Third, the IRS assesses ESRPs

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[1] The District Court incorrectly identified the source of the employer mandate as ACA §1411, which is codified at 42 U.S.C. §18081. (ROA.630.) In fact, the mandate is contained in I.R.C. §4980H.

against applicable large employers after certifying that the prerequisites to liability are satisfied. We address each stage in turn.

b. HHS makes an advance determination concerning individuals' eligibility for the premium tax credit

The Affordable Care Act provides that each State shall establish a Health Benefit Exchange to assist individuals seeking to purchase health insurance coverage through the private marketplace. 42 U.S.C. §18031(b). The Affordable Care Act further provides that, if a State does not establish an Exchange, then HHS will establish and operate an Exchange in that State. 42 U.S.C. §18041(c). HHS operates the Exchange in Texas, which is the relevant state here. https://www.cms.gov/marketplace/in-person-assisters/training-webinars/training/marketplaces-map (last visited Nov. 24, 2025).

When an individual purchases health insurance coverage through an Exchange, he has the opportunity to apply for financial assistance in the form of a premium tax credit, which reduces the amount that he pays in insurance premiums.[2] I.R.C. §36B. As part of its "advance

[2] Individuals that purchase certain insurance coverage and receive a premium tax credit may also benefit from cost-sharing reductions, (continued…)

determination" that an applicant is eligible for a premium tax credit, HHS reviews and verifies information provided by the applicant via the coverage application, including but not limited to information about the individual's citizenship or immigration status, his household income, and the extent to which his employer offers minimum essential coverage (and, if so, whether that coverage is affordable and provides minimum value). 42 U.S.C. §§18081(a)(1) & (a)(2), 18082(a)(1) & (b)(1); *see also* I.R.C. §36B(c)(2)(C)(ii) (defining minimum value). Once HHS has determined that the individual is eligible for a premium tax credit, the Treasury Department makes an "advance payment" of that credit to the individual's chosen health insurance provider. This is commonly referred to as an "advance payment of the premium tax credit" or "APTC." 42 U.S.C. §§18081(b), (c)(3), & (e), 18082(a)(3) & (c).

Following HHS's determination that an individual is eligible for an APTC because his employer failed to offer health coverage or offered unaffordable coverage, the Exchange is required to "notify the

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which reduce the amount paid for deductibles, copayments, and coinsurance. 42 U.S.C. §18071. For simplicity, this brief focuses on premium tax credits, which apply to a greater number of individuals and coverages.

[individual's] employer … that the employer may be liable for" an ESRP. 42 U.S.C. §18081(e)(4)(B)(iii). The Exchange is also required to notify the employer that it can dispute HHS's determination in an administrative appeal.[3] *Id.* §18081(e)(4)(B)(iii) & (C), (f). The HHS appeal is "in addition to any rights of appeal the employer may have under subtitle F of this title" *i.e.*, the appeal rights available under the Internal Revenue Code. 42 U.S.C. §18081(f)(2)(A); *see infra*, p. 14.

c. Individuals claim the premium tax credit on their income tax returns and demonstrate their entitlement thereto

Regardless of whether HHS has made an advance determination that an individual is eligible for a premium tax credit, the individual must claim the credit on his income tax return at the end of the year and demonstrate his entitlement thereto. I.R.C. §36B; Treasury Regulation ("Treas. Reg.") (26 C.F.R.) §1.36B-1, *et seq.* The individual does so by filing Form 8962 as an attachment to his return and

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[3] The District Court seemed to suggest that ACA §1411 requires the Exchange to issue two notices: one notifying the employer that it may be liable for an ESRP and another notifying the employer of its right to an administrative appeal. (ROA.632, 635.) In fact, nothing in the statute prevents the Exchange from issuing a single notice notifying the employer of both its potential liability and the availability of an appeal. *See* 42 U.S.C. §18081(e)(4)(B)(iii) & (C).

reporting (among other things) his income, his joint filer's income, his dependents' income, his household's income, and the premiums charged by his chosen health insurance provider. *See* https://www.irs.gov/pub/irs-pdf/f8962.pdf (last visited Nov. 24, 2025).

If the individual applied for financial assistance when purchasing health insurance coverage and his insurance provider received advance payment of the premium tax credit, then his Form 8962 must also reconcile that APTC against the amount of the credit to which he is actually entitled. I.R.C. §36B(f); Treas. Reg. §1.36B-4; https://www.irs.gov/pub/irs-pdf/f8962.pdf. Subject to certain limitations, the individual is required to repay (in the form of a tax) any amount of the APTC that exceeds the credit to which he is entitled. I.R.C. §36B(f)(2); Treas. Reg. §1.36B-4(a)(1), (3); https://www.irs.gov/pub/irs-pdf/f8962.pdf.

If the individual did not apply for financial assistance when purchasing health insurance coverage, then there is no prior HHS eligibility determination and no APTC to be reconciled. 78 Fed. Reg. 4594-01, at *4636 (Jan. 22, 2013). In that situation, the IRS must determine, in the first instance, the individual's entitlement to the

premium tax credit, *i.e.*, the amount of the credit that "is allowed or paid with respect to the employee." I.R.C. §4980H(a)(2); *see also id.* §4980H(b)(1)(B).

d. The IRS assesses ESRPs against applicable large employers after certifying that the prerequisites to liability are satisfied

The requirement that applicable large employers offer health insurance is backed up by ESRPs. If an applicable large employer fails to offer minimum essential coverage to its full-time employees (and their dependents), then the employer may be subject to an ESRP under I.R.C. §4980H(a), calculated as 1/12th of $2,000 for each full-time employee on the employer's payroll per month (or $2,000 per employee per year, subject to the reduction provided in I.R.C. §4980H(c)(2)(D)(i)(I) and adjusted under I.R.C. §4980H(c)(5)). I.R.C. §4980H(a), (c); Treas. Reg. §54.4980H-5; *Optimal Wireless*, 77 F.4th at 1071. If an applicable large employer offers minimum essential coverage, but the coverage is unaffordable or does not provide minimum value, then the employer may be subject to an ESRP under I.R.C. §4980H(b), calculated as 1/12th of $3,000 for each full-time employee on the employer's payroll per month (or $3,000 per employee per year, subject to the limitation

provided in I.R.C. §4980H(b)(2) & (c)(2)(D)(i)(II) and adjusted under I.R.C. §4980H(c)(5)). I.R.C. §4980H(b), (c); Treas. Reg. §54.4980H-5; *Optimal Wireless*, 77 F.4th at 1071-72.

Importantly, ESRP liability is not imposed automatically when an applicable large employer fails to offer minimum essential coverage to its full-time employees (and their dependents), or when it offers minimum essential coverage that is unaffordable or does not provide minimum value. Rather, liability is imposed only upon the occurrence of additional specified conditions. First, at least one of the employer's full-time employees must purchase coverage through an Exchange. I.R.C. §4980H(a)(2), (b)(1)(B). Second, the employee must claim a premium tax credit on his income tax return. I.R.C. §§36B, 4980H(a)(2) & (b)(1)(B). Third, the credit must be "allowed or paid" with respect to the employee. I.R.C. §4980H(a)(2), (b)(1)(B). Finally, it must be "certified to the employer" that these conditions are satisfied. *Id.*

The information necessary to make the required certification is reported to the IRS in the ordinary course. Applicable large employers are required to file Forms 1094-C and 1095-C with the IRS, reporting the number of full-time employees on their payrolls each month;

whether they offered those employees (and their dependents) the opportunity to enroll in minimum essential coverage; the name, address, and taxpayer identification number of each full-time employee on their payrolls each month; and the name, address, and taxpayer identification number of each full-time employee covered under the employers' health plan each month. I.R.C. §§6055, 6056; Treas. Reg. §§1.6055-1, 301.6056-1; https://irs.gov/pub/irs-pdf/f1094c.pdf (last visited Nov. 24, 2025); https://irs.gov/pub/irs-pdf/f1095c.pdf (last visited Nov. 24, 2025). And as we just explained, employees claiming a premium tax credit are required to file Forms 8962 as attachments to their income tax returns, demonstrating their entitlement to the credit and providing information that can be reconciled against the information reported by employers. I.R.C. §36B; https://www.irs.gov/pub/irs-pdf/f8962.pdf.

Once the IRS has made a preliminary determination that all the conditions for ESRP liability are satisfied, it issues a Letter 226-J to the employer. (ROA.109-114); https://www.irs.gov/individuals/understanding-your-letter-226-j (last visited Nov. 24, 2025). The letter sets forth the IRS's determination that the employer is liable for an

ESRP, the amount of the proposed liability, and the certification contemplated by I.R.C. §4980H. (ROA.109-114.) The letter further invites the employer either to agree with the proposed ESRP and pay it, or to submit information to contradict the IRS's preliminary determination. (ROA.110.) Finally, the letter informs the employer that, if it does not respond, the IRS will formally assess the liability and undertake collection. (ROA.111.)

If the employer's proposed ESRP liability still remains unresolved, it is generally invited to file a written protest and obtain a conference with the IRS Independent Office of Appeals. (ROA.180-181); *see also* I.R.C. §7803(e); Statement of Procedural Rules, 26 C.F.R. §601.106. In such a conference, the employer has the opportunity to present evidence and argument, as well as meet with an Appeals Officer. *Lewis v. Commissioner*, 128 T.C. 48, 59 (2007); https://www.irs.gov/pub/irs-pdf/p5.pdf (last visited Nov. 24, 2025).

At the conclusion of these administrative processes, the ESRP is "assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68" of the Internal Revenue Code. I.R.C. §4980H(d)(1).

2. The IRS determines that Faulk is liable for an employer shared responsibility payment for 2019

Faulk is a janitorial services company with a principal place of business in Fort Worth, Texas. (ROA.9.) At the relevant time, Faulk had approximately 100 employees and was, therefore, an "applicable large employer" subject to the Affordable Care Act's employer mandate. (ROA.12, 112.) After the employer mandate went into effect, Faulk offered its employees the opportunity to purchase health insurance coverage. (ROA.12, 222.) The record does not disclose the nature of the coverage offered by Faulk or the amount that its employees would have been required to pay as premiums. None of Faulk's employees purchased the coverage offered by Faulk. (ROA.12, 222.)

In 2019, Faulk stopped offering its employees the opportunity to purchase health insurance coverage, and multiple employees purchased coverage through an Exchange. (ROA.12, 112, 222.) On December 1, 2021, the IRS issued Faulk a Letter 226-J, which certified that, for each month of 2019, at least one of its full-time employees had enrolled in coverage through an Exchange and been allowed a corresponding premium tax credit. (ROA.12, 109-114.) The letter further set forth the IRS's preliminary determination that Faulk's resulting ESRP liability

for 2019 was $205,621.71. (ROA.109, 112.) On December 28, 2021, Faulk paid the proposed ESRP in full. (ROA.10, 223.)

Faulk then filed an administrative claim for refund with the IRS. (ROA.18, 223, 425-437.) Faulk did not challenge the IRS's determination that it was an applicable large employer subject to the employer mandate, that it had not offered its employees the opportunity to purchase health insurance coverage, that at least one of its full-time employees had been allowed a premium tax credit for each month of 2019, or that the IRS had correctly calculated the amount of the ESRP. Instead, Faulk argued that the certification required by I.R.C. §4980H could be made only by HHS; therefore, the IRS's certification was invalid, and no ESRP could be imposed. (ROA.426-436.) The IRS rejected Faulk's argument and assessed the ESRP. (ROA.21, 461-472.) The IRS also proposed ESRP liabilities against Faulk for subsequent years. (ROA.165, 222.)

C. Proceedings in the District Court

1. Faulk filed this suit asserting four claims against the Government: two seeking a refund of the ESRP that Faulk had paid for 2019; and two seeking a declaratory judgment that 45 C.F.R.

§155.310(i), which supported the procedure used by the IRS to assess the ESRP, was invalid and should be set aside. In Count I, Faulk alleged that it had no ESRP liability for 2019 in the absence of an I.R.C. §4980H certification by HHS, rather than the IRS. In Count II, Faulk alleged that the ESRP assessment against it was improper in the absence of written supervisory approval, as required for certain penalties by I.R.C. §6751(b)(1). In Count III, Faulk alleged that the regulation at issue conflicted with the relevant statutory provisions. In Count IV, Faulk alleged that the regulation was arbitrary and capricious. (ROA.8-22.)

The Government moved to dismiss Faulk's complaint. (ROA.78-107.) In its motion, the Government argued that Faulk's refund claims failed as a matter of law. (ROA.95-102, 193-196.) The Government further argued that the court lacked jurisdiction over Faulk's claims seeking declaratory relief and that, at all events, those claims failed as a matter of law. (ROA.102-106, 196-200.) In its response, Faulk conceded that the refund claim asserted in Count II should be dismissed (ROA.154), but otherwise opposed the Government's motion (ROA.147-176).

After the Government's motion was fully briefed, the District Court notified the parties that it intended to treat the parties' briefing as cross-motions for summary judgment. (ROA.202-203.) Following supplemental briefing, the court granted Faulk's motion for summary judgment on Counts I and III, denied the Government's cross-motion on those counts, and dismissed the remaining counts. (ROA.628-644.)

2. As to the refund claim in Count I, the court grappled with the relevant provisions of the Affordable Care Act, which it found presented significant "interpretative challenges." (ROA.636-637.) The court homed in on I.R.C. §4980H's requirement that imposition of an ESRP be preceded by "certifi[cation] to the employer under section 1411 of the Patient Protection and Affordable Care Act" that at least one full-time employee had enrolled "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." (ROA.634); I.R.C. §4980H(a)(2).

The court acknowledged that "I.R.C. §4980H is silent as to which agency must provide certification." Nonetheless, it concluded that I.R.C. §4980H's cross-reference to ACA §1411 meant that certification

must be carried out "by reason of the authority of ACA §1411." And because the authority of ACA §1411 "is exclusively given to HHS," the court further concluded that the IRS's "established practice" of making the certifications itself was improper. Because the IRS followed this practice in assessing an ESRP against Faulk for 2019, the court held that the ESRP was invalid and that Faulk was entitled to a refund. (ROA.633-638.)

The court conceded that its interpretation of the relevant provisions was "not … without its challenges." In particular, the court noted that ACA §1411 does not use the word "certification" or "certify" in connection with the employer mandate or ESRPs. However, the court opined that, because ACA §1411 directs the Exchange to "notify" employers that it has determined one of their employees is eligible for an advance payment of the premium tax credit, the "notice" contemplated by ACA §1411 was "likely" the same as the "certification" contemplated by I.R.C. §4980H. The court candidly admitted that the "[ACA §1411] 'notice' and [I.R.C. §4980H] 'certification' may not be the same," but ultimately concluded that conflating the two represented

"the best interpretation" that could be drawn from a statutory scheme that was "far from perfectly drafted." (ROA.635-636.)

3. The court next turned to Count III of Faulk's complaint, seeking a declaratory judgment that 45 C.F.R. §155.310(i)—which supported the IRS's practice of making I.R.C. §4980H certifications—was invalid. The court held that the tax exception to the Declaratory Judgment Act did not deprive it of jurisdiction because the target of Faulk's declaratory relief was "the improper certification that stands as a procedural prerequisite to the tax," not the tax itself. The court then held that, because it had already determined that the relevant statutory provisions require HHS to make the certification contemplated by I.R.C. §4980H, the regulation supporting the IRS's contrary practice would be set aside. (ROA.639-642.)

Because it held that the regulation would be set aside as conflicting with the relevant statutes, the court declined to reach Count IV of Faulk's complaint, seeking to set aside the regulation as arbitrary and capricious.[4] (ROA.643.)

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[4] The court later held that the Government was substantially justified in defending this suit and therefore denied Faulk's motion for

(continued…)

SUMMARY OF ARGUMENT

1. This appeal stems from Faulk's challenge to the procedures that the IRS used when assessing an approximately $200,000 ESRP against it in connection with the Affordable Care Act's employer mandate. Under the plain terms of I.R.C. §4980H(a)(1), the imposition of ESRP liability must be preceded by a certification to the employer that one of its employees enrolled in a qualified health plan with respect to which a premium tax credit was allowed or paid. It is undisputed that the IRS made such a certification to Faulk. And because Faulk's sole challenge to the ESRP was that it did not receive a valid I.R.C. §4980H certification, the ESRP should have been sustained in full.

The District Court nonetheless disallowed the ESRP. In doing so, the court created a new requirement, unmoored from the statutory text, that HHS—and only HHS—can make the certification contemplated by I.R.C. §4980H. The court did so even though I.R.C. §4980H is silent as to which agency must make the required certification; even though the

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attorneys' fees. *Faulk Co., Inc. v. Becerra*, 2025 WL 1953854, at *1-*2 (N.D. Tex. July 16, 2025).

certification requirement is contained in Title 26, which the IRS is charged with administering; and even though the court could identify no statutory provision that authorizes HHS to "certify," or make a "certification," concerning anything connected with the employer mandate or ESRPs.

To justify this result, the court conflated an HHS "notice" requirement, contained in ACA §1411, with the IRS "certification" requirement, contained in I.R.C. §4980H. But ACA §1411 notices and I.R.C. §4980H certifications address different steps in the ESRP process, take into account different facts, are issued to different categories of employers, and have a different temporal sweep. Even Faulk "tend[ed] to agree with the United States that the employer notice requirement of Section 1411 is not, by itself, coterminous with what Congress envisioned" for I.R.C. §4980H certifications. (ROA.171.) Under the circumstances, the court's contrary reading of the relevant statutory provisions cannot stand.

2. The District Court also entered a declaratory judgment that an HHS regulation, which supported the IRS's authority to make I.R.C. §4980H certifications, conflicted with the relevant statutory provisions

and should be set aside. In fact, the regulation reflects a correct reading of the relevant provisions, as we have just explained. At all events, the tax exception to the Declaratory Judgment Act deprives courts of jurisdiction to award declaratory relief "with respect to Federal taxes," like the declaratory relief awarded here.

The judgment of the District Court is erroneous and should be reversed.

ARGUMENT

The District Court's judgment was erroneous and should be reversed

Standard of review

This Court reviews *de novo* the grant and denial of cross-motions for summary judgment. *Cont'l Airlines, Inc. v. Int'l Bhd. of Teamsters*, 391 F.3d 613, 616 (5th Cir. 2004).

I.

The District Court erred in holding that Faulk was entitled to a refund of the employer shared responsibility payment assessed against it for 2019

A. The IRS properly assessed an ESRP against Faulk after it certified that the prerequisites to liability were satisfied, as required by I.R.C. §4980H

As discussed at page 12, *supra*, ESRP liability is not imposed automatically when an applicable large employer fails to offer minimum essential coverage to its full-time employees (and their dependents), or when it offers minimum essential coverage that is unaffordable or does not provide minimum value. Rather, liability is imposed only upon the occurrence of additional specified conditions: at least one of the employer's full-time employees must purchase coverage through an Exchange, the employee must claim a premium tax credit on his income tax return, and the credit must be "allowed or paid" with respect to the employee. I.R.C. §4980H(a)(2); *see also id.* §4980H(b)(1)(B). Furthermore, liability is only imposed after it "has been certified" that these conditions are satisfied:

> 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[.]

I.R.C. §4980H(a)(2); *see also id.* §4980H(b)(1)(B).

Here, Faulk does not dispute that it failed to offer minimum essential coverage to its full-time employees for 2019 and, indeed, readily admits that it offered no coverage at all. (ROA.12, 222.) Nor does Faulk dispute that at least one of its full-time employees purchased coverage through an Exchange, that the employee claimed a tax credit on his income tax return, and that the credit was allowed or paid. (ROA.112.) Moreover, Faulk does not dispute that the IRS issued a Letter 226-J certifying that the foregoing conditions were met. (ROA.109-114.) Accordingly, all the prerequisites to ESRP liability were satisfied, and the ESRP assessed against Faulk for 2019 should have been sustained.

B. The District Court erred in holding that the I.R.C. §4980H certification was invalid because it was made by the IRS, rather than HHS

The District Court nonetheless disallowed the ESRP. In doing so, the court held that the certification contemplated by I.R.C. §4980H could be made only by HHS and, therefore, the IRS's certification was invalid. (ROA.633-638.) However, nothing in the text of I.R.C. §4980H

requires that HHS make the certification, and, in fact, the IRS is the only agency with the both the legal authority and practical ability to do so. By engrafting a contrary requirement onto I.R.C. §4980H that appears nowhere in the statutory text, the court erred.

1. The IRS is the agency best suited to make an I.R.C. §4980H certification, and nothing in the statutory text requires that the certification be made by HHS

a. This case turns on the proper interpretation of I.R.C. §4980H(a) and (b). In matters of statutory interpretation, the court begins with the text of the statute. *Knight v. Commissioner*, 552 U.S. 181, 187 (2008). If "the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case," and "the statutory scheme is coherent and consistent," then the court looks no further. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (citation and internal quotations omitted).

By its terms, I.R.C. §4980H provides that ESRP liability is imposed only after it "has been certified" that certain prerequisites to liability are satisfied. I.R.C. §4980H(a)(2) *see also id.* §4980H(b)(1)(B). As Faulk noted in the proceedings below, the certification requirement is phrased "in the passive voice, so it is silent as to which agency" is

responsible for making the required certification. (ROA.172.) The District Court echoed that observation, stating that "I.R.C. § 4980H is silent as to which agency must provide certification." (ROA.634.)

At first blush, the most natural reading of the provision is that Congress did not require any particular agency to make the certification. *See Bartenwerfer v. Buckley*, 598 U.S. 69, 76 (2023) (statute's use of the passive voice suggested that "Congress was agnostic" about who took the required action) (citation, alteration, and internal quotations omitted). Thus, the certification could validly be made by the IRS, HHS, or some other agency altogether. This is consistent with the Supreme Court's admonition that "we ordinarily resist reading words or elements into a statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23, 29 (1997); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 536 (1947) ("One more caution is relevant when one is admonished to listen attentively to what a statute says. One must also listen attentively to what it does not say.").

Of course, courts have an obligation to avoid construing statutes in a way that would create a "glaringly absurd" result. *Armstrong Paint*

& Varnish Works v. Nu-Enamel Corp., 305 U.S. 315, 333 (1938); *accord Snow v. First Am. Title Ins. Co.*, 332 F.3d 356, 360 (5th Cir. 2003). A plausible argument could therefore be advanced that I.R.C. §4980H should not be read to permit certification by an agency wholly unconnected with the administration of the Internal Revenue Code or Affordable Care Act. *See Bartenwerfer*, 598 U.S. at 76 ("context can confine a passive-voice sentence to a likely set of actors"). But it is eminently reasonable—and certainly does not create a glaringly absurd result—for the IRS, which is charged with administering the tax code, to make a certification that serves as the prerequisite to the imposition of a tax. *See* I.R.C. §7801(a)(1). Neither Faulk nor the District Court has suggested otherwise.

b. Indeed, the IRS is not just the agency best suited to make the certification required by I.R.C. §4980H, but the only agency that has both the legal authority and practical ability to do so. As a threshold matter, I.R.C. §7801 provides that "[e]xcept as otherwise expressly provided by law, the administration and enforcement of [Title 26] shall be performed by or under the supervision of the Secretary of the Treasury." I.R.C. §7801(a)(1). As we have explained,

the I.R.C. §4980H certification requirement is both contained in, and a prerequisite to liability under, Title 26; therefore, it must be performed by or under the supervision of the Treasury Department unless "otherwise expressly provided by law." However, no law provides for HHS, which is located outside the Treasury Department, to make such a certification—much less does so expressly.

Furthermore, the IRS has all the information necessary to make an I.R.C. §4980H certification. Applicable large employers are required to file Forms 1094-C and 1095-C with the IRS, reporting the information necessary to determine whether they offered health insurance coverage, the extent of coverage offered, the number of full-time employees, and the identity of those employees. I.R.C. §§6055, 6056; Treas. Reg. §§1.6055-1, 301.6056-1; https://irs.gov/pub/irs-pdf/f1094c.pdf; https://irs.gov/pub/irs-pdf/f1095c.pdf. And employees claiming a premium tax credit are required to file Form 8962 with the IRS, demonstrating their entitlement to the credit and providing information that can be reconciled against the information reported by the employers. I.R.C. §36B; https://www.irs.gov/pub/irs-pdf/f8962.pdf. Thus, the IRS is well-positioned to certify to an applicable large

employer that at least one of its full-time employees was enrolled in a qualified health plan for which a premium tax credit was allowed or paid. *See* I.R.C. §4980H(a), (b).

c. By contrast, HHS does not have the information necessary to make an I.R.C. §4980H certification. In particular, HHS does not have information about whether a premium tax credit was allowed or paid. Even if HHS might otherwise get around this problem by requesting the necessary information from the IRS, this is not an option here because the IRS is statutorily prohibited from disclosing this information to HHS.

The rules governing the inspection and disclosure of returns and return information are set forth in I.R.C. §6103. I.R.C. §6103(a) provides a general rule that "returns" and "return information" shall be confidential, and shall not be disclosed "except as authorized by this title." I.R.C. §6103(a). The term "return" is defined to include "any tax or information return, declaration of estimated tax, or claim for refund … which is filed with the Secretary [of the Treasury] …" I.R.C. §6103(b)(1). The term "return information" is broadly defined to include "a taxpayer's identity" and "the nature, source, or amount of his ...

credits." I.R.C. §6103(b)(2)(A). Thus, the extent to which a premium tax credit was allowed or paid falls squarely within the definition of return information and presumptively cannot be disclosed to HHS.

The general prohibition against disclosure in I.R.C. §6103(a) is subject to a series of exceptions. I.R.C. §6103(c)-(o). The relevant exception here is I.R.C. §6103(*l*)(21), which authorizes the IRS to disclose certain return information to HHS in connection with determining whether an individual seeking to purchase health coverage through an Exchange is *eligible* for a premium tax credit. I.R.C. §6103(*l*)(21) (titled "Disclosure of return information to carry out eligibility requirements for certain programs"). However, I.R.C. §6103(*l*)(21) does not authorize the IRS to make a later-in-time disclosure to HHS that a "premium tax credit … *is allowed or paid* with respect to the employee," as required to make an I.R.C. §4980H certification. I.R.C. §4980H(a) (emphasis added); *see also* 42 U.S.C. §18081(f)(2)(B).

This issue is particularly acute in the case of individuals who do not apply for a premium tax credit when they purchase health coverage through an Exchange, but later claim the credit on their income tax

returns. Under those circumstances, HHS never makes a preliminary eligibility determination, and the only agency that considers the individuals' eligibility or entitlement to the credit is the IRS. *Supra*, pp. 10-11. But I.R.C. §6103 makes no provision for the IRS to disclose this determination to HHS, rendering HHS incapable of making an I.R.C. §4980H certification with respect thereto.

The District Court brushed aside this problem by pointing to ACA §1411(c) and (d), under which "numerous inter-agency communications [are] contemplated." (ROA.637.) But this reasoning collapses under its own weight. ACA §1411(c) and (d) provide that an Exchange can disclose certain information to HHS for the purpose of verifying individuals' *eligibility* for premium tax credits, *see* 42 U.S.C. §18081(c)(3), and that HHS can, in turn, disclose that information to the Secretary of the Treasury for the purpose of having the Treasury Department verify the individuals' *eligibility* for premium tax credits, *see* 42 U.S.C. §18081(d). But as we have explained, there is a difference between the initial determination that an employee is *eligible* for a premium tax credit and the later-in-time *payment or allowance* thereof. *Supra*, pp. 7-11. The fact that Congress authorized the Treasury

Department to disclose information to HHS in connection with the former, but not the latter, gives rise to an inference that the omission was intentional. *See Polselli v. Internal Revenue Serv.*, 598 U.S. 432, 439 (2023); *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) (discussing the negative-inference canon).

d. To be sure, the District Court was correct that HHS would have the information necessary to certify that an *advance payment of the premium tax credit* had been made to an employee. (ROA.637.) And under a literal reading of I.R.C. §4980H, HHS would therefore be able to certify to the employer that, in the instance of such APTC, a premium tax credit had been "*paid* with respect to the employee." I.R.C. §4980H(a)(2) (emphasis added); *see also id.* §4980H(b)(1)(B). But such a certification would serve no purpose. ESRP liability is never imposed against an employer based solely on APTC, where the IRS might well disallow—and the employee might well have to repay—that credit following the IRS's review of information reported on Forms 1094-C, 1095-C, and 8962. *Supra*, pp. 9-14.

More fundamentally, HHS would never be in a position to certify that a premium tax credit had been "*allowed* … with respect to the

employee."[5] I.R.C. §4980H(a)(2) (emphasis added); *see also id.* §4980H(b)(1)(B). Requiring that HHS make the certification contemplated by I.R.C. §4980H would thus improperly render this portion of the statute a nullity. *See Corley v. United States*, 556 U.S. 303, 314 (2009) (courts should construe statutes "so that no part will be inoperative or superfluous, void or insignificant") (citation and internal quotations omitted).

e. Even assuming that the IRS *could* disclose information to HHS about whether a premium tax credit was allowed or paid, so that HHS could use that information to make an I.R.C. §4980H certification, it would make far more sense for the IRS to simply use that information to make the certification itself. Of course, nothing would prevent Congress from creating a circular arrangement in which it directed that the IRS disclose information to HHS, that HHS make a certification based on that information, and that the IRS then rely on the HHS certification to assess an ESRP liability. But in the absence of any clear indication that Congress intended such an arrangement, this Court

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[5] In I.R.C. §36B, Congress made clear that Treasury's advance payment of a premium tax credit was distinct from the later-in-time allowance thereof. I.R.C. §36B(f).

should avoid reading this type of inefficiency into the statute. *See E.E.O.C. v. Louisville & Nashville R.R. Co.*, 505 F.2d 610, 613 (5th Cir. 1974) ("There is a presumption against a construction which would render a statute ineffective or inefficient.") (citation and internal quotations omitted).

f. A regulation promulgated by HHS reinforces the conclusion that responsibility for making an I.R.C. §4980H certification belongs to the IRS:

> Certification program for employers. 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 which a [Qualified Health Plan] for which a premium tax credit or cost-sharing reduction is allowed or paid.

45 C.F.R. §155.310(i) (emphasis added). Although courts no longer defer to agency interpretations of an ambiguous statutory provision, they "'may properly resort [to those interpretations] for guidance.'" *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394 (2024) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). And the interpretation reflected in the HHS regulation is entitled to particular respect because it was promulgated in close proximity to the Affordable

Care Act's effective date, was issued through notice-and-comment rulemaking, and reflects the Government's consistent, considered position over the last decade. *See Loper Bright*, 603 U.S. at 386.

The District Court afforded no respect to 45 C.F.R. §155.310(i), brushing it aside as an impermissible "delegation" of authority from HHS to the IRS. (ROA.642.) The District Court's approach badly mischaracterizes the regulation. Although one agency does sometimes delegate authority to another by regulation, such delegations generally are made expressly. *E.g.*, 31 C.F.R. §1010.810(g) ("The authority to enforce the provisions of 31 U.S.C. 5314 and §§ 1010.350 and 1010.420 of this chapter has been redelegated from FinCEN to the Commissioner of Internal Revenue …"). The HHS regulation does nothing of the sort. Instead, it simply sets out HHS's interpretation of the relevant statutory provisions and, as such, should have been accorded due respect. *See Loper Bright*, 603 U.S. at 385-86; *see also infra*, pp. 49-50.

2. I.R.C. §4980H(a)'s cross-reference to ACA §1411 does not create a requirement that the certification be made by HHS

In holding that only HHS can make the certification contemplated by I.R.C. §4980H, the District Court focused on §4980H's requirement that certification be made "under section 1411 of the Patient Protection and Affordable Care Act." (ROA.634 (quoting I.R.C. §4980H(a)(2)); *see also* I.R.C. §4980H(b)(1)(B). The Government urged the court to interpret this phase as "in accordance with" or "consistent with" ACA §1411. Under that reading, the IRS would be authorized to—and certainly not precluded from—making the certification, but would need to do so in accordance with the standards set out in ACA §1411. (ROA.100-101, 195.) For its part, Faulk urged the court to interpret this phrase as "by reason of the authority" of ACA §1411. And because ACA §1411 only confers authority on HHS, Faulk further urged that HHS must make the certification. (ROA.169-170.)

The District Court rejected the Government's interpretation and adopted Faulk's. However, the court acknowledged that its interpretation was neither "the only possible interpretation of the statutes in question" nor "without its challenges." (ROA.635, 638.) The

primary "challenge" with the court's interpretation is that it reads ACA §1411 as authorizing HHS to make the required certification, even though ACA §1411 does nothing of the sort. By reading such an authorization into ACA §1411 that appears nowhere in its text, rather than adopting the Government's interpretation that presents no such problem, the court erred.

a. The meaning of "'under section 1411' of the ACA" must be determined based on the context in which it appears

I.R.C. §4980H does not define the preposition "under." The word should therefore be afforded its commonly understood meaning. *See Commissioner v. Soliman*, 506 U.S. 168, 174 (1993). However, the word "under" is susceptible to many different meanings. *Kucana v. Holder*, 558 U.S. 233, 245 (2010); *see* https://www.dictionary.com/browse/under (listing 18 definitions); *under*, *Black's Law Dictionary* (12th ed. 2024) (listing 17 definitions). Accordingly, its meaning in any particular statute must be determined based on the context in which it appears. *Kucana*, 558 U.S. at 245.

For some statutes, courts have determined that "under" means "in accordance with" or "consistent with." *E.g., Kirtsaeng v. John Wiley &*

Sons, Inc., 568 U.S. 519, 530 (2013) ("under" meant "in accordance with" or "in compliance with");[6] *see* https://www.dictionary.com/browse/under (definition 14); *under*, *Black's Law Dictionary* (12th ed. 2024) (definition 15). For other statutes, courts have determined that "under" means "pursuant to" or "by reason of the authority of." *E.g.*, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 124 (2018); *see also under*, *Black's Law Dictionary* (12th ed. 2024) (definition 15). As discussed below, the relevant context confirms that the Government's interpretation of "'under section 1411' of the ACA" is sound and that the District Court's interpretation is fallacious.

b. The best interpretation of "'under section 1411' of the ACA" is "'in accordance with section 1411' of the ACA"

As we have just explained, "under" sometimes means "in accordance with" or "consistent with." Applying this meaning in the

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[6] *See also In re Ten Eyck Co., Inc.*, 40 F. Supp. 270, 271 (N.D.N.Y. 1941), *aff'd*, 126 F.2d 806 (2d Cir. 1942); *Mala Geoscience AB v. Witten Techs., Inc.*, 2007 WL 1576318, at *5 (D.D.C. May 30, 2007) (citing *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 659 (1999)); *Unwired Planet, Inc. v. Microsoft Corp.*, 193 F. Supp. 3d 336, 342 (D. Del. 2016); *accord* B. Garner, *A Dictionary of Modern Legal Usage* at 721, 896 (2d ed. 1995) (defining "pursuant to" as "in accordance with," and providing that "under" is generally a preferable substitute for "pursuant to" when referring to a statute).

context of I.R.C. §4980H, the provision requires that certifications be made "in accordance with" ACA §1411. Thus, when certifying to an applicable large employer that at least one of its full-time employees had enrolled "in a qualified health plan with respect to which an applicable premium tax credit … [was] allowed or paid with respect to the employee," the IRS would be required to apply the standards set out in ACA §1411. I.R.C. §4980H(a)(2); *see also id.* §4980H(b)(1)(B).

The District Court rejected this interpretation, concluding that it would render the phrase "'under section 1411' of the ACA" meaningless. (ROA.635.) This does not withstand scrutiny. Under the Government's interpretation, the purpose of the phrase "'under section 1411' of the ACA" is to tell the IRS where to find the standards that it must follow when making its certification. Those standards include, among other things, requirements for an employee to qualify for a premium tax credit. *E.g.*, 42 U.S.C. §18081(a)(1) (citizenship and residency requirements), (a)(2) (income requirements), (a)(2)-(3) (coverage requirements); *see also id.* §18081(a) (directing HHS to establish a program for determining the foregoing). And it is, in fact, common for one statutory provision to direct an agency to standards located in

another statutory provision. *E.g.*, I.R.C. §§139K(b) (incorporating the definitions provided "under section 25F(c)"), 6726(d)(1)(B) (tying penalty amounts to "the cost-of-living adjustment determined under section 1(f)(3)"), 7466(b) (determinations about discipline of Tax Court judges "shall be based on the grounds for removal of a judge from office under section 7443(f)").

Here, Congress had a particular interest in directing the IRS to the standards in ACA §1411. The standards governing tax liability are ordinarily located in the Internal Revenue Code. Indeed, in considering an employer's potential ESRP liability, the IRS must determine whether the employer qualifies as an "applicable large employer" by resort to the definition in I.R.C. §4980H(c)(2), and it must determine the amount of the employer's liability by resort to the formulas in I.R.C. §4980H(a) and (b). But the IRS must also look outside the Internal Revenue Code for some of the standards governing ESRP liability. In particular, it must determine whether a premium tax credit is appropriately allowed or paid to an employee by resort to the standards and procedures discussed in ACA §1411. Under the circumstances, it was logical and appropriate to direct the IRS to ACA §1411.

Of course, telling the IRS where to find some of the standards governing ESRP liability may not have seemed particularly significant to the District Court. "[B]ut a job is a job, and enough to bar the rule against redundancy from disqualifying an otherwise sensible reading." *Polselli*, 598 U.S. at 443 (citation and internal quotations omitted). And that sensible reading becomes all the more compelling when contrasted with the court's fatally flawed interpretation, discussed below.

c. The District Court's interpretation of "'under section 1411' of the ACA" as "'by reason of the authority of' section 1411 of the ACA" is fatally flawed

i. The District Court chose to interpret "under section 1411" of the ACA as "by reason of the authority" of section 1411 of the ACA. (ROA.634-635.) While this meaning might work in a different statutory context, it immediately hits strong headwinds here. As the District Court and Faulk acknowledged, ACA §1411 never authorizes HHS (or anyone else) to "certify" or make a "certification" in connection with the employer mandate or ESRPs. (ROA.171, 635.) This omission, standing alone, should have given the court pause.

To get around this problem, the District Court turned to ACA §1411(e), which requires that HHS "notify" and provide "notice" to

certain employers that (i) one of their employees has been determined eligible for a premium tax credit and (ii) the employers have the right to an administrative appeal with HHS to dispute this determination. 42 U.S.C. §18081(e). The court concluded that the "notice" contemplated by ACA §1411(e) is the same as the "certification" contemplated by I.R.C. §4980H. On this reading, ACA §1411 does, in fact, confer authority on HHS to make the certification contemplated by I.R.C. §4980H. (ROA.635.) But in adopting that reading, the court created multiple, unresolvable problems that demonstrate the fallacy of its reasoning.

ii. As a threshold matter, the words "certification" and "certify" are not synonymous with the words "notice" and "notify." Certification is "[t]he act of attesting; esp., the process of giving someone or something an official document stating that a specified standard or qualified has been met." *Certification*, *Black's Law Dictionary* (12th ed. 2024); https://www.dictionary.com (defining "certification" as "the act of certifying" and "certify" as "to attest as certain; give reliable information of; confirm"). A "notice," by contrast, is a "[l]egal notification required by law or agreement." *Notice*, *Black's Law*

Dictionary (12th ed. 2024); https://www.dictionary.com/browse/notice (defining "notice" as "a note, placard, or the like conveying information or a warning").

Nor do the relevant statutes use the terms "certification" and "notice" interchangeably. I.R.C. §4980H requires "certification" prior to the imposition of ESRP liability, but it never refers to that "certification" as a "notice." *See* I.R.C. §4980H(a)(2), (b)(1)(B). I.R.C. §4980H also uses the term "notice" in an unrelated context, namely "notice and demand" for payment, but it never refers to this "notice" as a "certification." *See* I.R.C. §4980H(d)(1).

The distinction between the terms "certification" and "notice" is preserved and reinforced in ACA §1411. ACA §1411(e) provides that an Exchange shall "notify," and provide "notice" to, an employer that one or more of its employees is eligible for a premium tax credit, that the employer may be liable for an ESRP, and that the employer may avail itself of an administrative appeal. 42 U.S.C. §18081(e)(4)(B)(iii), (C). However, ACA §1411 never refers to that "notice" as a "certification." ACA §1411 also uses the term "certification" in an unrelated context, namely "certification" that an *individual* is exempt from the Affordable

Care Act's mandate to purchase health insurance, but it never refers to that "certification" as a "notice." *See* 42 U.S.C. §18081(a)(4), (b)(5), (e)(2)(B), (e)(4)(B)(iv). Thus, usage confirms that the two terms carry different meanings.

Where the relevant statutes consistently distinguish between certifications and notices, the District Court should have honored that distinction. *See Mohamad v. Palestinian Auth.*, 566 U.S. 449, 456 (2012) ("We generally seek to respect Congress's decision to use different terms to describe different categories of people or things."). After all, "'[a] word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning.'" *Landry's, Inc. v. Insur. Co. of the State of Pa.*, 4 F.4th 366, 370 (5th Cir. 2021) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012)).

iii. The distinction between the certification contemplated by I.R.C. §4980H and the notice contemplated by ACA §1411 is not merely linguistic. In addition to using different words to describe the certification and notice requirements, the Government and Faulk agree that Congress made the two different in substance. (ROA.171 ("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.'").) As discussed below, there are at least five substantive differences between I.R.C. §4980H certifications and ACA §1411 notices, reinforcing the conclusion that the District Court erred by lumping the two together.

First, ACA §1411 notices and I.R.C. §4980H certifications address different stages in the process of applying for and obtaining a premium tax credit. As to ACA §1411(e), an employer receives notice following HHS's advance determination that an employee "*is eligible for* a premium tax credit." 42 U.S.C. §18081(e)(4)(B)(iv) (emphasis added). However, as to I.R.C. §4980H, the employer receives a different, later-in-time certification that such "premium tax credit … *is allowed or paid* with respect to the employee." I.R.C. §4980H(a)(2), (b)(1)(B) (emphasis added); *supra*, pp. 7-11.

Second, different facts are taken into account when determining whether to issue ACA §1411 notices and I.R.C. §4980H certifications. ACA §1411 notices are issued following an employee eligibility

determination, which is made without regard to whether the employee worked full-time or part-time. 42 U.S.C. §18081(e)(4)(B)(iii). I.R.C. §4980H certifications, however, are issued only after a premium tax credit has been allowed or paid to "at least one full-time employee." I.R.C. §4980H(a)(2); *see id.* §4980H(b)(1)(B) (certifications issued based on determination regarding "1 or more full-time employees"); *see also* 77 Fed. Reg. 18310-01, at *18369 (Mar. 27, 2012).

Third, ACA §1411 notices are, in some respects, issued to a broader pool of employers than I.R.C. §4980H certifications. ACA §1411 notices are issued without regard to an employer's size, once HHS has made an advance determination that an employee is eligible for a premium tax credit. 42 U.S.C. §18081(e)(4)(B)(iii). I.R.C. §4980H certifications, by contrast, are only issued to "applicable large employers," *i.e.*, generally those with at least 50 full-time employees, including full-time equivalent employees. I.R.C. §4980H(a), (b), (c)(2); *see also* 78 Fed. Reg. 4594-01, at *4654; 77 Fed. Reg. 18310-01, at *18356.

Fourth, ACA §1411 notices are, in other respects, issued to a narrower pool of employers than I.R.C. §4980H certifications. ACA

§1411 notices are issued only to employers that failed to offer health coverage at all or offered unaffordable coverage. 42 U.S.C. §18081(e)(4)(B)(iii) (requiring notice to employers that did "not provide minimum essential coverage" or provided "coverage but it is not affordable"). But I.R.C. §4980H certifications are issued to every employer that is subject to an ESRP. I.R.C. §4980H(a), (b). This includes not only employers that failed to offer health coverage at all or offered unaffordable coverage, but also employers who offered coverage that did not provide minimum value. *Id.* §4980H(a)(1), (b)(1)(A).

Fifth, ACA §1411 notices and I.R.C. §4980H certifications have a different temporal sweep. ACA §1411 notices address HHS's advance determination that an employee is eligible for a premium tax credit. 42 U.S.C. §18081(e)(4)(B)(iii). This determination is made once a year, at the time the employee applies for financial assistance through the Exchange. By contrast, I.R.C. §4980H certifications address, on a month-by-month basis, the extent to which a premium credit was allowed or paid with respect to a full-time employee who enrolled in insurance coverage through an Exchange. I.R.C. §4980H(a)(2), (b)(1)(B) (certification is made "for such month" that a credit is allowed or paid).

iv. The distinction between the notice contemplated by ACA §1411(e) and the certification contemplated by I.R.C. §4980H is buttressed by the relevant HHS regulation, 45 C.F.R. §155.310. In 45 C.F.R. §155.310(h), HHS addressed the method by which an Exchange notifies employers of its advance determination that an employee is eligible for a premium tax credit. In 45 C.F.R. §155.310(i), HHS stated that the IRS would separately adopt methods to make the later-in-time I.R.C. §4980H certification to applicable large employers that the prerequisites to ESRP liability were satisfied.

In explaining an interim version of this guidance, HHS made clear that the distinction between ACA §1411 notices and I.R.C. §4980H certifications was a function of the statutory scheme enacted by Congress: "The statute makes clear that the two processes are distinct." 77 Fed. Reg. 18310-01, at *18369. As to the former, HHS explained:

> Under sections 1411 and 1412 of the Affordable Care Act, the Exchange will make eligibility determinations for advance payments of the premium tax credit and cost-sharing reductions, notify employers that a payment may be assessed and that the employer has a right to appeal to the Exchange, and provide information to the Treasury.

Id. As to the latter, HHS emphasized that "[t]he assessment of shared responsibility payments under section 4980H of the Code is within the

jurisdiction of the Treasury." *Id.* And in the subsequent notice of proposed rulemaking that preceded the final regulation, HHS reiterated that the "certification program" employed in connection with Treasury's assessment of ESRPs "is distinct from the notification specified in [ACA] section 1411(e)(4)(B)(iii) and paragraph (h)." 78 Fed. Reg. 4594-01, at *4636. Thus, HHS has long recognized the different functions of, and responsibility for, the advance eligibility notices sent to employers, on one hand, and the later-in-time certifications that serve as a prerequisite to ESRP liability, on the other.

v. As we just explained, ACA §1411 notices and I.R.C. §4980H certifications address different steps in the ESRP process, take into account different facts, are issued to different categories of employers, and have a different temporal sweep. The District Court hurried past these issues, opining that nothing would prevent HHS from issuing notices that go beyond the requirements of ACA §1411 and thereby "comply with both" ACA §1411 and the seemingly more demanding I.R.C. §4980H. (ROA.637.) For example, the court suggested that "HHS and the Exchange could … facilitate monthly certification" to comply with I.R.C. §4980H even though nothing in ACA §1411 provides

for HHS to issue notices with this frequency. (*Id.*) But this just illustrates why the court's interpretation of the phrase "'under section 1411' of the ACA" cannot be right. If nothing in ACA §1411 contemplates HHS issuing monthly notices, then it would make little sense to say that HHS was doing so "'by reason of the authority' of ACA § 1411." And the court never explained how, as a practical matter, HHS would effectuate the issuance of monthly notices when the corresponding eligibility determination is made only once a year. *Supra*, p. 48.

Moreover, even assuming that HHS had the authority and ability to issue notices more frequently than contemplated by ACA §1411, this would not resolve the other problems that result from merging I.R.C. §4980H certifications into ACA §1411 notices. In particular, HHS would have to ignore ACA §1411's directive that it notify employers of its advance determination that one of their employees was *eligible* for a premium tax credit and instead wait to issue such notices until the later *allowance or payment* of such a credit (or issue multiple notices, addressed to a series of different determinations, even though nothing in §1411 contemplates such a process). HHS would also have to ignore

ACA §1411's directive that it issue notices without regard to whether an employee who purchased coverage through an Exchange worked full-time or part-time and instead issue notices only with respect to full-time employees. HHS would further have to ignore ACA §1411's directive that it issue notices without regard to employer size, and instead issue notices only to applicable large employers. And even as HHS was issuing fewer notices than directed by ACA §1411 in some respects, it would have to issue more notices than directed in another respect, *i.e.*, by issuing notices to employers who offered coverage that did not provide minimum value, even though nothing in ACA §1411 so requires. At this point, it would make little sense—and, indeed, would approach glaring absurdity—to say that HHS was issuing notices "'by reason of the authority' of ACA § 1411."

Nor do the problems end there. Merging I.R.C. §4980H certifications into ACA §1411 notices would require HHS to apply definitions and requirements found in the Internal Revenue Code, notwithstanding I.R.C. §7801(a)(1)'s directive that the Secretary of the Treasury shall administer and enforce the Code. *Supra*, pp. 28-29. Even more incongruous, it would sometimes make federal ESRP

liability turn on the conduct of States. After all, it is the Exchanges that are charged with providing ACA §1411 notices, and many Exchanges are State-run. 42 U.S.C. §§18031(b), 18081(e)(4)(B)(iii).

To its credit, the District Court acknowledged that the notice contemplated by ACA §1411 and the certification contemplated by I.R.C. §4980H "may not be the same." (ROA.636.) And the interplay between the relevant provisions of the Affordable Care Act is undoubtedly complex. But the fact "[t]hat a statute is complicated does not mean it is ambiguous. It just means that the judge needs to work harder to determine—in the sense of ascertain—the statute's meaning." Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 319 (2017). When the text of the relevant provisions is scrutinized and the canons of interpretation are faithfully applied, it becomes untenable to conflate ACA §1411 notices with I.R.C. §4980H certifications.

3. The fact that certification must occur before the imposition of liability does not create a requirement that HHS make the certification

a. The District Court attempted to prop up its interpretation of I.R.C. §4980H by noting that the certification requirement is phrased in the past tense, namely that "at least one full-time employee of the applicable large employer *has been certified* to the employer under section 1411" of the ACA. I.R.C. §4980H(a) (emphasis added). The court opined that this meant certification must occur before the IRS becomes involved in the ESRP process. (ROA.635-636.) Here again, the court's interpretation was divorced from the statutory text.

It is, of course, true that I.R.C. §4980H's certification requirement is phrased in the past tense. It is also true that the provision incorporates a temporal requirement, namely that certification must occur before an ESRP is imposed. I.R.C. §4980H(a), (b). This follows from the provision's plain text, which provides that "*[i]f*" certain requirements are met, "*then* there is hereby imposed on the employer an assessable payment." I.R.C. §4980H(a)(1), (2) (emphasis added). And those requirements include that a certification has been made. I.R.C. §4980H(a)(2), (b)(1)(B).

This temporal requirement was satisfied here. In a Letter 226-J that *proposed* an ESRP liability for 2019, the IRS provided a certification to Faulk. (ROA.12, 109-114.) Following further administrative proceedings, the liability was then *imposed and assessed*. (ROA.21, 461-472.) Accordingly, the certification occurred prior to the imposition of liability, which is all that I.R.C. §4980H requires.

b. The District Court nonetheless interpreted I.R.C. §4980H as including a further temporal requirement, namely that certification be made not only before ESRP liability is imposed but also "before the IRS enters the picture." The court then concluded that this requirement was not satisfied here because the certification was made by the IRS. (ROA.635-636.)

As this Court held in rejecting the argument that a different statute should be interpreted to include a temporal requirement untethered from the statutory language, "[t]he problem with this interpretation is that it has no basis in the text of the statute." *Swift v. Commissioner*, 144 F.4th 756, 770 (5th Cir. 2025) (citation and internal quotations omitted). We reiterate that, as the District Court

acknowledged elsewhere in its opinion, I.R.C. §4980H says nothing about which agency must make the certification. (ROA.634); *supra*, pp. 26-27. As a necessary corollary, I.R.C. §4980H says nothing about the certification being made by an agency other than the IRS. And I.R.C. §4980H certainly does not say that the certification must "take place before the IRS enters the picture." (ROA.636.) In crafting such a requirement out of whole cloth, the court compounded its other errors.

4. The District Court's policy concerns do not justify rewriting I.R.C. §4980H

Finally, the District Court's opinion seemed driven by its concern that HHS has not been complying with its obligation to issue the notices contemplated by ACA §1411. (ROA.636, 638.) But even if HHS failed to comply with the ACA §1411 notice requirement, it would not be a basis for invalidating Faulk's ESRP liability for 2019.

First and foremost, no provision of the Affordable Care Act makes the issuance of an ACA §1411 notice a condition precedent to ESRP liability. As discussed, Congress conditioned the imposition of ESRP liability on an I.R.C. §4980H certification. I.R.C. §4980H(a)(2), (b)(1)(B). However, Congress did not similarly condition ESRP liability on the issuance of an ACA §1411 notice. Where Congress chose to

condition the imposition of ESRP liability on the former requirement, but not the latter, that choice should be respected. *See Polselli*, 598 U.S. at 439.

Indeed, when Congress wants to condition the imposition of a tax or tax penalty on compliance with a procedural requirement, it does so expressly. *E.g.*, I.R.C. §6672(b)(1) ("No penalty shall be imposed under subsection (a) unless the Secretary notifies the taxpayer in writing by mail to an address as determined under section 6212(b) or in person that the taxpayer shall be subject to an assessment of such penalty."); *see also* I.R.C. §§6213(a) ("Except as otherwise provided in section 6851, 6852, or 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapter 41, 42, 43, or 44 … shall be made … until such notice has been mailed to the taxpayer …"), 6751(b)(1) ("No penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor …"). Congress did not do so for ACA §1411 notices. Thus, even if HHS were required to issue an ACA §1411 notice and failed to do so, that failure would not justify invalidating Faulk's ESRP liability—regardless of how "important" the notice requirement

may be. (ROA.636, 638); *see Pac. Gas & Elec. Co. v. F.E.R.C.*, 113 F.4th 943, 950 (D.C. Cir. 2024) ("[p]olicy concerns cannot override the text of a statutory provision").

At all events, it is unclear how Faulk was prejudiced in any way relevant to this case by not receiving an ACA §1411 notice. The notice would have informed Faulk of the availability of an HHS appeal in which to dispute HHS's "determination that the employer does not provide minimum essential coverage through an employer-sponsored plan or that the employer does provide that coverage but it is not affordable coverage with respect to an employee." 42 U.S.C. §18081(f)(2)(A). But Faulk concedes that it offered no insurance coverage at all in 2019 (ROA.12, 222), meaning that there was nothing for it to dispute in such an appeal.

Of course, Faulk has speculated that, if it had known some of its employees were obtaining health insurance through the Exchange in 2019, then it might have offered them the opportunity to purchase coverage in later years and thereby avoided ESRP liability in those years. (ROA.222.) But even if we were to credit Faulk's speculation about how it would have hypothetically behaved in 2020, 2021, etc.,

that would have no bearing on Faulk's ESRP liability for 2019—the only year for which it seeks a refund here.

Notably, Faulk is not left without recourse for HHS's alleged failure to comply with ACA §1411. To the extent that Faulk believes it is entitled to, and would benefit from, the HHS notice and appeal process (either for 2019 or on a going-forward basis), it could bring a suit to compel that process. But where Congress has failed to condition the imposition of ESRP liability on HHS's compliance with ACA §1411, this Court should not rewrite the relevant statutes to do otherwise.

II.

The District Court erred in declaring the HHS regulation invalid and setting it aside

In addition to ordering a refund of the ESRP that Faulk paid for 2019, the District Court declared that an HHS regulation, which supports the Government's position that the IRS can make the certification contemplated by I.R.C. §4980H, was invalid and should be set aside. (ROA.641-642.) As discussed below, that ruling was incorrect on the merits and, at all events, the court lacked jurisdiction to award such relief.

A. The HHS regulation reflects a correct interpretation of the relevant statutes

As we explained, 45 C.F.R. §155.310(i) provides that "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 which a [Qualified Health Plan] for which a premium tax credit or cost-sharing reduction is allowed or paid." *Supra*, p. 35. As we further explained, the regulation represents the best reading of the relevant statutes, namely that the IRS is charged with making the certification required by I.R.C. §4980H. *Supra*, pp. 24-59. It follows that the regulation does not conflict with those statutes. Consequently, the District Court's order setting the regulation aside is erroneous and should be reversed.

B. At all events, the tax exception to the Declaratory Judgment Act barred the declaratory relief awarded

1. Separate from the merits, the District Court lacked jurisdiction to award declaratory relief invalidating the HHS regulation. The Internal Revenue Code establishes a comprehensive scheme of administrative and judicial avenues that Congress has designed to resolve tax disputes. A series of statutory provisions

channel such disputes into those avenues and away from freestanding suits seeking equitable relief. Relevant here are the Anti-Injunction Act ("AIA"), I.R.C. §7421(a), and the tax exception to the Declaratory Judgment Act ("DJA"), 28 U.S.C. §2201(a),[7] each of which operates as a jurisdictional bar to suits that fall within its respective scope. *Rivero v. Fid. Invests., Inc.*, 1 F.4th 340, 344-45 (5th Cir. 2021).

With certain enumerated exceptions, the AIA provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." I.R.C. §7421(a). That "broad and mandatory language," *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 12 (2008), "could scarcely be more explicit" in precluding challenges to assessment and collection outside the highly reticulated scheme enacted by Congress. *Bob Jones Univ.*, 416 U.S. at 736. Consequently, the AIA has "almost literal effect," precluding any suit brought for the purpose of restraining assessment or collection that falls outside that scheme. *Id.* at 737.

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[7] For convenience, we use the acronym "DJA" to refer to the exception, not the Act itself.

> The Declaratory Judgment Act generally provides that:
>
> [i]n a case of actual controversy within its jurisdiction, … any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration …

28 U.S.C. §2201(a). However, the DJA expressly excepts the award of such declaratory relief "with respect to Federal taxes." *Id.* Like the AIA, the DJA is subject to certain enumerated exceptions, although the exceptions enumerated in the DJA are different from the exceptions enumerated in the AIA. *Compare id. with* I.R.C. §7421(a).

The Supreme Court has long held that the DJA's prohibition against declaratory relief is "at least as broad as the prohibition of the Anti-Injunction Act." *Alexander v. Ams. United Inc.*, 416 U.S. 752, 759 n.10 (1974). Some courts, though acknowledging that the AIA and DJA were enacted at different times and use different language, have concluded that the two prohibitions are "coterminous." *E.g.*, *Cohen v. United States*, 650 F.3d 717, 730-31 (D.C. Cir. 2011) (en banc). But this Court has concluded that the textual differences between the two statutes must be respected. *Rivero*, 1 F.4th at 345-46. Under this Court's precedent, the DJA therefore bars a suit seeking declaratory relief with respect to Federal taxes, even if the suit falls outside the AIA

because it "does not involve 'the assessment or collection of any tax.'" *Id.*

2. In Count III of its complaint, Faulk sought a declaratory judgment that 45 C.F.R. §155.310(i) conflicted with the relevant statutes and was, therefore, "unlawful and void." (ROA.20-21.) Faulk's complaint made clear that the injury from which it sought relief was the IRS's reliance on the regulation "to pursue ESRP excise taxes against Faulk Company." (ROA.17.) In its opposition to the Government's motion to dismiss, Faulk doubled down on this position, complaining that the IRS Independent Office of Appeals may, in pending administrative appeals concerning its ESRP liability for post-2019 years, rely on the regulation when considering whether to compromise that liability. (ROA.165.) Faulk further complained that the IRS may rely on the regulation to assert ESRP liabilities against it in the future. (ROA.165.) There is, therefore, no real dispute that Count III seeks declaratory relief with respect to Federal taxes. As such, it runs headlong into the DJA and should have been dismissed for lack of jurisdiction. *See Rivero*, 1 F.4th at 346 (DJA barred suit seeking relief that "would inevitably involve sifting through the applicable Treasury

regulations … in order, ultimately, to make a determination 'with respect to Federal taxes'"); *Optimal Wireless*, 77 F.4th at 1072-73 (DJA barred suit seeking to prevent the IRS from assessing ESRPs without first complying with certain procedural requirements); *Gilbert v. United States*, 998 F.3d 410, 414-15 (9th Cir. 2021) (DJA barred suit seeking declaratory judgment "that withholding funds as required by [tax] rules from the Contract price is not a breach of the Contract").

3. The District Court nonetheless held that the DJA was inapplicable based on the reasoning from the Supreme Court's decision in *CIC Servs., LLC v. Internal Revenue Serv.*, 593 U.S. 209 (2021). (ROA.640-641.) The court's reliance on *CIC Services* was misplaced for two reasons.

First, the District Court cited *CIC Services* for the proposition that "[b]oth the Declaratory Judgment Act and Anti-Injunction Act apply 'when the target of a requested injunction is a tax obligation.'" (ROA.640-641 (quoting *CIC Servs.*, 593 U.S. at 218).) However, *CIC Services* addressed only the AIA. 593 U.S. at 211-26. It did not mention, let alone interpret, the DJA. The District Court should have therefore followed this Court's DJA precedent, which provides that the

DJA should be applied according to its own terms and not through the lens of the narrower AIA. *See Rivero*, 1 F.4th at 345-46. And when the DJA is so applied, it bars Count III, as we have just explained.

Second, even if this Court were to apply the reasoning from *CIC Services* to the DJA, the DJA would still bar Count III of Faulk's complaint. As background, CIC Services acted as a "material advisor" to participants in micro-captive insurance arrangements. Based on an IRS notice, CIC Services was required to report information about those arrangements to the IRS, which the IRS might potentially use to determine tax adjustments to the returns of CIC Services' clients (but not CIC Services' own returns). Nonetheless, if CIC Services failed to submit the required information, it was potentially subject to (i) a civil penalty that was treated as a tax for purposes of the AIA and (ii) criminal prosecution if its failure to comply were willful. CIC Services brought suit before the reporting obligation went into effect, and thus prior to any potential civil or criminal liability, seeking to enjoin the reporting obligation. *CIC Services,* 593 U.S. at 214-15, 217.

The Supreme Court held that the purpose of the suit was to challenge a reporting obligation, rather than to restrain assessment or

collection. Furthermore, based on three factors, the Court concluded that the suit was not "a tax action in disguise." First, the IRS notice "impose[d] affirmative reporting obligations, inflicting costs separate and apart from the statutory tax penalty." Second, CIC Services stood "nowhere near the cusp of tax liability," where the "reporting rule and the statutory tax penalty are several steps removed from each other." Third, even if the tax penalty were enjoined, CIC Services would remain subject to the reporting requirement, with any violation "punishable … by separate criminal penalties." *CIC Servs.,* 593 U.S. at 219-22.

The Supreme Court emphasized that CIC Services' suit fell outside the AIA because it "contest[ed], and s[ought] relief from," a legal mandate separate and apart from any tax. If the suit had been a "run-of-the-mine suit[ ]" that preemptively sought to foreclose tax liability, the AIA would have barred pre-enforcement review. In such a case, the taxpayer's "sole recourse" would have been "to pay the tax and seek a refund." *CIC Servs.*, 593 U.S. at 223-24.

This case is nothing like *CIC Services*. In its complaint, Faulk sought to invalidate 45 C.F.R. §155.310(i) because "the IRS continues to pursue ESRP excise taxes against Faulk Company in reliance on" that

regulation. (ROA.17.) Thus, by Faulk's own admission, the "target" of its requested declaratory relief was "a tax obligation." *CIC Servs.*, 593 U.S. at 218. And under this Court's post-*CIC Services* precedent, where a taxpayer seeks to foreclose the assessment of taxes based on an "alleged procedural deficiency," the AIA deprives the court of jurisdiction. *Franklin v. United States*, 49 F.4th 429, 435 (5th Cir. 2022); *accord Optimal Wireless*, 77 F.4th at 1072-73; *Hancock Cty. Land Acquisitions, LLC v. United States*, 2022 WL 3449525, at *2 (11th Cir. 2022) (per curiam) (AIA barred suit seeking to prevent the IRS from taking step that was the "statutory prerequisite" to the assessment of taxes), *cert. denied*, 143 S. Ct. 577 (2023). The District Court's contrary conclusion—*i.e.*, that the DJA was inapplicable because the target of Count III was "the improper certification that stands as a procedural prerequisite to the tax"—cannot be squared with this precedent. (ROA.641.)

Indeed, each of the factors considered in *CIC Services* supports the conclusion that Faulk brought this suit to restrain the assessment and collection of taxes. First, Faulk has identified no obligations or costs that the regulation inflicts on it "separate and apart" from the

(allegedly improper) imposition of tax. *CIC Servs.*, 593 U.S. at 220. Second, Faulk filed suit when it was on "the cusp tax liability," *id.* at 221, as the IRS had assessed an ESRP liability against it for one year and proposed liabilities against it for multiple others. (ROA.18, 165, 222.) Third, Faulk would not be exposed to potential criminal liability by challenging the validity of the regulation in a refund claim, rather than a claim seeking equitable relief.

At bottom, Faulk's requested declaratory relief targets an "impending or eventual tax obligation" in a real and immediate way. *CIC Servs.*, 593 U.S. at 219. Consequently, its "sole recourse is to pay the tax and seek a refund."[8] *Id.* at 224.

[8] Because it set aside the HHS regulation as conflicting with the relevant statutes, the District Court did not reach Faulk's claim that the regulation should also be set aside as arbitrary and capricious. (ROA.643.) However, Faulk's arbitrary-and-capricious claim would be barred by the DJA for the same reasons as its contrary-to-law claim.

CONCLUSION

The judgment of the District Court should be reversed and the case remanded with instructions to enter judgment in favor of the Government.

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(s) /s/ Geoffrey Klimas

Attorney for Appellants

Dated: December 8, 2025

ADDENDUM

26 U.S.C. §4980H—Shared responsibility for employers regarding health coverage

(a) Large employers not offering health coverage.—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 and the number of individuals employed by the employer as full-time employees during such month.

(b) Large employers offering coverage with employees who qualify for premium tax credits or cost-sharing reductions.--

(1) In general.--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 $\frac{1}{12}$ of $3,000.

(2) Overall limitation.--The aggregate amount of tax determined under paragraph (1) with respect to all employees of an applicable large employer for any month shall not exceed the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

(c) Definitions and special rules.--For purposes of this section—

(1) Applicable payment amount.--The term "applicable payment amount" means, with respect to any month, $\frac{1}{12}$ of $2,000.

(2) Applicable large employer.--

(A) In general.--The term "applicable large employer" means, with respect to a calendar year, an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year.

(B) Exemption for certain employers.--

(i) In general.--An employer shall not be considered to employ more than 50 full-time employees if—

(I) the employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and

(II) the employees in excess of 50 employed during such 120-day period were seasonal workers.

(ii) Definition of seasonal workers.--The term "seasonal worker" means a worker who performs labor or services on a seasonal basis as defined by the Secretary of Labor, including workers covered by section 500.20(s)(1) of title 29, Code of Federal Regulations and retail workers employed exclusively during holiday seasons.

(C) Rules for determining employer size.--For purposes of this paragraph--

(i) Application of aggregation rule for employers.--All persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as 1 employer.

(ii) Employers not in existence in preceding year.--In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is an applicable large employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(iii) Predecessors.--Any reference in this subsection to an employer shall include a reference to any predecessor of such employer.

(D) Application of employer size to assessable penalties.--

(i) In general.--The number of individuals employed by an applicable large employer as full-time employees during any month shall be reduced by 30 solely for purposes of calculating—

(I) the assessable payment under subsection (a), or

(II) the overall limitation under subsection (b)(2).

(ii) Aggregation.--In the case of persons treated as 1 employer under subparagraph (C)(i), only 1 reduction under subclause (I) or (II) shall be allowed with respect to such persons and such reduction shall be allocated among such persons ratably on the basis of the number of full-time employees employed by each such person.

(E) Full-time equivalents treated as full-time employees.--Solely for purposes of determining whether an employer is an applicable large employer under this paragraph, an employer shall, in addition to the number of full-time employees for any month otherwise determined, include for such month a number of full-time employees determined by dividing the aggregate number of hours of service of employees who are not full-time employees for the month by 120.

(F) Exemption for health coverage under TRICARE or the Department of Veterans Affairs.--Solely for purposes of determining whether an employer is an applicable large employer under this paragraph for any month, an individual shall not be taken into account as an employee for such month if such individual has medical coverage for such month under—

(i) chapter 55 of title 10, United States Code, including coverage under the TRICARE program, or

(ii) under a health care program under chapter 17 or 18 of title 38, United States Code, as determined by the Secretary of Veterans Affairs, in coordination with the Secretary of Health and Human Services and the Secretary.

(3) Applicable premium tax credit and cost-sharing reduction.--The term "applicable premium tax credit and cost-sharing reduction" means—

(A) any premium tax credit allowed under section 36B,

(B) any cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act, and

(C) any advance payment of such credit or reduction under section 1412 of such Act.

(4) Full-time employee.--

(A) In general.--The term "full-time employee" means, with respect to any month, an employee who is employed on average at least 30 hours of service per week.

(B) Hours of service.--The Secretary, in consultation with the Secretary of Labor, shall prescribe such regulations, rules, and guidance as may be necessary to determine the hours of service of an employee, including rules for the application of this paragraph to employees who are not compensated on an hourly basis.

(5) Inflation adjustment.--

(A) In general.--In the case of any calendar year after 2014, each of the dollar amounts in subsection (b) and paragraph (1) shall be increased by an amount equal to the product of—

(i) such dollar amount, and

(ii) the premium adjustment percentage (as defined in section 1302(c)(4) of the Patient Protection and Affordable Care Act) for the calendar year.

(B) Rounding.--If the amount of any increase under subparagraph (A) is not a multiple of $10, such increase shall be rounded to the next lowest multiple of $10.

(6) Other definitions.--Any term used in this section which is also used in the Patient Protection and Affordable Care Act shall have the same meaning as when used in such Act.

(7) Tax nondeductible.--For denial of deduction for the tax imposed by this section, see section 275(a)(6).

(d) Administration and procedure.--

(1) In general.--Any assessable payment provided by this section shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) Time for payment.--The Secretary may provide for the payment of any assessable payment provided by this section on an annual, monthly, or other periodic basis as the Secretary may prescribe.

(3) Coordination with credits, etc.--The Secretary shall prescribe rules, regulations, or guidance 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.

(4) Time for response.--The Secretary shall allow an applicable large employer at least 90 days from the date of the first letter which informs the employer of a proposed assessment of the employer shared responsibility payment under this section to respond to the proposed assessment before taking any further action with respect to such proposed assessment.

26 U.S.C. §6103—Confidentiality and disclosure of returns and return information

(a) General rule.—Returns and return information shall be confidential, and except as authorized by this title—

> **(1)** no officer or employee of the United States,
>
> **(2)** no officer or employee of any State, any local law enforcement agency receiving information under subsection (i)(1)(C) or (7)(A), any local child support enforcement agency, or any local agency administering a program listed in subsection (l)(7)(D) who has or had access to returns or return information under this section or section 6104(c), and
>
> **(3)** no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (c), subsection (e)(1)(D)(iii), paragraph (10), (13), (14), or (15) of subsection (k), paragraph (6), (10), (12), (13) (other than subparagraphs (D)(v) and (D)(vi) thereof), (16), (19), (20), or (21) of subsection (l), paragraph (2) or (4)(B) of subsection (m), or subsection (n),

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

(b) Definitions.--For purposes of this section—

> **(1) Return.--**The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

(2) Return information.--The term "return information" means**--**

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessment, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition or offense,

…

(*l*) Disclosure of returns and return information for purposes other than tax administration.--

…

(21) Disclosure of return information to carry out eligibility requirements for certain programs.--

(A) In general.--The Secretary, upon written request from the Secretary of Health and Human Services, shall disclose to officers, employees, and contractors of the Department of Health and Human Services return information of any taxpayer whose income is relevant in determining any premium tax credit under section 36B or any cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act or eligibility for participation in a State medicaid program under title XIX of the Social Security Act, a State's children's health insurance program under title XXI of the Social Security Act, or a basic health program under section 1331 of Patient Protection and

Affordable Care Act. Such return information shall be limited to—

(i) taxpayer identity information with respect to such taxpayer,

(ii) the filing status of such taxpayer,

(iii) the number of individuals for whom a deduction is allowed under section 151 with respect to the taxpayer (including the taxpayer and the taxpayer's spouse),

(iv) the modified adjusted gross income (as defined in section 36B) of such taxpayer and each of the other individuals included under clause (iii) who are required to file a return of tax imposed by chapter 1 for the taxable year,

(v) such other information as is prescribed by the Secretary by regulation as might indicate whether the taxpayer is eligible for such credit or reduction (and the amount thereof), and

(vi) the taxable year with respect to which the preceding information relates or, if applicable, the fact that such information is not available.

(B) Information to exchange and State agencies.--The Secretary of Health and Human Services may disclose to an Exchange established under the Patient Protection and Affordable Care Act or its contractors, or to a State agency administering a State program described in subparagraph (A) or its contractors, any inconsistency between the information provided by the Exchange or State agency to the Secretary and the information provided to the Secretary under subparagraph (A).

(C) Restriction on use of disclosed information.-- Return information disclosed under subparagraph (A) or (B) may be used by officers, employees, and contractors of the Department of Health and Human Services, an Exchange, or a State agency only for the purposes of, and to the extent necessary in—

(i) establishing eligibility for participation in the Exchange, and verifying the appropriate amount of, any credit or reduction described in subparagraph (A),

(ii) determining eligibility for participation in the State programs described in subparagraph (A).

26 U.S.C. §7421—Prohibition of suits to restrain assessment or collection

(a) Tax

Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6232(c), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436, 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.

. . .

28 U.S.C. §2201—Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(9) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

. . .

42 U.S.C. §18081—Procedures for determining eligibility for Exchange participation, premium tax credits and reduced cost-sharing, and individual responsibility exemptions

(a) Establishment of program

The Secretary shall establish a program meeting the requirements of this section for determining—

(1) whether an individual who is to be covered in the individual market by a qualified health plan offered through an Exchange, or who is claiming a premium tax credit or reduced cost-sharing, meets the requirements of sections 18032(f)(3), 18071(e), and 18082(d) of this title and section 36B(e) of Title 26 that the individual be a citizen or national of the United States or an alien lawfully present in the United States;

(2) in the case of an individual claiming a premium tax credit or reduced cost-sharing under section 36B of Title 26 or section 18071 of this title—

(A) whether the individual meets the income and coverage requirements of such sections; and

(B) the amount of the tax credit or reduced cost-sharing;

(3) whether an individual's coverage under an employer-sponsored health benefits plan is treated as unaffordable under sections 36B(c)(2)(C) and 5000A(e)(2) of Title 26; and

(4) whether to grant a certification under section 18031(d)(4)(H) of this title attesting that, for purposes of the individual responsibility requirement under section 5000A of Title 26, an individual is entitled to an exemption from either the individual responsibility requirement or the penalty imposed by such section.

(b) Information required to be provided by applicants

(1) In general

An applicant for enrollment in a qualified health plan offered through an Exchange in the individual market shall provide—

(A) the name, address, and date of birth of each individual who is to be covered by the plan (in this subsection referred to as an "enrollee"); and

(B) the information required by any of the following paragraphs that is applicable to an enrollee.

(2) Citizenship or immigration status

The following information shall be provided with respect to every enrollee:

(A) In the case of an enrollee whose eligibility is based on an attestation of citizenship of the enrollee, the enrollee's social security number.

(B) In the case of an individual whose eligibility is based on an attestation of the enrollee's immigration status, the enrollee's social security number (if applicable) and such identifying information with respect to the enrollee's immigration status as the Secretary, after consultation with the Secretary of Homeland Security, determines appropriate.

(3) Eligibility and amount of tax credit or reduced cost-sharing

In the case of an enrollee with respect to whom a premium tax credit or reduced cost-sharing under section 36B of Title 26 or section 18071 of this title is being claimed, the following information:

(A) Information regarding income and family size

The information described in section 6103(l)(21) of Title 26 for the taxable year ending with or within the second calendar year preceding the calendar year in which the plan year begins.

(B) Certain individual health insurance policies obtained through small employers

The amount of the enrollee's permitted benefit (as defined in section 9831(d)(3)(C) of Title 26) under a qualified small employer health reimbursement arrangement (as defined in section 9831(d)(2) of such title).

(C) Changes in circumstances

The information described in section 18082(b)(2) of this title, including information with respect to individuals who were not required to file an income tax return for the taxable year described in subparagraph (A) or individuals who experienced changes in marital status or family size or significant reductions in income.

(4) Employer-sponsored coverage

In the case of an enrollee with respect to whom eligibility for a premium tax credit under section 36B of Title 26 or cost-sharing reduction under section 18071 of this title is being established on the basis that the enrollee's (or related individual's) employer is not treated under section 36B(c)(2)(C) of Title 26 as providing minimum essential coverage or affordable minimum essential coverage, the following information:

(A) The name, address, and employer identification number (if available) of the employer.

(B) Whether the enrollee or individual is a full-time employee and whether the employer provides such minimum essential coverage.

(C) If the employer provides such minimum essential coverage, the lowest cost option for the enrollee's or individual's enrollment status and the enrollee's or individual's required contribution (within the meaning of section 5000A(e)(1)(B) of Title 26) under the employer-sponsored plan.

(D) If an enrollee claims an employer's minimum essential coverage is unaffordable, the information described in paragraph (3).

If an enrollee changes employment or obtains additional employment while enrolled in a qualified health plan for which such credit or reduction is allowed, the enrollee shall notify the Exchange of such change or additional employment and provide the information described in this paragraph with respect to the new employer.

(5) Exemptions from individual responsibility requirements

In the case of an individual who is seeking an exemption certificate under section 18031(d)(4)(H) of this title from any requirement or penalty imposed by section 5000A of Title 26, the following information:

(A) In the case of an individual seeking exemption based on the individual's status as a member of an exempt religious sect or division, as a member of a health care sharing ministry, as an Indian, or as an individual eligible for a

hardship exemption, such information as the Secretary shall prescribe.

(B) In the case of an individual seeking exemption based on the lack of affordable coverage or the individual's status as a taxpayer with household income less than 100 percent of the poverty line, the information described in paragraphs (3) and (4), as applicable.

(c) Verification of information contained in records of specific Federal officials

(1) Information transferred to Secretary

An Exchange shall submit the information provided by an applicant under subsection (b) to the Secretary for verification in accordance with the requirements of this subsection and subsection (d).

(2) Citizenship or immigration status

(A) Commissioner of Social Security

The Secretary shall submit to the Commissioner of Social Security the following information for a determination as to whether the information provided is consistent with the information in the records of the Commissioner:

(i) The name, date of birth, and social security number of each individual for whom such information was provided under subsection (b)(2).

(ii) The attestation of an individual that the individual is a citizen.

(B) Secretary of Homeland Security

(i) In general

In the case of an individual—

(I) who attests that the individual is an alien lawfully present in the United States; or

(II) who attests that the individual is a citizen but with respect to whom the Commissioner of Social Security has notified the Secretary under subsection (e)(3) that the attestation is inconsistent with information in the records maintained by the Commissioner;

the Secretary shall submit to the Secretary of Homeland Security the information described in clause (ii) for a determination as to whether the information provided is consistent with the information in the records of the Secretary of Homeland Security.

(ii) Information

The information described in clause (ii) is the following:

(I) The name, date of birth, and any identifying information with respect to the individual's immigration status provided under subsection (b)(2).

(II) The attestation that the individual is an alien lawfully present in the United States or in the case of an individual described in clause (i)(II), the attestation that the individual is a citizen.

(3) Eligibility for tax credit and cost-sharing reduction

The Secretary shall submit the information described in subsection (b)(3)(A) provided under paragraph (3), (4), or (5) of subsection (b) to the Secretary of the Treasury for verification of household income and family size for purposes of eligibility.

(4) Methods

(A) In general

The Secretary, in consultation with the Secretary of the Treasury, the Secretary of Homeland Security, and the Commissioner of Social Security, shall provide that verifications and determinations under this subsection shall be done—

(i) through use of an on-line system or otherwise for the electronic submission of, and response to, the information submitted under this subsection with respect to an applicant; or

(ii) by determining the consistency of the information submitted with the information maintained in the records of the Secretary of the Treasury, the Secretary of Homeland Security, or the Commissioner of Social Security through such other method as is approved by the Secretary.

(B) Flexibility

The Secretary may modify the methods used under the program established by this section for the Exchange[2] and verification of information if the Secretary determines such modifications would reduce the administrative costs and burdens on the applicant, including allowing an applicant to request the Secretary of the Treasury to provide the information described in paragraph (3) directly to the

Exchange or to the Secretary. The Secretary shall not make any such modification unless the Secretary determines that any applicable requirements under this section and section 6103 of Title 26 with respect to the confidentiality, disclosure, maintenance, or use of information will be met.

(d) Verification by Secretary

In the case of information provided under subsection (b) that is not required under subsection (c) to be submitted to another person for verification, the Secretary shall verify the accuracy of such information in such manner as the Secretary determines appropriate, including delegating responsibility for verification to the Exchange.

(e) Actions relating to verification

(1) In general

Each person to whom the Secretary provided information under subsection (c) shall report to the Secretary under the method established under subsection (c)(4) the results of its verification and the Secretary shall notify the Exchange of such results. Each person to whom the Secretary provided information under subsection (d) shall report to the Secretary in such manner as the Secretary determines appropriate.

(2) Verification

(A) Eligibility for enrollment and premium tax credits and cost-sharing reductions

If information provided by an applicant under paragraphs (1), (2), (3), and (4) of subsection (b) is verified under subsections (c) and (d)—

(i) the individual's eligibility to enroll through the Exchange and to apply for premium tax credits and cost-sharing reductions shall be satisfied; and

(ii) the Secretary shall, if applicable, notify the Secretary of the Treasury under section 18082(c) of this title of the amount of any advance payment to be made.

(B) Exemption from individual responsibility

If information provided by an applicant under subsection (b)(5) is verified under subsections (c) and (d), the Secretary shall issue the certification of exemption described in section 18031(d)(4)(H) of this title.

(3) Inconsistencies involving attestation of citizenship or lawful presence

If the information provided by any applicant under subsection (b)(2) is inconsistent with information in the records maintained by the Commissioner of Social Security or Secretary of Homeland Security, whichever is applicable, the applicant's eligibility will be determined in the same manner as an individual's eligibility under the medicaid program is determined under section 1396a(ee) of this title (as in effect on January 1, 2010).

(4) Inconsistencies involving other information

(A) In general

If the information provided by an applicant under subsection (b) (other than subsection (b)(2)) is inconsistent with information in the records maintained by persons under subsection (c) or is not verified under subsection (d), the Secretary shall notify the Exchange and the Exchange shall take the following actions:

(i) Reasonable effort

The Exchange shall make a reasonable effort to identify and address the causes of such inconsistency, including through typographical or other clerical

errors, by contacting the applicant to confirm the accuracy of the information, and by taking such additional actions as the Secretary, through regulation or other guidance, may identify.

(ii) Notice and opportunity to correct

In the case the inconsistency or inability to verify is not resolved under subparagraph (A), the Exchange shall—

(I) notify the applicant of such fact;

(II) provide the applicant an opportunity to either present satisfactory documentary evidence or resolve the inconsistency with the person verifying the information under subsection (c) or (d) during the 90-day period beginning the date on which the notice required under subclause (I) is sent to the applicant.

The Secretary may extend the 90-day period under subclause (II) for enrollments occurring during 2014.

(B) Specific actions not involving citizenship or lawful presence

(i) In general

Except as provided in paragraph (3), the Exchange shall, during any period before the close of the period under subparagraph (A)(ii)(II), make any determination under paragraphs (2), (3), and (4) of subsection (a) on the basis of the information contained on the application.

(ii) Eligibility or amount of credit or reduction

If an inconsistency involving the eligibility for, or amount of, any premium tax credit or cost-sharing reduction is unresolved under this subsection as of the close of the period under subparagraph (A)(ii)(II), the Exchange shall notify the applicant of the amount (if any) of the credit or reduction that is determined on the basis of the records maintained by persons under subsection (c).

(iii) Employer affordability

If the Secretary notifies an Exchange that an enrollee is eligible for a premium tax credit under section 36B of Title 26 or cost-sharing reduction under section 18071 of this title because the enrollee's (or related individual's) employer does not provide minimum essential coverage through an employer-sponsored plan or that the employer does provide that coverage but it is not affordable coverage, the Exchange shall notify the employer of such fact and that the employer may be liable for the payment assessed under section 4980H of Title 26.

(iv) Exemption

In any case where the inconsistency involving, or inability to verify, information provided under subsection (b)(5) is not resolved as of the close of the period under subparagraph (A)(ii)(II), the Exchange shall notify an applicant that no certification of exemption from any requirement or payment under section 5000A of such title will be issued.

(C) Appeals process

The Exchange shall also notify each person receiving notice under this paragraph of the appeals processes established under subsection (f).

(f) Appeals and redeterminations

(1) In general

The Secretary, in consultation with the Secretary of the Treasury, the Secretary of Homeland Security, and the Commissioner of Social Security, shall establish procedures by which the Secretary or one of such other Federal officers—

(A) hears and makes decisions with respect to appeals of any determination under subsection (e); and

(B) redetermines eligibility on a periodic basis in appropriate circumstances.

(2) Employer liability

(A) In general

The Secretary shall establish a separate appeals process for employers who are notified under subsection (e)(4)(C) that the employer may be liable for a tax imposed by section 4980H of Title 26 with respect to an employee because of a determination that the employer does not provide minimum essential coverage through an employer-sponsored plan or that the employer does provide that coverage but it is not affordable coverage with respect to an employee. Such process shall 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.

Such process shall be in addition to any rights of appeal the employer may have under subtitle F of such title.

(B) Confidentiality

Notwithstanding any provision of this title (or the amendments made by this title) or section 6103 of Title 26, an employer shall not be entitled to any taxpayer return information with respect to an employee for purposes of determining whether the employer is subject to the penalty under section 4980H of Title 26 with respect to the employee, except that—

(i) the employer may be notified as to the name of an employee and whether or not the employee's income is above or below the threshold by which the affordability of an employer's health insurance coverage is measured; and

(ii) this subparagraph shall not apply to an employee who provides a waiver (at such time and in such manner as the Secretary may prescribe) authorizing an employer to have access to the employee's taxpayer return information.

…

42 U.S.C. §18082—Advance determination and payment of premium tax credits and cost-sharing reductions

(a) In general

The Secretary, in consultation with the Secretary of the Treasury, shall establish a program under which—

> **(1)** upon request of an Exchange, advance determinations are made under section 18081 of this title with respect to the income eligibility of individuals enrolling in a qualified health plan in the individual market through the Exchange for the premium tax credit allowable under section 36B of Title 26 and the cost-sharing reductions under section 18071 of this title;

…

> **(3)** the Secretary of the Treasury makes advance payments of such credit or reductions to the issuers of the qualified health plans in order to reduce the premiums payable by individuals eligible for such credit.

(b) Advance determinations

> **(1) In general**
>
> The Secretary shall provide under the program established under subsection (a) that advance determination of eligibility with respect to any individual shall be made—
>
> > **(A)** during the annual open enrollment period applicable to the individual (or such other enrollment period as may be specified by the Secretary); and
> >
> > **(B)** on the basis of the individual's household income for the most recent taxable year for which the Secretary, after consultation with the Secretary of the Treasury, determines information is available.

…

(c) Payment of premium tax credits and cost-sharing reductions

(1) In general

The Secretary shall notify the Secretary of the Treasury and the Exchange through which the individual is enrolling of the advance determination under section 18081 of this title.

(2) Premium tax credit

(A) In general

The Secretary of the Treasury shall make the advance payment under this section of any premium tax credit allowed under section 36B of Title 26 to the issuer of a qualified health plan on a monthly basis (or such other periodic basis as the Secretary may provide).

(B) Issuer responsibilities

An issuer of a qualified health plan receiving an advance payment with respect to an individual enrolled in the plan shall—

(i) reduce the premium charged the insured for any period by the amount of the advance payment for the period;

(ii) notify the Exchange and the Secretary of such reduction;

(iii) include with each billing statement the amount by which the premium for the plan has been reduced by reason of the advance payment; and

(iv) in the case of any nonpayment of premiums by the insured—

(I) notify the Secretary of such nonpayment; and

(II) allow a 3-month grace period for nonpayment of premiums before discontinuing coverage.

(3) Cost-sharing reductions

The Secretary shall also notify the Secretary of the Treasury and the Exchange under paragraph (1) if an advance payment of the cost-sharing reductions under section 18071 of this title is to be made to the issuer of any qualified health plan with respect to any individual enrolled in the plan. The Secretary of the Treasury shall make such advance payment at such time and in such amount as the Secretary specifies in the notice.

…

45 C.F.R. §155.310—Eligibility process

…

(i) Certification program for employers. 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.

25-10773

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FAULK COMPANY, INC.,

Plaintiff-Appellee

v.

ROBERT F. KENNEDY, JR., in his official capacity as Secretary of Health and Human Services, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES and its subcomponent CENTERS FOR MEDICARE AND MEDICAID SERVICES, MEHMET OZ, in his official capacity as Administrator of the Centers for Medicare and Medicaid Services, and UNITED STATES OF AMERICA,

Defendants-Appellants

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

RECORD EXCERPTS

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TABLE OF CONTENTS

Tab 1

APPEAL,CLOSED

U.S. District Court
Northern District of Texas (Fort Worth)
CIVIL DOCKET FOR CASE #: 4:24-cv-00609-P

Faulk Company, Inc. v. United States Department of Health and Human Services et al
Assigned to: Judge Mark Pittman
Case in other court: United States Court of Appeals 5th Circuit, 25-10773
Cause: 05:551 Administrative Procedure Act

Date Filed: 06/28/2024
Date Terminated: 04/23/2025
Jury Demand: None
Nature of Suit: 870 Federal Tax Suits: Taxes (US Plaintiff or Defendant)
Jurisdiction: U.S. Government Defendant

Plaintiff

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V.

Defendant

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Defendant

United States Department of Health and Human Services
And Its sub-agency Defendant Centers for Medicare and Medicaid Services

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Defendant

Chiquita Brooks-LaSure
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Date Filed	#	Docket Text
06/28/2024	1 (p.8)	COMPLAINT against All Defendants filed by Faulk Company, Inc.. (Filing fee $405; Receipt number ATXNDC-14730546) Clerk to issue summonses for federal and non-federal defendants. In each Notice of Electronic Filing, the judge assignment is indicated, and a link to the Judges Copy Requirements and Judge Specific Requirements is provided. The court reminds the filer that any required copy of this and future documents must be delivered to the judge, in the manner prescribed, within three business days of filing. Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas must seek admission promptly. Forms, instructions, and exemption information may be found at www.txnd.uscourts.gov, or by clicking here: Attorney Information - Bar Membership. If admission requirements are not satisfied within 21 days, the clerk will notify the presiding judge. (Winn, Taylor) (Entered: 06/28/2024)
06/28/2024	2 (p.23)	CERTIFICATE OF INTERESTED PERSONS/DISCLOSURE STATEMENT by Faulk Company, Inc.. (Clerk QC note: Affiliate entry indicated). (Winn, Taylor) (Entered: 06/28/2024)
06/28/2024	3 (p.26)	New Case Notes: A filing fee has been paid. File to: Judge Pittman. Pursuant to Misc. Order 6, Plaintiff is provided the Notice of Right to Consent to Proceed Before A U.S. Magistrate Judge. Clerk to provide copy to plaintiff if not received electronically. Attorneys are further reminded that, if necessary, they must comply with Local Rule 83.10(a) within 14 days or risk the possible dismissal of this case without prejudice or without further notice. (sre) (Entered: 07/01/2024)
07/01/2024	4 (p.28)	Summons issued as to Chiquita Brooks-LaSure, United States Department of Health and Human Services, United States of America, Xavier Becerra, U.S. Attorney, and U.S. Attorney General. (sre) (Entered: 07/01/2024)
07/01/2024	5 (p.52)	Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee $100; Receipt number ATXNDC-14734968) filed by Faulk Company, Inc. (Attachments: # 1 (p.8) Proposed Order)Attorney David LeFevre added to party Faulk Company, Inc.(pty:pla) (LeFevre, David) (Entered: 07/01/2024)
07/02/2024	6	ELECTRONIC ORDER granting 5 (p.52) Application for Admission Pro Hac Vice of David LeFevre. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge Mark Pittman on 7/2/2024) (jaf) (Entered: 07/02/2024)
07/08/2024	7 (p.57)	SUMMONS Returned Executed as to United States of America ; served on 7/2/2024. (Winn, Taylor) (Entered: 07/08/2024)
07/15/2024	8 (p.58)	Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee $100; Receipt number ATXNDC-14761238) filed by Faulk Company, Inc. Attorney Christine Vanderwater added to party Faulk Company, Inc.(pty:pla) (Vanderwater, Christine) (Entered: 07/15/2024)
07/16/2024	9	ELECTRONIC ORDER granting 8 (p.58) Application for Admission Pro Hac Vice of Christine Vanderwater. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge Mark Pittman on

		7/16/2024) (jaf) (Entered: 07/16/2024)
07/26/2024	10 (p.62)	SUMMONS Returned Executed as to Chiquita Brooks-LaSure ; served on 7/15/2024. (Winn, Taylor) (Entered: 07/26/2024)
07/26/2024	11 (p.65)	SUMMONS Returned Executed as to United States Department of Health and Human Services ; served on 7/15/2024. (Winn, Taylor) (Entered: 07/26/2024)
07/26/2024	12 (p.68)	SUMMONS Returned Executed as to Xavier Becerra ; served on 7/15/2024. (Winn, Taylor) (Entered: 07/26/2024)
08/20/2024	13 (p.71)	Unopposed Motion for Extension of Time to File Answer *or Otherwise Respond to Complaint* filed by Chiquita Brooks-LaSure, United States Department of Health and Human Services, United States of America, Xavier Becerra (Attachments: # 1 (p.8) Proposed Order)Attorney Mary Elizabeth Smith added to party Chiquita Brooks-LaSure(pty:dft), Attorney Mary Elizabeth Smith added to party United States Department of Health and Human Services(pty:dft), Attorney Mary Elizabeth Smith added to party United States of America(pty:dft), Attorney Mary Elizabeth Smith added to party Xavier Becerra(pty:dft) (Smith, Mary) (Entered: 08/20/2024)
08/23/2024	14 (p.77)	ORDER GRANTING DEFENDANTS' UNOPPOSED 13 (p.71) MOTION TO EXTEND TIME TO ANSWER OR OTHERWISE RESPOND TO COMPLAINT : It is hereby ORDERED that Defendants' answer or response to the complaint is due November 2, 2024. (Ordered by Judge Mark Pittman on 8/23/2024) (mmw) (Entered: 08/23/2024)
11/01/2024	15 (p.78)	Motion to Dismiss for Failure to State a Claim, MOTION to Dismiss for Lack of Jurisdiction () filed by United States of America, United States Department of Health and Human Services, Chiquita Brooks-LaSure, Xavier Becerra (Smith, Mary) (Entered: 11/01/2024)
11/01/2024	16 (p.81)	Brief/Memorandum in Support filed by United States of America, United States Department of Health and Human Services, Chiquita Brooks-LaSure, Xavier Becerra re 15 (p.78) Motion to Dismiss for Failure to State a Claim MOTION to Dismiss for Lack of Jurisdiction (Smith, Mary) (Entered: 11/01/2024)
11/01/2024	17 (p.108)	Appendix in Support filed by United States of America, United States Department of Health and Human Services, Chiquita Brooks-LaSure, Xavier Becerra re 15 (p.78) Motion to Dismiss for Failure to State a Claim MOTION to Dismiss for Lack of Jurisdiction (Smith, Mary) (Entered: 11/01/2024)
11/04/2024	18 (p.115)	ORDER: Proposed Scheduling Order due by 11/25/2024. (Ordered by Judge Mark Pittman on 11/4/2024) (sre) (Entered: 11/04/2024)
11/18/2024	19 (p.120)	Joint MOTION to Extend Time Plaintiff's Time to Respond to Defendant's Motion to Dismiss and Defendant's Time to Reply filed by United States of America, United States Department of Health and Human Services, Chiquita Brooks-LaSure, Xavier Becerra (Attachments: # 1 (p.8) Proposed Order) (Smith, Mary) (Entered: 11/18/2024)
11/18/2024	20 (p.127)	ORDER: Before the Court is the Parties' Joint Motion to Extend Plaintiff's Time to Respond to Defendant's Motion to Dismiss and Defendant's Time to Reply. ECF No. 19 (p.120) . Having considered the Motion and applicable law, the Court hereby GRANTS the Motion. Therefore, the Court ORDERS that: (1) Plaintiff's response to the motion to dismiss is due December 6, 2024; and (2) Defendant's reply to Plaintiff's response is due January 10, 2025. Responses due by 12/6/2024. Replies due

		by 1/10/2025. (Ordered by Judge Mark Pittman on 11/18/2024) (sre) (Entered: 11/18/2024)
11/25/2024	21 (p.128)	Proposal for contents of scheduling and discovery order *Report Regarding Contents of Scheduling Order - "Joint Report"* by Faulk Company, Inc.. (Winn, Taylor) (Entered: 11/25/2024)
12/04/2024	22 (p.135)	SCHEDULING ORDER: Trial set for 10/27/2025 in US Courthouse, Courtroom 4th Floor, 501 W. 10th St. Fort Worth, TX 76102-3673 before Judge Mark Pittman., Joinder of Parties due by 2/2/2025., Amended Pleadings due by 2/2/2025., Deadline for mediation is on or before 4/30/2025., Discovery due by 5/30/2025., Motions due by 6/29/2025., Pretrial Order due by 10/2/2025., ADR Provider, William Royal Furgeson (Mediator), added. (Ordered by Judge Mark Pittman on 12/4/2024) (sre) (Entered: 12/04/2024)
12/05/2024	23 (p.144)	NOTICE of Change of Address for Attorney Mary Elizabeth Smith on behalf of United States of America. (Filer confirms contact info in ECF is current.) (Smith, Mary) (Entered: 12/05/2024)
12/06/2024	24 (p.147)	RESPONSE filed by Faulk Company, Inc. re: 15 (p.78) Motion to Dismiss for Failure to State a Claim MOTION to Dismiss for Lack of Jurisdiction (Winn, Taylor) (Entered: 12/06/2024)
12/06/2024	25 (p.177)	Appendix in Support filed by Faulk Company, Inc. re 24 (p.147) Response/Objection *Defendant's Response to Plaintiff's Motion to Dismiss* (Winn, Taylor) (Entered: 12/06/2024)
01/10/2025	26 (p.192)	REPLY filed by United States of America, United States Department of Health and Human Services, Chiquita Brooks-LaSure, Xavier Becerra re: 15 (p.78) Motion to Dismiss for Failure to State a Claim MOTION to Dismiss for Lack of Jurisdiction (Smith, Mary) (Entered: 01/10/2025)
02/04/2025	27 (p.202)	ORDER: Before the Court is the Defendants' (Government) Motion to Dismiss for Failure to State a Claim (Motion). ECF No. 15 (p.78) . The Court ORDERS that the Parties meet and confer regarding this proposal and submit any objections to transitioning to summary judgment by February 11, 2025. If there are no objections, the Court further ORDERS the Parties to include a joint proposal for a briefing schedule by February 11, 2025. (Ordered by Judge Mark Pittman on 2/4/2025) (sre) (Entered: 02/04/2025)
02/11/2025	28 (p.204)	NOTICE of *Joint Proposal Regarding Briefing Schedule* re: 27 (p.202) Order Setting Deadline/Hearing, filed by United States of America , Faulk Company, Inc. (Smith, Mary) Modified filers on 2/12/2025 (jnp). (Entered: 02/11/2025)
02/12/2025	29 (p.208)	ORDER: Before the Court is the Parties' 28 (p.204) Joint Proposal Regarding Briefing Schedule ("Report"). The Report requests that the Court allow the Parties to file supplemental briefing as well as responses to the supplemental briefing. Having reviewed the Report and other docket filings, the Court GRANTS this request. (Please see order for specifics.) (Ordered by Judge Mark Pittman on 2/12/2025) (jnp) (Entered: 02/12/2025)
03/07/2025	30 (p.210)	MOTION for Summary Judgment filed by Faulk Company, Inc. with Brief/Memorandum in Support. (Winn, Taylor) (Entered: 03/07/2025)
03/07/2025	31 (p.218)	Appendix in Support filed by Faulk Company, Inc. re 30 (p.210) MOTION for Summary Judgment (Winn, Taylor) (Entered: 03/07/2025)

03/14/2025	32 (p.380)	MOTION to Excuse Parties from Mediation Requirement or, in the Alternative, to Stay the Mediation Deadline re 22 (p.135) Scheduling Order,, Add and Terminate Parties, filed by United States of America (Attachments: # 1 (p.8) Proposed Order) (Smith, Mary) (Entered: 03/14/2025)
03/18/2025	33 (p.386)	ORDER: The 32 (p.380) Motion is GRANTED. It is therefore ORDERED that the Parties are not required to mediate this case. (Ordered by Judge Mark Pittman on 3/18/2025) (jnp) (Entered: 03/18/2025)
03/21/2025	34 (p.387)	RESPONSE filed by Chiquita Brooks-LaSure, United States Department of Health and Human Services, United States of America, Xavier Becerra re: 30 (p.210) MOTION for Summary Judgment (Smith, Mary) (Entered: 03/21/2025)
03/21/2025	35 (p.398)	MOTION for Leave to File Amended Appendix in Support of Plaintiff's Motion for Summary Judgment*Plaintiff Faulk Company, Inc.s Motion for Leave to File an Amended Appendix in Support of its Motion for Summary Judgment and Brief in Support* filed by Faulk Company, Inc. with Brief/Memorandum in Support. (Winn, Taylor) (Entered: 03/21/2025)
03/21/2025	36 (p.402)	Appendix in Support filed by Faulk Company, Inc. re 35 (p.398) MOTION for Leave to File Amended Appendix in Support of Plaintiff's Motion for Summary Judgment*Plaintiff Faulk Company, Inc.s Motion for Leave to File an Amended Appendix in Support of its Motion for Summary Judgment and Brief in Support* (Winn, Taylor) (Entered: 03/21/2025)
03/24/2025	37	ELECTRONIC ORDER granting 35 (p.398) Plaintiff's Motion for Leave to File. (Unless the document has already been filed, clerk to enter the document as of the date of this order.) (Ordered by Judge Mark Pittman on 3/24/2025) (chmb) (Entered: 03/24/2025)
04/10/2025	38 (p.628)	OPINION & ORDER: The Court DENIES the Government's Motion. ECF No. 15 (p.78) . The Court GRANTS Faulk's Motion in part and ENTERS summary judgment in Faulks favor on Counts I and III. ECF No. 30 (p.210) . Finally, the Court DENIES Faulks Motion in part as to attorney's fees. Id. The Court ORDERS the IRS to refund Faulk $205,621.71 for the ESRP assessed for tax year 2019. The Court further ORDERS that 45 C.F.R. § 155.310(i) be SET ASIDE as void and unenforceable. Given the Courts ruling on Count III, the Court finds that there are no outstanding issues left in this case other than the Plaintiff's request for attorney's fees. If either Party objects to this Court entering final judgment following the resolution of attorney's fees, the Court ORDERS such objection be filed on or before April 17, 2025. (Ordered by Judge Mark Pittman on 4/10/2025) (sre) Modified date per DJ Chambers on 4/11/2025 (sre). (Main Document 38 replaced on 4/11/2025) (sre). (Entered: 04/10/2025)
04/23/2025	39 (p.645)	FINAL JUDGMENT: This final judgment is issued pursuant to Federal Rule of Civil Procedure 58(a). In accordance with the Court's Opinion & Order (ECF No. 38 (p.628)), this case is DISMISSED with prejudice. The Clerk of the Court shall transmit a true copy of this judgment to the Parties. As stated in Federal Rule of Civil Procedure 54, Plaintiffs application for attorneys fees must be filed within fourteen days of the entry of this judgment. FED. R. CIV. P. 54(d)(2)(B)(i). Accordingly, the Court ORDERS that Plaintiff file any application for attorneys fees on or before May 7, 2025; any response by Defendants shall be filed on or before May 21, 2025; and any reply by Plaintiff shall be filed on or before May 28, 2025. (Ordered by Judge Mark Pittman on 4/23/2025) (sre) (Entered: 04/23/2025)

04/25/2025	40 (p.646)	MOTION to Amend/Correct 39 (p.645) Judgment,,,, Modify Hearings/Deadlines,,, *Plaintiff's Unopposed Motion to Alter or Amend the Court's Final Judgment* filed by Faulk Company, Inc. (Winn, Taylor) (Entered: 04/25/2025)
04/25/2025	41 (p.650)	ORDER & AMENDED FINAL JUDGMENT: Before the Court is Plaintiff Faulk Company Inc.'s 40 (p.646) . Having considered the Motion, the pleadings, and other docket filings, the Court finds that the Motion should be and hereby is GRANTED. Therefore, the Court ORDERS that the Court's Final Judgment (ECF No. 39 (p.645)) be amended to reflect its ruling in its Opinion & Order (ECF No. 38 (p.628)). See order for additional details. (Ordered by Judge Mark Pittman on 4/25/2025) (sre) (Entered: 04/25/2025)
05/07/2025	42 (p.651)	MOTION for Attorney Fees filed by Faulk Company, Inc. with Brief/Memorandum in Support. (Winn, Taylor) (Entered: 05/07/2025)
05/07/2025	43 (p.661)	Appendix in Support filed by Faulk Company, Inc. re 42 (p.651) MOTION for Attorney Fees (Winn, Taylor) (Entered: 05/07/2025)
05/07/2025	44 (p.692)	BILL OF COSTS by Faulk Company, Inc.. (Winn, Taylor) (Entered: 05/07/2025)
05/21/2025	45 (p.697)	RESPONSE filed by Chiquita Brooks-LaSure, United States Department of Health and Human Services, United States of America, Xavier Becerra re: 42 (p.651) MOTION for Attorney Fees (Smith, Mary) (Entered: 05/21/2025)
05/28/2025	46 (p.717)	REPLY filed by Faulk Company, Inc. re: 42 (p.651) MOTION for Attorney Fees (Winn, Taylor) (Entered: 05/28/2025)
06/20/2025	47 (p.726)	NOTICE OF APPEAL as to 41 (p.650) Order,, Terminate Motions, to the Fifth Circuit by Chiquita Brooks-LaSure, United States Department of Health and Human Services, United States of America, Xavier Becerra. T.O. form to appellant electronically at Transcript Order Form or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. IMPORTANT ACTION REQUIRED: Provide an electronic copy of any exhibit you offered during a hearing or trial that was admitted into evidence to the clerk of the district court within 14 days of the date of this notice. Copies must be transmitted as PDF attachments through ECF by all ECF Users or delivered to the clerk on a CD by all non-ECF Users. See detailed instructions here. (Exception: This requirement does not apply to a pro se prisoner litigant.) Please note that if original exhibits are in your possession, you must maintain them through final disposition of the case. (Smith, Mary) (Entered: 06/20/2025)
07/01/2025	48 (p.729)	Transcript Order Form: re 47 (p.726) Notice of Appeal, transcript not requested Reminder: If the transcript is ordered for an appeal, Appellant must also file a copy of the order form with the appeals court. (Smith, Mary) (Entered: 07/01/2025)
07/03/2025	49 (p.731)	USCA Case Number 25-10773 in United States Court of Appeals 5th Circuit for 47 (p.726) Notice of Appeal, filed by United States Department of Health and Human Services, Chiquita Brooks-LaSure, United States of America, Xavier Becerra. (tle) (Entered: 07/03/2025)

Tab 2

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

FAULK COMPANY, INC.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO. _____**
	§	
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 ORIGINAL COMPLAINT

I. INTRODUCTION

1. This is a civil action whereby Plaintiff Faulk Company, Inc. ("Faulk Company") seeks to restore the statutory due process created by Congress in Section 1411 of the Affordable Care Act ("ACA") with respect to the ACA's employer mandate—an excise tax penalty assessable by the Internal Revenue Service ("IRS") that it calls Employer Shared Responsibility Payments ("ESRP"). This due process is a statutory requirement for the imposition of such Employer Shared Responsibility Payment excise taxes, but the Department of Human & Health Services ("HHS") and the IRS have flagrantly disregarded and utterly ignored it. Relying on a thoroughly misguided regulation issued by HHS's sub-agency—Centers for Medicare & Medicaid Services ("CMS")—purporting to sever the due process required by Section 1411 of the ACA from the "Section 1411 Certification" that is a prerequisite to assessment of any ESRP excise taxes, the IRS decided simply to declare that one of its own letters—Letter 226-J—will serve as the required Section 1411

Certification, notwithstanding the fact that Letter 226-J has absolutely nothing to do with Section 1411 of the ACA whatsoever. In the absence of the due process required by Section 1411 of the ACA, no ESRP excise taxes are assessable, and Faulk Company should be refunded the ESRP excise taxes it paid for calendar tax year 2019, plus interest and costs. Moreover, given that the IRS continues to assess ESRP excise taxes against Faulk Company in reliance on this misguided HHS regulation, the regulation should be set aside as contrary to the statutory text of the ACA and as an arbitrary and capricious exercise of agency rulemaking authority.

II. PARTIES

2. Plaintiff Faulk Company, Inc., is an organization that is incorporated in the State of Texas and has its principal place of business in Fort Worth, Texas. It provides janitorial services for Texas schools.

3. Defendant United States of America ("USA") is the federal government of the United States of America. Pursuant to Fed. R. Civ. P. 4(i), the United States Attorney for the Northern District of Texas may be served by mailing a copy of this Complaint and the Summons by certified mail to Civil Process Clerk, U.S. Attorney for the Northern District of Texas, 1100 Commerce Street, Third Floor, Dallas, Texas 75242-1699, and the Attorney General of the United States may be served by mailing two copies of this Complaint and the Summons by certified mail to U.S. Attorney General, U.S. Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530.

4. Defendant United States Department of Health and Human Services—and more particularly its sub-agency Defendant Centers for Medicare and Medicaid Services—is the federal agency in charge of regulating state-based individual health insurance exchanges and operating the federally-facilitated exchange created pursuant to the ACA. HHS and CMS co-signed the

regulation at 45 C.F.R. § 155.310(i), upon which the IRS relies to justify its position that Letter 226-J is a Section 1411 Certification. HHS is headquartered at 200 Independence Avenue SW, Washington, D.C. 20201. CMS is headquartered at 7500 Security Boulevard, Baltimore, MD 21244.

5. Defendant Xavier Becerra is the Secretary of HHS. He is sued in his official capacity.

6. Defendant Chiquita Brooks-LaSure is the Administrator of CMS. She is sued in her official capacity.

III. JURISDICTION AND VENUE

7. This Court has jurisdiction over this action—Counts One and Two—under 28 U.S.C. § 1346(a).

8. The prerequisites of 26 U.S.C. § 7422 for a civil action against the United States have been met. Faulk Company paid the wrongly assessed $205,621.71 on December 28, 2021, albeit under protest, and it duly filed a claim for refund on Form 843 shortly thereafter, on January 28, 2022, which was received by IRS on February 1, 2022. As required by 26 U.S.C. § 6532(a), more than six (6) months have elapsed since Faulk Company's refund request. Faulk Company has received no notice of disallowance from IRS, and Faulk Company has not filed a written waiver of the requirement that it be mailed a notice of disallowance.

9. As this is a refund suit, it is not abrogated by the Anti-Injunction Act or the Declaratory Judgment Act. 26 U.S.C. § 7421(a); 28 U.S.C. § 2201(a).

10. Plaintiff also brings this suit—Counts Three and Four—under the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq., the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and this Court's inherent equitable powers.

11. This Court also has federal question jurisdiction under 28 U.S.C. § 1331, in that this case arises out of federal law—specifically, 26 U.S.C. § 4980H and Section 1411 of the ACA, codified at 42 U.S.C. § 18081.

12. Venue is proper in the United States District Court for the Northern District of Texas pursuant to 28 U.S.C. § 1402(a)(2) because Faulk Company's principal place of business is in Fort Worth, Texas.

13. Venue is also proper pursuant to 28 U.S.C. § 1392(b)(2) because a substantial part of the events giving rise to the claims occurred in this judicial district.

IV. FACTS

14. The Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-148, 124 Stat. 119, became law on March 23, 2010. The ACA added Section 4980H to Title 26 of the U.S. Code (the Internal Revenue Code, or the "Code").

15. Under 26 U.S.C. § 4980H, certain "applicable large employers" are subject to an excise tax (referred to by the Treasury Department's Internal Revenue Service as an "Employer Shared Responsibility Payment" or "ESRP") if the employer fails to offer qualifying health coverage to its employees who work at least 30 hours per week under an eligible employer-sponsored plan for any month, but only if one or more employees who work at least 30 hours per week are "certified to the employer under section 1411 of the … [ACA] as having enrolled for such month in a qualified 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(a)(2), 4980H(b)(1)(B) (a "Section 1411 Certification").

16. Section 1411 of the ACA specifically requires HHS to make the Section 1411 Certification. 42 U.S.C. § 18081(f)(2)(A). Moreover, Section 1411 of the ACA and the governing regulations mandate that HHS provide the employer with an appeal to HHS to determine the appropriateness and properly computed amount of any applicable premium tax credit or cost-sharing reduction that HHS proposes to provide to an employee of the employer. Faulk Company has received no such letter or certification from HHS for 2019 or any other tax year, and it has been afforded no such appeal.

17. In 2019 and thereafter, Faulk Company was (and presently still is) subject to the ACA as an "applicable large employer" with more than 50 full-time equivalent employees. Prior to 2019, Faulk Company offered minimum essential coverage to its employees, but stopped doing so because no employees enrolled in it.

18. On or about December 1, 2021, the IRS issued Letter 226-J to Faulk Company for the 2019 tax year. In that letter, the IRS communicated to Faulk Company that the IRS (not HHS) was making the Section 1411 Certification, that it was doing so by and through such Letter 226-J, and that it was therefore imposing an ESRP excise tax against Faulk Company under 26 U.S.C. § 4980H. However, because HHS has not made a Section 1411 Certification or provided any HHS appeal rights, such assessment and collection of any ESRP excise tax from Faulk Company is in error.

19. Instead, in the course of administrative proceedings, the IRS stated that "Department of Health and Human Services (HHS) regulations at 45 C.F.R. § 155.310(i) provide that as part of its determination of whether an employer has a liability under section 4980H of the Internal Revenue 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 Qualified

Health Plan for which a premium tax credit or cost-sharing reduction is allowed or paid. The Letter 226J is the ALE's certification under section 1411 of the Affordable Care Act."

20. Letter 226-J may very well be a general "certif[ication] to an employer that one or more employees has enrolled for one or more months during a year in a Qualified Health Plan for which a premium tax credit or cost-sharing reduction is allowed or paid," but that is not the element under 26 U.S.C. § 4980H that must be satisfied. What's required to impose an ESRP excise tax is something far more specific: one or more employees who work at least 30 hours per week must be "certified *to the employer under section 1411 of the ... [ACA]* as having enrolled for such month in a qualified 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(a)(2), 4980H(b)(1)(B) (emphasis supplied). The phrase, "under Section 1411," modifies "certified to the employer;" it is not a reference to anything having to do with an employee.

21. The reference in 26 U.S.C. § 4980H to that which must be provided to an employer under Section 1411 of the ACA is critical because it is a direct reference to very specific due process requirements that HHS must carry out with respect to employers, but which process HHS has utterly failed to implement.

22. Section 1411 of the ACA enacted 42 U.S.C. §§ 18081(e)(4)(B)(iii) and 18081(e)(4)(C). Under those provisions, if HHS determines that a state or federal health insurance exchange enrollee is eligible for a premium tax credit or cost-sharing reduction because the employer does not provide minimum essential coverage through an employer-sponsored plan or that the employer does provide coverage, but such coverage is not affordable or does not provide minimum value, HHS must notify the state or federal health insurance exchange (hereinafter collectively, "Exchange").

23. Thereafter, but "within a reasonable timeframe" following the determination that one of the employer's employees is eligible for subsidized coverage, the Exchange must notify the employer of such fact and, additionally, that the employer may be liable for ESRP excise taxes under 26 U.S.C. § 4980H. *See also* 45 C.F.R. § 155.310(h).

24. HHS specifically acknowledged and conceded in the preamble to its Exchange regulations that the Section 1411 Certification and notice under the ACA could not be delegated to any other government agency, including the IRS. Specifically, the preamble provides:

> Comment: One commentator suggested that IRS, and not HHS, effectuate the notice described in § 155.310(h) because (1) IRS has information about employers subject to free rider assessments, and (2) IRS maintains a database of employer contacts for the transmission of sensitive personal information. Another commentator suggested that reporting to employers should be consolidated and centralized into a Federal process, with information provided on a monthly or quarterly basis.
> Response: Section 1411(e)(4)(B)(iii) provides that this notice must be provided to employers by Exchanges in connection with certain eligibility determinations. *It is not within the discretion of the [HHS] Secretary to shift responsibility for provision of this notice to the IRS.*

77 Fed. Reg. 18357 (Mar. 27, 2012).

25. Further, Section 1411 of the ACA mandates specific HHS appeals procedures. See, for example, 42 U.S.C. § 18081(e)(4)(B)(iii), which advises that the employer may be liable for an excise tax under 26 U.S.C. § 4980H, and 42 U.S.C. § 18081(e)(4)(C), which advises the employer of its appeal rights. Under those appeal rights, the employer is permitted the opportunity to (1) present information to the Exchange for review of the determination, and (2) have access to the data used to make the determination to the extent allowable by law. 42 U.S.C. § 18081(f)(2)(A).

26. In enacting the ACA, Congress amended the confidential taxpayer information disclosure rules under 26 U.S.C. § 6103 to facilitate the transfer of information necessary for HHS to make the Section 1411 Certification. 26 U.S.C. § 6103(1)(21) provides HHS with sufficient

information during the HHS appeal process to permit an accurate and proper computation of potential ESRP excise tax liability "within a reasonable timeframe" after the employee applies for Exchange coverage—not two to three years later when history is long written and there is nothing an employer can do about it.

27. Notwithstanding the clear requirement in 26 U.S.C. § 4980H that the employer receive certification specifically "under Section 1411," the IRS relied upon an HHS regulation it says gives it the authority to issue Section 1411 Certifications:

> (i) Certification program for employers. 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).

28. The regulation uses the word "certify," but it has nothing to do with Section 1411 whatsoever. What's more, HHS acknowledged this when it proposed the regulation:

> 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) [of the ACA] and paragraph (h) [of the proposed regulation]*.

78 Fed. Reg. 4594, 4636 (Jan. 22, 2013) (emphasis supplied). The notifications required by Sections 1411(e)(4)(B)(iii) and 1411(e)(4)(C) of the ACA—codified at 42 U.S.C. § 18081(e)(4)(B)(iii) and 18081(e)(4)(C), which were combined and implemented together by HHS in 45 C.F.R. § 155.310(h)—are the *only* things in Section 1411 of the ACA that are provided to the employer. They are the *only* things that could rationally be "certified to the employer under section 1411 of the … [ACA]."

29. HHS ignored both phrases, "to the employer" and "under Section 1411," and instead issued a regulation that simply said that as part of the IRS's own process for assessing ESRP excise taxes under 26 U.S.C § 4980H, the IRS should "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." The language in 45 C.F.R. § 155.310(i) that follows "certify to an employer" comes from 26 U.S.C § 4980H, not Section 1411 of the ACA. Nothing in 45 C.F.R. § 155.310(i) has anything to do with Section 1411 of the ACA, and the IRS's reliance upon this regulation as authority for claiming Letter 226-J is a Section 1411 Certification is sorely misplaced.

30. Neither 45 C.F.R. § 155.310(i) nor Letter 226-J bear any relationship to Section 1411 of the ACA; there is absolutely nothing "*under section 1411*" about either one of them. The only way IRS Letter 226-J could constitute a "certifi[cation] to the employer under section 1411 of the Patient Protection and Affordable Care Act" within the meaning of 26 U.S.C. §§ 4980H(a)(2) and 4980H(b)(1)(B) is if the phrase, "under section 1411 of the Patient Protection and Affordable Care Act," is ignored and given no effect whatsoever. To do so is to rewrite the statute written by Congress and signed into law by the President, something neither the IRS nor HHS can do.

31. The IRS has erred by interpreting HHS regulation 45 C.F.R. § 155.310(i) as authorizing it to issue letters that meet the requirements of 26 U.S.C. §§ 4980H(a)(2) and 4980H(b)(1)(B). HHS has erred by issuing a regulation that severs certification to an employer from everything in Section 1411 that pertains to employers and by failing to implement the due process that section requires, thereby depriving employers of required statutory due process.

32. Receipt of a Section 1411 Certification is a prerequisite to imposition of any ESRP excise taxes, but Faulk Company received no such Section 1411 Certification. Accordingly, Faulk Company seeks a refund of the $205,621.71, which it paid to the IRS on December 31, 2021, following a proposed assessment of ESRP excise taxes issued by the IRS on December 1, 2021, for the 2019 tax year.

33. Furthermore, the IRS continues to pursue ESRP excise taxes against Faulk Company in reliance on an HHS regulation that has altogether severed that which is to be "certified to the employer" from "under Section 1411." HHS regulation 45 C.F.R. § 155.310(i) is therefore contrary to the statutory text of the ACA, and Plaintiff seeks the Court's ruling setting aside that regulation.

COUNT ONE: Collection of Tax in Violation of the Requirement of 26 U.S.C. § 4980H that Plaintiff Receive a Section 1411 Certification from HHS

34. Faulk Company incorporates herein all statements and allegations contained in this Complaint.

35. Under 26 U.S.C. §§ 4980H(a)(2) and 4980H(b)(1)(B) and the implementing regulations, an employer is only liable for an ESRP excise tax if it has received a Section 1411 Certification.

36. The ACA requires that any certification under Section 1411 of the ACA be issued by HHS.

37. Faulk Company received no Section 1411 Certification from HHS with respect to 2019 or any other year.

38. On December 1, 2021, the Internal Revenue Service sent Plaintiff a Letter 226-J, proposing that an ESRP excise tax be assessed against Faulk Company, Inc. in the amount of $205,621.71 for tax year 2019 under 26 U.S.C. § 4980H. The IRS communicated to Faulk

Company that "[t]his letter certifies, under Section 1411 of the Affordable Care Act, that for at least one month in the year, one or more of [Faulk Company's] full-time employees was enrolled in a qualified health plan for which a … [premium tax credit] was allowed."

39. HHS has never made a Section 1411 Certification with respect to Faulk Company's 2019 tax year. Additionally, HHS has never provided Faulk Company with any appeal so that Faulk Company could contest or dispute the subsidies given to its employees or otherwise take action on account of its potential excise tax exposure under 26 U.S.C. § 4980H.

40. On December 30, 2021, Faulk Company responded to Letter 226-J by facsimile, stating that it disagreed with the assessment of the aforementioned ESRP excise tax and that, notwithstanding such disagreement, full payment was made (albeit under protest).

41. On December 31, 2021, Faulk Company paid the 2019 ESRP excise tax in full via EFTPS.

42. On January 28, 2022, Faulk Company filed Form 843 with the IRS requesting a full refund of the 2019 ESRP excise tax on the basis that it was unlawfully proposed and assessed.

43. Faulk Company has received no notice of disallowance from the IRS, and Faulk Company has not filed a written waiver of the requirement that it be mailed a notice of disallowance.

44. Under the implementing regulations for Section 1411 of the ACA, the Section 1411 Certification must be issued "within a reasonable timeframe following a determination that the employee is eligible for advance payments of the premium tax credit and cost-sharing reductions." 45 C.F.R. § 155.310(h).

45. The IRS's purported Section 1411 Certification (Letter 226-J) for tax year 2019 was issued more than three (3) years after November 2018 when open enrollment began for 2019

Exchange coverage and two (2) years after December 2019 when the last employee could theoretically have sought 2019 Exchange coverage.

46. Congress designed Section 1411 to provide real-time information to employers in advance of their potential exposure to ESRP excise taxes. Even if Letter 226-J could constitute a Section 1411 Certification, it was too late.

47. Faulk Company, therefore, is not liable for any ESRP excise taxes for 2019, and it should be refunded $205,621.71 in ESRP excise tax payments for the 2019 tax year, plus interest and costs.

48. Moreover, the IRS's position is not substantially justified. The statutory language of the ACA is clear that it is HHS that issues Section 1411 Certifications and that those certifications are part of a process that is to occur in reasonable proximity to an individual's application for subsidized individual coverage from a state exchange or the federally-facilitated exchange. The process concocted by the IRS and HHS deprives employers—and deprived Faulk Company—of critical statutory due process, and it is an unjustifiable position. Therefore, Faulk Company should be awarded its litigation expenses, including attorney's fees, expenses and costs.

COUNT TWO: Collection of Tax in Violation of the Requirement of 26 U.S.C. § 6751(b) that Penalties Be Approved in Writing by a Supervisor

49. Faulk Company incorporates herein all statements and allegations contained in this Complaint.

50. Under Code Section 4980H(d)(1), any ESRP excise tax shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68 of Title 26 of the U.S. Code. Under 26 U.S.C. § 6751(b)(1), which provides procedural requirements for assessment of penalties, no penalty under Title 26 of the U.S. Code may be assessed unless the initial determination of such assessment is personally approved, in writing, by the immediate

supervisor of the individual making such determination or such higher-level official as the Treasury Secretary may designate. Upon information and belief, neither HHS nor the IRS complied with 26 U.S.C. § 6751(b)(1).

51. Faulk Company, therefore, is not liable for any ESRP excise taxes for 2019, and it should be refunded $205,621.71 in ESRP excise tax payments for the 2019 tax year, plus interest.

52. Moreover, the IRS's position is not substantially justified, and Faulk Company should be awarded its litigation expenses, including attorney's fees, expenses and costs.

COUNT THREE: Administrative Procedure Act – Conflict with Statute

53. Faulk Company incorporates herein all statements and allegations contained in this Complaint.

54. The Administrative Procedure Act ("APA") empowers courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

55. It likewise authorizes courts to set aside agency action "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(C).

56. The HHS regulation at 45 C.F.R. § 155.310(i) conflicts with Section 1411 of the ACA in that it purports to sever certification from Section 1411. It is therefore in excess of statutory authority and not in accordance with law. *See, e.g., Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 609 (2013) ("It is a basic tenet that 'regulations, in order to be valid, must be consistent with the statute under which they are promulgated.'").

57. HHS regulation 45 C.F.R. § 155.310(i) must therefore be set aside. 5 U.S.C. § 706(2).

COUNT FOUR: Administrative Procedure Act – Arbitrary and Capricious

58. Faulk Company incorporates herein all statements and allegations contained in this Complaint.

59. The APA empowers courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

60. The HHS regulation at 45 C.F.R. § 155.310(i) "fail[s] to consider . . . important aspect[s] of the problem." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). It also "misconceive[s] the law" and therefore "may not stand." *SEC v. Chenery Corp*., 318 U.S. 80, 94 (1943).

61. HHS regulation 45 C.F.R. § 155.310(i) must therefore be set aside. 5 U.S.C. § 706(2).

V. PRAYER FOR RELIEF

WHEREFORE, Faulk Company requests judgment against the United States of America:

A. Compelling the IRS to refund Faulk Company $205,621.71 that was illegally assessed and collected by IRS, plus interest at the applicable underpayment rate, plus costs;

B. An award of attorney's fees, expenses, and costs; and

C. Such other relief as the Court may deem just and proper.

Further, Faulk Company requests judgment against Defendants HHS, CMS, Secretary Becerra and Administrator Brooks-Lasure in its favor and that the Court:

A. Set aside 45 C.F.R. § 155.310(i) as contrary to statute and an abuse of discretion pursuant to the APA, 5 U.S.C. § 706(2);

B. Issue a declaratory judgment declaring that 45 C.F.R. § 155.310(i) is unlawful and void; and

C. Award Plaintiff such other relief as the Court may deem just and proper.

Respectfully submitted,

By: */s/ Taylor Winn*
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ATTORNEYS FOR PLAINTIFF FAULK COMPANY, INC.

Tab 3

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

FAULK COMPANY, INC., Plaintiff, v. 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 Centers for Medicare & Medicaid Services (CMS), Defendants.	Case No. 4:24-cv-00609

APPENDIX IN SUPPORT OF UNITED STATES' MOTION TO DISMISS

The United States provides this appendix in support of its motion to dismiss:

Appendix Pages	Exhibit	Description
APP-001 to APP-006	A	IRS Letter 226-J issued to Plaintiff

Department of the Treasury
Internal Revenue Service
1973 North Rulon White Boulevard
Ogden, UT 84201-0062

Date:
12/1/2021

Tax year:
2019

Employer ID number:
[redacted]

Person to contact:
4980H Response Unit

Employee ID number:
L226J

Contact telephone number:
[redacted]

Contact e-fax number:
[redacted]

Response date:
12/31/2021

FAULK COMPANY INC
PO BOX 100533
FORT WORTH, TX 76185

Dear FAULK COMPANY INC:

We have made a preliminary calculation of the Employer Shared Responsibility Payment (ESRP) that you owe.

Proposed ESRP $205,621.71

Our records show that you filed one or more Forms 1095-C, Employer-Provided Health Insurance Offer and Coverage, and one or more Forms 1094-C, Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns, with the IRS. Our records also show that for one or more months of the year at least one of the full-time employees you identified on Form 1095-C was allowed the premium tax credit (PTC) on his or her individual income tax return filed with the IRS. Based on this information, we are proposing that you owe an ESRP for one or more months of the year.

You generally owe an ESRP for a month if either:

- You did not offer minimum essential coverage (MEC) to at least 95% of your full-time employees (and their dependents) and at least one of your full-time employees was certified as being allowed the PTC; or
- You offered MEC to at least 95% of your full-time employees (and their dependents), but at least one of your full-time employees was certified as being allowed the PTC (because the coverage was unaffordable or did not provide minimum value, or the full-time employee was not offered coverage).

This letter certifies, under Section 1411 of the Affordable Care Act, that for at least one month in the year, one or more of your full-time employees was enrolled in a qualified health plan for which a PTC was allowed.

Based on this certification and information contained in our records, we are proposing that you owe an ESRP of $205,621.71.

What you must do
Review this letter carefully. It explains the proposed ESRP and what you should do if you agree or disagree with this proposal. You must tell us whether you agree or disagree with the proposed ESRP by the Response date on the first page of this letter.

The following items are included:

- An explanation of the employer shared responsibility provisions in Internal Revenue Code (IRC) Section 4980H, which are the basis for the ESRP. See **About the ESRP**;
- An **ESRP Summary Table** itemizing your proposed ESRP by month;
- An **Explanation of the ESRP Summary Table**;

Exhibit
A

- Form 14764, **ESRP Response**; and
- Form 14765, **Employee Premium Tax Credit (PTC) Listing (Employee PTC Listing)**

It will be useful to have the Form(s) 1094-C and 1095-C that you filed with the IRS for the tax year shown on the first page of this letter available when you review this letter.

If you agree with the proposed ESRP

- Complete, sign, and date the enclosed Form 14764, ESRP Response, and return it to us by the Response date on the first page of this letter.
- Include your payment of $205,621.71. If you're enrolled in the Electronic Federal Tax Payment System (EFTPS), you can pay electronically instead of by check or money order.
- If you don't pay the entire agreed-upon ESRP, you will receive a Notice and Demand (your "bill") for the balance due. For additional payment options, refer to Publication 594, The IRS Collection Process, or call the telephone number on your bill. We will begin the collection process if you do not make payment in full and on time after you receive your bill.

If you disagree with the proposed ESRP

- Complete, sign, and date the enclosed Form 14764, ESRP Response, and send it to us so we receive it by the Response date on the first page of this letter.
    - Include a signed statement explaining why you disagree with part or all of the proposed ESRP. You may include documentation supporting your statement.
    - Make sure your statement describes changes, if any, you want to make to the information reported on your Form(s) 1094-C or Forms 1095-C. Do not file a corrected Form 1094-C with the IRS to report any changes you want to make to your Form 1094-C filed for the tax year shown on the first page of this letter.
    - Make changes, if any, on the **Employee PTC Listing** using the indicator codes in the Instructions for Forms 1094-C and 1095-C for the tax year shown on the first page of this letter. Do not file corrected Forms 1095-C with the IRS to report requested changes to the Employee PTC Listing; and
    - Include your revised Employee PTC Listing, if necessary, and any additional documentation supporting your changes with your Form 14764, ESRP Response, and signed statement.

About the Form 14765, Employee PTC Listing

The Employee PTC Listing shows the name and truncated social security number of each full-time employee for whom you filed a Form 1095-C if:

- The employee was allowed a PTC on his or her individual income tax return for one or more months of the tax year shown on the first page of this letter; and either
- You did not report an affordability safe harbor or other relief from the ESRP on the employee's Form 1095-C for one or more of the months the employee was allowed a PTC, or
- We have determined based on information reported that you do not qualify for the safe harbor claimed on line 16.

These employees are referred to as assessable full-time employees.

Each monthly box on the Employee PTC Listing has two rows. The first row reflects the codes, if any, that were entered on line 14 and line 16 of the employee's Form 1095-C for each month. However, if you claimed a safe harbor on line 16, and we determined based on information reported that you do not qualify for that safe harbor, it will show an XF, XG, or XH instead of the 2F, 2G, or 2H that was reported. For each employee, if the month **is not highlighted**, the employee is an assessable full-time employee for that month. If the month is highlighted, the employee is not an assessable full-time employee for that month.

Employees who are not considered assessable full-time employees **for all twelve** months of the year (either because the employee was not allowed a PTC for any month in the calendar year or a safe harbor or other provision providing relief was reported on Form 1095-C for each month the employee was allowed a PTC) are not included on the Employee PTC Listing.

Specific instructions for making changes to the Employee PTC Listing

- If the information reported on an assessable full-time employee's Form 1095-C was inaccurate or incomplete, you may make changes to the Employee PTC Listing using the applicable indicator codes for lines 14 and 16 that are described in the Instructions for Forms 1094-C and 1095-C. Make any changes, for each employee, as necessary, by entering new codes on the 2nd row of each monthly box.
- When making changes, first enter the indicator code for line 14 and then enter the indicator code for line 16. Separate the two codes with a slash (e.g., 1H/2A).
- If the same indicator code applies for all 12 months of the calendar year, enter that code in the "All 12 Months" column, and do not make entries for any of the months.
- If you are providing additional information about the changes for an employee, enter a check in the column titled "Additional Information Attached." Otherwise, leave this column blank.

NOTE: If more than one indicator code could apply for a month, enter only one code for that month on the Employee PTC Listing. Note any additional indicator codes that could apply for the affected employee in your signed statement. Include the employee's name, the applicable months and the additional indicator codes for each month.

We will review what you submit and will contact you.

Please ensure the signed statement and all documents submitted include the tax year and your employer ID number in the top right corner.

If we don't hear from you

If you don't respond by the Response date on the first page of this letter, we will send you a Notice and Demand for the ESRP that we proposed and assessed. The ESRP will be subject to IRS lien and levy enforcement actions. Interest will accrue from the date of the Notice and Demand and continue until you pay the total ESRP balance due.

About the ESRP

The ESRP rules only apply to an employer that is an applicable large employer (ALE). In general, an employer is an ALE for a year if it had an average of 50 or more full-time employees (including full-time equivalent employees) during the preceding calendar year.

The ESRP applies and is calculated on a monthly basis. Each month is a taxable period. An ALE may be liable for an ESRP for any month under either IRC Section4980H (a) or (b) if it:

- **Did not offer** MEC to at least 95% of its full-time employees (and their dependents) and at least one full-time employee was allowed the PTC (**IRC Section 4980H(a)**); or

- **Did offer** MEC to at least 95% of its full-time employees (and their dependents) and at least one full-time employee was allowed the PTC (because the coverage was unaffordable or did not provide minimum value, or the full-time employee was not offered coverage) (**IRC Section 4980H(b)**).

The ESRP is not deductible for income tax purposes.

Our authority for proposing the ESRP is IRC Section 4980H. For more information about IRC Section 4980H, including definitions of key terms, such as full-time employee, how to determine ALE status and whether the ALE has made an offer of coverage visit the ACA Information Center for Applicable Large Employers (ALEs) at www.irs.gov, keyword "ALEs." In addition, for information about completing Forms 1094-C and 1095-C and available transition relief, see the Instructions for Forms 1094-C and 1095-C for the tax year shown at the top of the page. You can find prior year Instructions at www.irs.gov (at the top of the screen select "Forms and Pubs," under the "Browse" heading choose "List of Prior Year Forms & Pubs" and in the "Find" box enter "1094-C" or "1095-C ").

ESRP Summary Table

Information Reported to IRS

Month	a. Form 1094-C, Part III, Col (a) Minimum essential coverage offer indicator offered to at least 95%	b. Form 1094-C, Part III, Col (b) Full-time employee count for ALE member	c. Allocated reduction of full-time employee count for IRC Section 4980H(a)	d. Count of assessable full-time employees with a PTC for IRC Section 4980H(a)	e. Count of assessable full-time employees with a PTC for IRC Section 4980H(b)	f. Applicable IRC Section 4980H provision	g. Monthly ESRP amount
January	No	103	30	8	8	4980H(a)	$15,208.09
February	No	114	30	8	8	4980H(a)	$17,499.72
March	No	122	30	9	9	4980H(a)	$19,166.36
April	No	110	30	6	6	4980H(a)	$16,666.40
May	No	129	30	8	8	4980H(a)	$20,624.67
June	No	105	30	6	6	4980H(a)	$15,624.75
July	No	93	30	7	7	4980H(a)	$13,124.79
August	No	99	30	4	4	4980H(a)	$14,374.77
September	No	118	30	5	5	4980H(a)	$18,333.04
October	No	117	30	5	5	4980H(a)	$18,124.71
November	No	132	30	7	7	4980H(a)	$21,249.66
December	No	105	30	5	5	4980H(a)	$15,624.75
						Total Proposed ESRP	$205,621.71

Explanation of the ESRP Summary Table

The ESRP summary table includes the following information.

Column (a). **Form 1094-C, Part III, Col (a), Minimum essential coverage offer indicator (offered to at least 95%)**
This column shows the information you reported on the Form 1094-C, Part III, Column (a) filed with the IRS about whether you offered MEC to at least 95% of your full-time employees and their dependents. If there was no entry on Form 1094-C, Part III, Column (a) for one or more months, each missing entry is shown as "No" in column (a).

Column (b). **Form 1094-C, Part III, Col (b), Full-time employee count for ALE member**
This column shows the information you reported on the Form 1094-C, Part III, Column (b) filed with the IRS reporting the number of your full-time employees. However, if you did not report the number of full-time employees for any month of the year, the full-time employee count in column (b) will reflect the number you reported on Form 1094-C, Part II, line 20, "Total number of Forms 1095-C filed by and/or on behalf of ALE Member." If you reported the number of full-time employees for some, but not all months of the year, the full-time employee count in column (b) for each month for which you did not report will reflect the greatest number of full-time employees you reported for any one month of the year.

Column (c). **Allocated reduction of full-time employee count for IRC Section 4980H(a)**
This column shows the number by which the full-time employee count in column (b) is reduced when computing an ESRP under IRC Section 4980H(a). In general, under IRC Section 4980H(a), an ALE's number of full-time employees is reduced by its allocable share of 30. If the ALE is not part of an Aggregated ALE Group, the ALE's allocable share is 30. If the ALE is a member of an Aggregated ALE Group, the ALE's allocable share is based upon the number of ALE members reported in Part IV of Form 1094-C. For the 2015 year only, transition relief increased 30 to 80 for an employer that certified on Form 1094-C, Line 22 and entered B on Form 1094-C, Part III, Column (e), reporting that it met the criteria for the transition relief. Even if "yes" is entered in column (a) (meaning no ESRP under IRC Section 4980H(a) applies for the month), this column (c) will be filled in because the amount of a potential ESRP under IRC Section 4980H(a) for a month caps the amount of an ESRP under IRC Section 4980H(b) for a month.

Column (d). **Count of assessable full-time employees with a PTC for IRC Section 4980H(a)**
The number shown for each month is the number of your full-time employees who were allowed a PTC on their individual income tax returns and for whom no provision providing relief is applicable under IRC Section 4980H(a). These employees are listed on the Employee PTC Listing and are referred to as assessable full-time employees. You are subject to an ESRP for any month that IRC Section 4980H(a) applies to you, if there is at least one assessable full-time employee for that month.

Column (e). **Count of assessable full-time employees with a PTC for IRC Section 4980H(b)**
The number shown for each month is the number of your full-time employees who were allowed a PTC and for whom no safe harbor or other provision providing relief is applicable under IRC Section 4980H(b). These employees are listed on the Employee PTC Listing and are referred to as assessable full-time employees. You are subject to an ESRP for these employees for any month that IRC Section 4980H(b) applies to you, if there is at least one assessable full-time employee for that month.

Column (f). **Applicable IRC Section 4980H provision**
This column shows whether the ESRP, if any, has been computed under IRC Section 4980H(a) or (b).

Column (g). **Monthly ESRP amount**
This column shows the proposed ESRP amount per month, if any. Each month is a separate taxable period. The total proposed ESRP amount for the year is shown at the bottom. For more information, see "Calculation of your ESRP" below.

Calculation of your ESRP

NOTE: References to all columns relate to the ESRP Summary Table above.

We computed your ESRP amount on a month-by-month basis as shown in column (g). For any month, an employer may owe no ESRP or an ESRP under either IRC Section 4980H(a) or 4980H(b) as described below, but not both. (See column (f) for the ESRP provision, if any, that applies to you for each month.)

IRC Section 4980H(a) applies for a month when column (a) Minimum essential coverage offer indicator (offered to at least 95%) is marked "No" and column (d) Count of assessable full-time employees with a PTC for IRC Section 4980H(a) is at least one for that same month. An IRC Section 4980H(a) ESRP is computed by taking the number in column (b), IRC Section 4980H full-time employee count for ALE member, subtracting the number in column (c), Allocated reduction of full-time employee count for IRC Section 4980H(a), and multiplying the resulting number by $2,500/12 or $208.33 to arrive at the monthly ESRP amount.

IRC Section 4980H(b) applies for a month when column (a) Minimum essential coverage indicator (offered to at least 95%) is marked "Yes" and column (e) Count of assessable full-time employees with a PTC for IRC Section 4980H(b) is at least one for that same month. An IRC Section 4980H(b) ESRP is computed by taking the number in column (e), Count of assessable full-time employees with a PTC for 4980H(b), and multiplying that number by $3,750/12 or $312.50 to arrive at the monthly ESRP amount.

NOTE: The ESRP amount under IRC Section 4980H(b) in column (g) cannot be more than the amount that would have been proposed under IRC Section 4980H(a) had it applied to you for that same month. If you are a member of an Aggregated ALE Group and are subject to an ESRP under IRC Section 4980H(a) or are subject to an ESRP under IRC Section 4980H(b) that may be limited by IRC Section 4980H(a) cap, please contact the person identified on the first page of this letter to ensure the allocation has been correctly computed.

Additional information

- For more information about this letter, visit www.irs.gov/ltr226J.
- For information about the ESRP and the PTC, visit www.irs.gov/aca.
- For information about the collection process visit www.irs.gov/Pub594.
- For tax forms, instructions and publications, visit www.irs.gov/forms-pubs or call 800-TAX-FORM (800-829-3676).
- Keep this letter for your records.

If you need assistance, please don't hesitate to contact us.

Sincerely,

Lissa Baddley

Lissa Baddley
Operation Manager

Enclosures:
Publication 1
Notice 609
Form 14764
Form 14765

Tab 4

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

FAULK COMPANY, INC.,

Plaintiff,

v. **No. 4:24-cv-00609-P**

XAVIER BECERRA, ET AL.,

Defendants.

OPINION & ORDER

Before the Court are two cross-motions for summary judgment: one filed by Defendants United States of America, United States Department of Health and Human Services, Chiquita Brooks-LaSure, and Xavier Becerra ("the Government"); the other, by Plaintiff Faulk Company, Inc. ("Faulk"). ECF Nos. 15, 30. The Government's Motion, as originally filed, was a motion to dismiss. ECF No. 15. Upon proposal by the Court, the Parties agreed to convert the Government's Motion into a motion for summary judgment because the "disputes appear[ed] to be purely legal in nature." ECF No. 27. The Parties were also given the opportunity to provide additional briefing. *Id.* In response, Faulk filed its Motion. ECF No. 30. Having considered both Motions, other relevant docket filings, and the applicable law, the Court will **DENY** the Government's Motion for Summary Judgment and **GRANT** Faulk's Motion for Summary Judgment in part as to Counts I and III and **DENY** in part as to attorney's fees.

BACKGROUND

This case arises out of the Internal Revenue Service's ("IRS") assessment of an excise tax on Faulk for tax year 2019. Faulk is a Texas corporation that provides janitorial services for Texas schools. Before 2019, Faulk offered minimum essential health insurance coverage to its employees as directed by the Affordable Care Act ("ACA"). In 2019, Faulk stopped providing this coverage to its employees.

On December 1, 2021, the IRS issued what it calls a Letter 226-J to Faulk proposing an excise tax known as the employer shared responsibility payment ("ESRP") for Faulk's failure to offer its full-time employees minimum health insurance coverage under the ACA. The Letter 226-J advised Faulk that the IRS's preliminary calculation of the ESRP was $205,621.71. The Letter 226-J purported to serve as a "certification" to Faulk prior to the assessment of the ESRP. Faulk responded on December 30, 2021, informing the IRS that it disagreed with the proposed assessment and that Faulk was paying the ESRP under protest. On January 28, 2022, Faulk filed a refund claim with the IRS for the 2019 ESRP but received no response.

Faulk then filed this case on June 28, 2024. The Complaint alleges that the United States Department of Health and Human Services ("HHS") and the IRS violated Faulk's statutory due process rights by improperly categorizing the Letter 226-J as a "certification" to Faulk prior to the assessment of an ESRP. Faulk argues that HHS, not the IRS, was required to provide the certification, and that the certification lacked proper notice of potential liability and notice of a right to appeal. On November 1, 2024, the Government moved to dismiss Faulk's Complaint under Rules 12(b)(6) and 12(b)(1) of the Federal Rules of Civil Procedure alleging that Faulk failed to state a claim for Counts I and II and that the Court lacks jurisdiction for Counts III and IV.

Once the Parties fully briefed the Government's Motion to Dismiss, the Court suggested that the Motion be converted to a motion for summary judgment because the Parties' disputes were "purely legal in nature." The Parties agreed. And with the Court's permission for additional briefing, Faulk filed a Cross-Motion for Summary Judgment. The Court now addresses both Motions.

LEGAL STANDARD

Summary judgment is appropriate when the moving party "shows that there is no genuine dispute as to any material fact" and "is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A dispute is "genuine" if the evidence presented would allow a reasonable jury to return a verdict in favor of the non-moving party. *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 248 (1986). A fact is "material" when it might affect the outcome of a case. *Id.* Generally, the "substantive law will identify which facts are material," and "[f]actual disputes that are irrelevant or unnecessary will not be counted." *Id.*

When determining whether summary judgment is appropriate, the Court views the evidence in the light most favorable to the nonmovant. *First Am. Title Ins. Co. v. Cont'l Cas. Co.*, 709 F.3d 1170, 1173 (5th Cir. 2013). In conducting its evaluation, the Court may rely on any admissible evidence available in the record but need only consider those materials cited by the parties. FED. R. CIV. P. 56(c)(1)–(3). The Court need not sift through the record to find evidence in support of the nonmovant's opposition to summary judgment; the burden falls on the moving party to simply show a lack of evidence supporting the nonmovant's case. *See Malacara v. Garber*, 353 F.3d 393, 404–05 (5th Cir. 2003).

ANALYSIS

Before addressing both Motions for Summary Judgment, the Court will provide an overview of the statutory framework for 42 U.S.C. § 18081 ("ACA § 1411"), 26 U.S.C. § 4980H ("I.R.C. § 4980H"), and 45 C.F.R. § 155.310(i) ("HHS Certification Regulation"). The Court will then address Count I and determine whether Faulk is entitled to a refund for the ESRP assessed by the IRS for tax year 2019. Finding that the ESRP was improperly assessed based on the statutory language, the Court will then consider the enforceability of the HHS Certification Regulation in Count III. The Court will end by briefly addressing Counts II and IV and Faulk's request for attorney's fees.

A. The Statutory/Regulatory Framework

This case demands familiarity with two statutory provisions of the ACA and one related regulation. The first statutory provision, ACA § 1411, is the employer mandate found in Title 42 of the United States Code. ACA § 1411 fashions minimum coverage requirements for employers and establishes HHS as the governing agency. Congress added the second provision, § 4980H, to the Internal Revenue Code ("I.R.C.") as an enforcement mechanism. I.R.C. § 4980H empowers the

IRS to penalize employers through the ESRP excise tax for failing to follow ACA § 1411's requirements. Three years after the ACA was enacted, the HHS Certification Regulation was issued in 45 C.F.R. § 155.310(a) by HHS's sub-agency, Centers for Medicare & Medicaid Services. The HHS Certification Regulation purports to clarify ACA § 1411 and I.R.C. § 4980H by establishing a process for penalizing an employer.

1. ACA § 1411

The ACA was passed in March 2010. Pub. L. No. 111–48, 124 Stat. 119 (2010). One of the ACA's many goals was "to increase the number of Americans covered by health insurance and decrease the cost of healthcare." *Optimal Wireless LLC v. Internal Revenue Serv.*, 77 F.4th 1069, 1071 (D.C. Cir. 2023) (quoting *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012) (quotation omitted)).

To that end, the employer mandate in ACA § 1411 requires that businesses employing at least fifty full-time equivalent employees provide their employees minimum health insurance coverage. *See generally* 42 U.S.C. § 18081. Congress gave HHS the exclusive authority to effectuate its provisions. *See* 42 U.S.C. § 18081(a) ("The Secretary [of HHS] shall establish a program meeting the requirements of this section."). The ACA also directs each State to establish a health insurance exchange (generally, the "Exchange") to operate as a virtual marketplace for health insurance policies. *See* 42 U.S.C. § 18031(b).[1] With the help of the Exchange, HHS collects and verifies information from employers to facilitate enrollment and ensure compliance with ACA § 1411. *See* 42 U.S.C. § 18081(b)–(d).

In section (e), Congress guarantees due process rights to employers subjected to the mandate. An employer's failure to provide insurance to eligible employees could result in the employer being "liable for the payment assessed under [I.R.C. § 4980H]." *Id.* § 18081(e)(4)(B)(iii). This excise tax payment is referred to as the ESRP. If HHS determines that an employer did not meet the minimum coverage requirements, HHS

[1]If a State did not establish an exchange, HHS was to operate an exchange in that State. *Id.* § 18041(c).

must notify the Exchange. *Id.* Thereafter, the Exchange must give two notices to an employer: *First*, notice "that the employer may be liable" for an ESRP, *id.*; and *second*, notice of the employer's right to appeal. *Id.* § 18101(e)(4)(C).

Where appropriate, Congress explicitly allows HHS to make certain delegations, for example, to the Exchange. *See id.* § 18081(d) ("[T]he Secretary shall verify the accuracy of such information in such manner as the Secretary determines appropriate, including delegating responsibility for verification to the Exchange."). But there is no delegation to the IRS anywhere in ACA § 1411. The closest ACA § 1411 comes to permitting a delegation to the IRS is a provision that allows the Secretary of HHS "or one of such other Federal officers," including the IRS Secretary, to hear an appeal on an individual's eligibility for government-funded exchange subsidies. *Id.* § 18081(f)(1).

2. I.R.C. § 4980H

As referenced in ACA § 1411, an employer's compliance with providing coverage is driven through an excise tax, the ESRP. *Id.* § 18081(e)(4)(iii) ("may be liable for the payment assessed under section 4980H of Title 26"). I.R.C. § 4980H instructs the IRS on when an ESRP may be assessed against an employer. An ESRP may be assessed by the IRS if: (1) an employer "fails to offer its full-time employees . . . the opportunity to enroll in minimum essential coverage . . . for any month" as ACA § 1411 dictates; and (2) if "at least one full-time employee of the applicable large employer has been *certified* to the employer under [ACA § 1411] as having enrolled for such month in a qualified health plan . . . ." 26 U.S.C. § 4980H(a)(1)–(2) (emphasis added). Thus, an employer must fail to offer the coverage *and* receive certification under ACA § 1411 of such failure before an ESRP may be assessed by the IRS.

3. HHS Certification Regulation

Based on ACA § 1411 and I.R.C. § 4980H, HHS issued the HHS Certification Regulation in 2013. 45 C.F.R. § 155.310(i). The HHS Certification Regulation provides:

> 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.

Id. As stated in the HHS Certification Regulation, HHS delegated authority to the IRS to complete the "certification" required to properly assess an ESRP in I.R.C. § 4980H. The IRS carries out the HHS Certification Regulation through the Letter 226-J.

B. Count I

Faulk argues in Count I that the ESRP assessed by the IRS failed to satisfy the certification requirement in I.R.C. § 4980H. The Court agrees. The required certification must come from HHS as directed by the statutory language.

"An administrative agency is itself a creature of statute" and therefore derives its power from statutory text. *Guardians Ass'n v. Civil Serv. Comm'n of N.Y.C.*, 463 U.S. 582, 614 (1983) (O'Connor, J., concurring). The Court therefore begins where it always does: with the text of the statutes. *See, e.g.*, *Bartenwerfer v. Buckley*, 598 U.S. 69, 74 (2023). The Court gives words their contextual meanings using normal rules of interpretation. *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). In interpreting ACA § 1411 and I.R.C. § 4980H, the Court endeavors to read the whole statutes contextually, giving effect to every word, clause, and sentence. *Fischer v. United States*, 603 U.S. 480, 486 (2024).

The Court cannot ignore the plain meaning of the text found in I.R.C. § 4980H.[2] Courts must "presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992). As discussed in the previous section, two conditions must be met for the IRS to assess an ESRP on an employer. *First*, the employer "fails to offer its full-time employees . . . the opportunity to enroll in minimum essential coverage . . . for any month"; and *second*, "at least one full-time employee of the applicable large employer has been certified to the employer under [ACA § 1411] as having enrolled for such month in a qualified health plan . . . ." 26 U.S.C. § 4980H(a)(1)–(2). I.R.C. § 4980H is silent as to which agency must provide certification. It does not explicitly state that HHS *or* the IRS is responsible for such certification. The only indication it provides is that an employer must be "certified . . . *under* [ACA §] 1411." *Id.* § 4980H(a)(2) (emphasis added).

The Supreme Court has stated that the word "'under' is a 'chameleon' that 'must draw its meaning from its context.'" *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 124 (2018) (quoting *Kucana v. Holder*, 558 U.S. 233, 245 (2010)). In *National Ass'n of Manufacturers*, the Supreme Court found that "under section 1311 . . . is most naturally read to mean . . . pursuant to or by reason of the authority of." *Id.* (cleaned up). The statutory language at issue in *National Ass'n of Manufacturers* is similar to I.R.C. § 4980H in this case, which states that an employer must be "certified . . . under [ACA §] 1411." I.R.C. § 4980H(a)(2). Following the reasoning in *National Ass'n of Manufacturers*, the Court finds that "certification" to an employer is carried out "by reason of the authority" of ACA § 1411—authority that is exclusively given to HHS,

[2]*See Ogden v. Saunders*, 25 U.S. 213, 332 (1827) (Marshall, C.J. dissenting) (stating "that the intention of the [statute] must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the [statute] was intended; [and] that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers").

not the IRS. Based on this reading, I.R.C. § 4980H demands certification to an employer be carried out by HHS.

This is not to say that the Court's reading is without its challenges. I.R.C. § 4980H guarantees an employer "certification" under ACA § 1411, but the word "certification" does not explicitly appear anywhere in ACA § 1411 with respect to the employer mandate; forms of the word "certify" are only used with respect to the determination that an individual is exempt from the individual mandate.[3] *See* 42 U.S.C. §§ 18081(a)(4), 18081(b)(5), 18081(e)(2)(B), 18081(e)(4)(B)(iv).

Nonetheless, the Court can draw upon the context of both statutes to determine the meaning of "certified to the employer under section 1411." Congress likely used "certified" to refer broadly to the two notices guaranteed to employers prior to assessment of an ESRP: *First*, in (e)(4)(B)(iii), notice to the employer of its liability under I.R.C. § 4980H; and *second*, in (e)(4)(C), notice of an employer's appellate rights. This interpretation is based on the actual relationship between the two statutes and explains why Congress would use the term "certified" rather than "notice."

If, on the other hand, Congress had merely intended for the IRS to certify an employer, as a process entirely detached from the notices required in ACA § 1411, there would be no need to refer back to ACA § 1411. Instead, I.R.C. § 4980H would simply command the IRS to provide its own certification. Concluding otherwise would render I.R.C. § 4980H's reference to ACA § 1411 meaningless, and the Court must "give effect, if possible, to every word of the statute." *Fischer*, 603 U.S. at 486 (2024). Furthermore, the statute uses the past tense—"*has been*

[3]While the individual mandate is distinct from the ESRP, the Court notes that HHS is also responsible for the individual mandate "certification," just as the Court concludes for the employer mandate certification. *See* 42 U.S.C. § 18081(a)(4) ("The Secretary shall establish a program . . . for determining . . . whether to grant a certification."). It is also worth noting that the purpose of the individual mandate certification is to "attest[] that . . . an individual is entitled to an exemption" or liable for "the penalty . . . ." *See id.* This mirrors the Court's understanding of certification with respect to the employer mandate, which attests that an employer may be subject to a penalty (the ESRP).

certified"—to suggest that a prior certification, or the notices completed by HHS through the Exchange under ACA § 1411, must take place before the IRS enters the picture. Thus, once HHS provides certification to an employer, consisting of the notice of potential liability and notice of the right to appeal, only then may the IRS assess an ESRP.

The Government's alternative interpretation of I.R.C. § 4980H is untenable. The Government posits that by certification "under" ACA § 1411, "Congress likely meant only that the certification be consistent with [ACA] § 1411." ECF No. 26 at 4. In support, the Government highlights that the notices in ACA § 1411 do not require HHS or the Exchange to "certify" anything to an employer. *Id.* As addressed above, the Court acknowledges that ACA § 1411 does not use the word "certify" with respect to the employer mandate. The Court also agrees that "notice" and "certification" may not be the same. The Court further recognizes that the statutes in question are far from perfectly drafted. Still, it is clear that the two notices in ACA § 1411—notice of potential liability and notice of appellate rights—were important to Congress. In fact, within ACA § 1411, Congress ordered HHS to conduct a study "to ensure . . . [t]he rights of employers to adequate due process" were sufficiently protected. 42 U.S.C. § 18081(i)(1)(B). Moreover, the command to provide those notices was strictly given to HHS and the Exchange in ACA § 1411. The Court therefore finds it more likely that by explicitly referring to ACA § 1411, I.R.C. § 4980H demands the two ACA § 1411 notices before an ESRP is assessed—rather than just requiring the IRS's certification to be *consistent* with ACA § 1411, as the Government suggests.

In addition to its alternative interpretation of I.R.C. § 4980H, the Government also contends that the IRS is in the "best position" to certify an employer before assessing an ESRP. ECF No. 15 at 15; ECF No. 34 at 7. In support, the Government highlights that certain information—such as whether employers offer health care coverage to full-time employees—is reported to the IRS, not HHS, and this information is needed for certification. *See* ECF No. 34 at 7. The IRS then provides the Letter 226-J to employers based on the forms completed by employers. *Id.*

The Court finds this point inconclusive because other parts of the statute suggest that HHS is better situated. For example, in 42 U.S.C. § 18082(a)(1)–(3), HHS makes "advance determinations" of subsidies and then directs the IRS to pay such subsidies to health insurers each month. HHS is required to inform the Exchange and the IRS of the "advance determinations." *Id.* § 18082(a)(2)(A). HHS also provides the individual enrollee's employer information. *Id.* § 18082(a)(2)(B). Thus, like the Court's interpretation of the certification and ESRP process, the IRS only becomes involved with advance determinations after an individual files a tax return and the advance determination process has been made by HHS. The Government's argument concerning the agencies' statutory positioning is also weak because it ignores the numerous inter-agency communications contemplated by subsections (c) and (d) of ACA § 1411. The fact that certification would require communication of some information between the IRS and HHS is therefore unpersuasive.

Another argument made by the Government is that I.R.C. § 4980H requires certification for "each month" that an employer may be liable, but ACA § 1411 is silent on the frequency that HHS must provide notice of potential liability or appellate rights through the Exchange. The Government contends this is "fatal" to Faulk's interpretation of I.R.C. § 4980H. ECF No. 34 at 5. The Court fails to see, however, why HHS and the Exchange could not facilitate monthly certification to comply with both statutes. Just because ACA § 1411 does not explicitly require the same frequency as I.R.C. § 4980H does not mean compliance with both is impossible.

Again, there are interpretative challenges for both Faulk's position and the Government's position. For Faulk, "certify" and "notice" are different words, and ACA § 1411 does not use any version of the word "certify" in § 18081(e)(4)(B)(iii) or § 18081(e)(4)(C) requiring notices from HHS through the Exchange. For the Government, I.R.C. § 4980H explicitly refers back to ACA § 1411 for "certification" before the IRS may assess an ESRP. But nowhere in ACA § 1411 does Congress grant HHS the ability to delegate notice *or* certification to the IRS—much less grant that authority to the IRS itself. Rather, Congress made clear that

HHS and the Exchange must administer the due process, including notice of liability and notice of appellate rights. *See* 42 U.S.C. § 18081(e)(4)(B)(iii) (stating that "the Exchange shall notify the employer" of potential liability); *id.* § 18081(e)(4)(C) (stating that "[t]he Exchange shall also notify each person" of the appeals process).

There are good reasons for Congress to keep the administration of due process in ACA § 1411 close to HHS rather than permit delegation. The ESRP excise tax can have major consequences for an employer. In 2024, if an employer meeting the minimum threshold of 50 full-time employees failed to provide adequate health insurance, the employer could be assessed $12,375 per month, or $148,599 for the year. An employer with 500 employees would owe just under $1.5 million. For a large corporation, this penalty may seem insignificant. But for a low-margin industry employer—for example, a janitorial services company like Faulk—such an assessment may be devastating. It may therefore be important to Congress that the primary agency responsible for overseeing employer compliance, HHS, also be the agency ensuring due process is met.

Although the Court acknowledges that its ruling is not the only possible interpretation of the statutes in question, it is the best interpretation. The Court could adopt the Government's "more flexible . . . interpretation," which would certainly be easier given the established practice by the IRS to issue certifications, but "it is not the judiciary's prerogative to change the plain meaning and language of the statute." *United States v. Stewart*, 7 F.3d 1350, 1354 (8th Cir. 1993) (Lay, J., concurring in part).[4] Accordingly, because the Court finds that the IRS cannot issue an ACA § 1411 certification, Faulk is entitled to a refund of $205,621.71 for the ESRP assessed by the IRS for tax year 2019.

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[4]*See Evans v. Jordan*, 8 F. Cas. 872, 873 (C.C.D. Va. 1813), aff'd, 13 U.S. 199, 3 L. Ed. 704 (1815) ("[In the legislative branch] is confided, without revision, the power of deciding on the justice as well as wisdom of measures relative to subjects on which they have the constitutional power to act. Wherever, then, their language admits of no doubt, their plain and obvious intent must prevail.").

C. Count III

In Count III, Faulk asks the Court to declare 45 C.F.R. § 155.310(i) void and unenforceable. The Government makes two preliminary challenges to Count III. *First*, the Government contends that Faulk lacks Article III standing to challenge the regulation. And *second*, even if Faulk has standing, that the Declaratory Judgment Act bars the requested relief. After rejecting both preliminary challenges, the Court will then address both Parties' arguments for summary judgment on Count III.

1. Standing

Faulk does not lack standing to challenge the HHS Certification Regulation. Standing under Article III requires "injury in fact, causation, and redressability." *Inclusive Cmtys. 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)). The party invoking federal jurisdiction bears the burden of establishing the elements of standing. *See id.* "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 (D.C. Cir. 2014)).

The Court has already concluded that the "certification" referenced in I.R.C. § 4980H is the same as the "notices" required by ACA § 1411. As a consequence, Faulk was injured when HHS neglected to provide notice of liability and notice of appellate rights before the IRS assessed an ESRP, as the certification in I.R.C. § 4980H demands. The HHS Certification Regulation—which takes the opposite stance of the Court's interpretation—is therefore the primary, if not sole, cause of Faulk's harm. If the Court were to invalidate the HHS Certification Regulation, HHS would presumably retake control of certification rather than impermissibly delegating such responsibilities to the IRS. And if Faulk's requested relief is granted in Count III, Faulk's and other employers' future due process rights will be protected. The Court therefore finds

that Faulk has Article III standing to challenge the HHS Certification Regulation.[5]

2. Declaratory Judgment Act

The Declaratory Judgment Act also does not impede Faulk's requested relief in Count III. The Declaratory Judgment Act provides: "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes . . . any court . . . may declare the rights and other legal relations of any interested party seeking such declaration . . . ." 28 U.S.C. § 2201(a). The Supreme Court has said that the federal tax exemption to the Declaratory Judgment Act is "at least as broad as the Anti-Injunction Act." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 732 n.7 (1974). Both the Declaratory Judgment Act and Anti-Injunction Act apply "when the *target* of a requested injunction is a tax obligation." *CIC*

[5]The Court strains its memory to recall a lawsuit in which the Government has not sought dismissal under the standing doctrine. Perhaps this is due to the seemingly treacherous task of interpreting and applying recent Supreme Court precedents related to standing, which this Court recently compared to "exploring uncharted territory with no compass." *See Chamber of Com. of the United States of Am. v. Consumer Fin. Prot. Bureau*, No. 4:24-CV-00213-P, 2024 WL 5012061, at *2 n.2 (N.D. Tex. Dec. 6, 2024) (Pittman, J.) (citing *Haaland v. Brackeen*, 599 U.S. 255 (2023) (holding that a state lacks standing to challenge federal law preempting state laws on foster child placement, even though "Congress's Article I powers rarely touch state family law")); *contra Massachusetts v. EPA*, 549 U.S. 497 (2007) (holding that a state had standing to challenge the EPA's decision not to regulate emissions of greenhouse gases because that power was preempted and greenhouse gases affected "the earth and air within [their] domain"); *contra United States v. Texas*, 599 U.S. 670 624 (2023) (holding that states near an international border lacked standing to challenge the federal government's immigration enforcement policies because the state's financial injury was not "legally cognizable"); *but see Biden v. Nebraska*, 600 U.S. 477 (2023) (holding that Missouri established standing by showing that it "suffered . . . a concrete injury to a legally protected interest, like property or money"); *contra Dept. of Ed. v. Brown*, 600 U.S. 551 (2023) (holding that individual loan borrowers lacked standing to allege the federal government unlawfully excluded them from a one-time direct benefit program purportedly designed to address harm caused by an indiscriminate global pandemic). However, the standing analysis in this case is simple and no serious, non-meritless argument can be posited that Faulk does not have standing to bring its present challenge.

Servs., LLC v. Internal Revenue Serv., 593 U.S. 209, 218 (2021) (emphasis added).

In determining the target of a requested injunction, courts look at "the relief requested" or "the thing sought to be enjoined" in the complaint. *Id.* The "taxpayer's subjective motive" is irrelevant. *Id.* at 217. Rather, the "objective aim" is the key. *Id.* When, as was the case in *CIC Services*, a party claims that the enforcement of a tax is *procedurally* flawed, the target is not the tax penalty itself. *See id.* at 218.

The target of Count III is not against ESRP excise tax itself—it is against the improper certification process that stands as a procedural prerequisite to the tax. Nowhere in Count III does Faulk assert that the ESRP is unlawful. Rather, it alleges that the HHS Certification Regulation "purports to sever certification from [ACA §] 1411," and is "therefore . . . not in accordance with the law." ECF No. 1 at 13. Faulk's target is the process by which the ESRP is assessed.

This is confirmed by the fact that the certification process, as the Court has interpreted, is administered by HHS, not the IRS. The downstream effect of ruling that the HHS Certification Regulation is void and unenforceable may inhibit the IRS's ability to assess the ESRP excise tax until HHS determines the proper way to issue such certification through the Exchange as ACA § 1411 requires. Still, the Court "rejects the Government's argument that an injunction against [the certification delegation] is the same as one against the tax penalty." *See CIC Servs., LLC*, 593 U.S. at 219.

Faulk's requested relief in Count III targets the proper statutory interpretation of the process required in I.R.C. § 4980H and ACA § 1411, not the tax itself. Therefore, the Declaratory Judgment Act does not bar the requested relief.

3. HHS Certification Regulation

Having found that Faulk has standing, that the Declaratory Judgment Act does not bar Count III, and that I.R.C. § 4980H and ACA § 1411 do not confer any power to the IRS to "certify" an employer for an ESRP, the Court now concludes that 45 C.F.R. § 155.310(i) should be set

aside as void and unenforceable. The Administrative Procedure Act ("APA") empowers courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

As discussed above, the HHS Certification Regulation delegates power to the IRS to certify an employer before assessing an ESRP. 45 C.F.R. § 155.310(i). ("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 . . . ."). In explaining the subsection, HHS stated that the "certification program" in the HHS Certification Regulation "is distinct from the notification specified in [ACA § 1411]." 78 Fed. Reg. 4593, 4636 (Jan. 22, 2013).

The Court disagrees. HHS did not have authority to add any certification program to be administered by the IRS because ACA § 1411 does not allow HHS to delegate to the IRS. As discussed in Section B, the closest thing to permissible delegation in ACA § 1411 allows the IRS to be one of many federal officers that may hear an appeal of an individual's eligibility for subsidies. *See* 42 U.S.C. § 18081(f)(1). Likewise, nothing in I.R.C. § 4980H authorizes the IRS to issue the certification. As the Court found, "certifi[cation] . . . under [ACA §] 1411" is a reference to HHS's duty to provide notices to employers in ACA § 1411 through the Exchange. 26 U.S.C. § 4980H(a)(2). Consequently, no independent power is granted to the IRS in I.R.C. § 4980H, and the Court finds that 45 C.F.R. § 155.310(i) should be set aside as void and unenforceable.[6]

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[6]Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 951 (2018) ("Section 706 of the APA authorizes and requires a court to 'set aside' agency rules and orders that it deems unlawful or unconstitutional. This extends beyond the mere non-enforcement remedies available to courts that review the constitutionality of legislation, as it empowers courts to 'set aside'—i.e., formally nullify and revoke—an unlawful agency action."); Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1173 (2020) ("The term 'set aside' means invalidation—and an invalid rule may not be applied to anyone.").

D. Counts II and IV

Faulk's Complaint contains four total causes of action. This opinion does not resolve Count II or Count IV. In Faulk's response to the Government's Motion, Faulk withdrew Count II. ECF No. 24 at 1. Therefore, Count II is no longer before the Court. As for Count IV, Faulk did not move for summary judgment because it is an APA challenge under 5 U.S.C. § 706(2)(A) alleging arbitrary and capricious decision making. *See* ECF No. 1 at 14. Such challenges are based on the administrative record, which HHS has yet to file for 45 C.F.R. § 155.310(i). Notwithstanding, 45 C.F.R. § 155.310(i) is void and unenforceable for exceeding statutory authority, as the Court found in Count III. Count IV is therefore unnecessary for this Court's ruling on the enforceability of the HHS Certification Regulation.

E. Attorney's Fees

Lastly, the Court finds Faulk's request for attorney's fees premature. Faulk's Motion was precipitated by an order from this Court transitioning from motion to dismiss to motion for summary judgment. ECF No. 29. In the Court's Order, the issues to be addressed were enumerated, and attorney's fees was not listed. *See id.* Therefore, to adequately address whether (1) Faulk is the substantially prevailing party and (2) the Government was not substantially justified in its position, Faulk must submit a separate motion for attorney's fees.

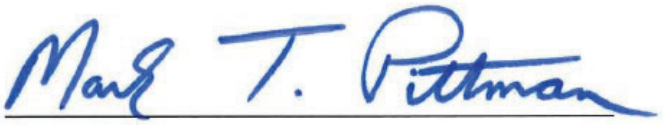
CONCLUSION

Based on the reasons above, the Court **DENIES** the Government's Motion. ECF No. 15. The Court **GRANTS** Faulk's Motion in part and **ENTERS** summary judgment in Faulk's favor on Counts I and III. ECF No. 30. Finally, the Court **DENIES** Faulk's Motion in part as to attorney's fees. *Id.*

Accordingly, the Court **ORDERS** the IRS to refund Faulk **$205,621.71** for the ESRP assessed for tax year 2019. The Court further **ORDERS** that 45 C.F.R. § 155.310(i) be **SET ASIDE** as void and unenforceable.

Given the Court's ruling on Count III, the Court finds that there are no outstanding issues left in this case other than the Plaintiff's request for attorney's fees. If either Party objects to this Court entering final judgment following the resolution of attorney's fees, the Court **ORDERS** such objection be filed **on or before April 17, 2025**.

SO ORDERED on this **10th day of April 2025.**



MARK T. PITTMAN
UNITED STATES DISTRICT JUDGE

Tab 5

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

FAULK COMPANY, INC.,

Plaintiff,

v. **No. 4:24-cv-00609-P**

XAVIER BECERRA, ET AL.,

Defendants.

ORDER & AMENDED FINAL JUDGMENT

Before the Court is Plaintiff Faulk Company Inc.'s ("Faulk") Unopposed Motion to Alter or Amend the Court's Final Judgment. ECF No. 40. Having considered the Motion, the pleadings, and other docket filings, the Court finds that the Motion should be and hereby is **GRANTED**.

Therefore, the Court **ORDERS** that the Court's Final Judgment (ECF No. 39) be amended to reflect its ruling in its Opinion & Order (ECF No. 38), specifically:

1. The IRS is **ORDERED** to refund Faulk the amount of **$205,621.71** for the ESRP assessed for tax year 2019;
2. 45 C.F.R. § 155.310(i) is **SET ASIDE** as void and unenforceable;
3. Count II of Faulk's Complaint is **DISMISSED with prejudice**;
4. Count IV of Faulk's Complaint is **DISMISSED without prejudice**; and
5. Faulk may file any application for attorney's fees **on or before May 7, 2025**; the Government may respond **on or before May 21, 2025**; and Faulk may reply **on or before May 28, 2025**.

SO ORDERED on this **25th day of April 2025.**

Mark T. Pittman

MARK T. PITTMAN
UNITED STATES DISTRICT JUDGE

Tab 6

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

FAULK COMPANY, INC., Plaintiff, v. UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ROBERT F. KENNEDY, Jr., in his official capacity as Secretary of HHS, and MEHMET OZ, M.D., in his official capacity as Administrator of CMS, Defendants.	Case No. 4:24-cv-00609

NOTICE OF APPEAL

Notice is hereby given that Defendants the United States of America, the United States Department of Health and Human Services, Robert F. Kennedy, in his official capacity as Secretary of HHS, and Mehmet Oz, M.D., in his official capacity as Administrator of the Centers for Medicare and Medicaid Services, appeals to the United States Court of Appeals for the Fifth Circuit from the Order and Amended Final Judgment entered in this action on April 25, 2025 (ECF No. 41).

Dated: June 20, 2025

Respectfully submitted,

/s/ Mary Elizabeth Smith
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CERTIFICATE OF SERVICE

I certify that on June 20, 2025, I filed the foregoing document with the Clerk of Court using the CM/ECF electronic filing system, which will send notification to all counsel of record.

/s/ Mary Elizabeth Smith
MARY ELIZABETH SMITH

CERTIFICATE OF SERVICE

It is hereby certified that, on December 8, 2025:

- Four copies of these record excerpts were sent by First Class Mail to the Clerk
- this record excerpts was filed with the Clerk of the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system;
- all required privacy redactions have been made in accordance with Local Rule 25.2.13;
- the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses;
- the electronic and paper submissions are identical as required by Local Rule 25.2.1; and
- The appellee is a CM/ECF participant, and will be served by the appellate CM/ECF system.

/s/ GEOFFREY J. KLIMAS

GEOFFREY J. KLIMAS

Attorney