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10 UNITED STATES DISTRICT COURT FOR THE
11 NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

12 COLIN SCHOLL and LISA STRAWN, on
13 behalf of themselves and all others
similarly situated,

14 Plaintiffs,

15 v.

16 STEVEN MNUCHIN, et al.,

17 Defendants.
18

Case No. 4:20-cv-05309-PJH

**RESPONSE TO PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT AND CROSS-MOTION
FOR SUMMARY JUDGMENT**

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I. INTRODUCTION

The CARES Act was enacted on March 27, 2020, and, among other measures, it created a 2020 refundable tax credit for eligible individuals, and also provided for advance refunds of these credits (also known as Economic Impact Payments, or EIPs) payable in 2020 to those eligible individuals, under certain circumstances. On May 6, 2020, the IRS posted a Frequently Asked Question (<https://perma.cc/VDN6-6QY8>) on its website stating that incarcerated individuals do not qualify for these advance refunds, or EIPs (the FAQ).¹

On August 1, 2020, Plaintiffs filed their class action complaint in this case, and on August 4, 2020, they moved for class certification and a preliminary injunction, arguing that the FAQ was final agency action that violates the Administrative Procedure Act (APA).² Defendants responded to that motion on September 1, arguing that Plaintiffs' claims were unripe, that they lacked standing, and that the government's sovereign immunity under the APA had not been waived because there was no final agency action for which there is no other adequate remedy. (Dkt. 44). On September 24, the Court entered an order granting Plaintiffs' motion. (Dkt. 50 ("PI Order")). On September 29, Plaintiffs moved for summary judgment, Dkt. 54 ("Motion"), essentially requesting that, as a legal matter, the Court should "convert its preliminary injunction into a permanent injunction" (15:22-23). Plaintiffs repeat their arguments from their motion for preliminary injunction, and resubmit several prior exhibits (2:27-28).³ Plaintiffs confirm that they "do not seek to supplement the record or conduct discovery for purposes of this motion" (7:4), and aver that "no further factual development is needed to enter final adjudication on the merits" (1:8-9). Plaintiffs moved to expedite briefing on their Motion on October 1 (Dkt. 58), which Defendants opposed, and the Court granted this motion on October 2 (Dkt. 62). Defendants' response to the Motion is due on October 7, and Plaintiffs' reply on October 9.

On October 1, 2020, Defendants moved for a stay of the PI Order pending appeal (Dkt. 58).

¹ This FAQ has since been updated in response to the Court's orders in this case. (See Dkt. 65, 3:25-28).

² Plaintiffs' complaint alleged a claim under the Little Tucker Act for damages, but neither their motion for preliminary injunction nor their motion for summary judgment pursue this claim.

³ Although Plaintiffs only refer to Exhibits 1 to 6, they actually resubmit Exhibits 1 to 7 to the Salahi Declaration.

1 With respect to the question of whether they are likely to prevail on the legal merits in an appeal,
2 Defendants argued that the Court incorrectly interpreted 26 U.S.C. § 6428 when it held that it
3 “unambiguously mandates disbursement of the advance refund and requires the Secretary to do so
4 expeditiously.” (Order, 24:6-8). The question of whether section 6428 creates a right for prisoners to
5 receive an advance refund is also at the heart of Plaintiffs’ motion for summary judgment, as they frame
6 their Motion as presenting two questions: (1) “whether the CARES Act requires Defendants to issue
7 advance refunds;” and (2) “if so, whether the CARES Act authorizes Defendants to exclude incarcerated
8 people from that program.”

9 For the reasons discussed below, and those discussed in Defendants’ opposition to Plaintiffs’
10 motion for preliminary injunction and class certification, (Dkt. 44), in their opposition to Plaintiffs’
11 motion for notice (Dkt. 56), their motion for a stay pending appeal (Dkt. 58), their response to the
12 Court’s order regarding notice (Dkt. 65), and the declarations of Michael J. Desmond and Kenneth C.
13 Corbin⁴ that accompany these filings (Dkts. 44-1 and 56-1), Defendants oppose Plaintiffs’ motion for
14 summary judgment. Section 6428 created a refundable tax credit, but did not create a right to an
15 advance refund of that credit. In fact, millions of other eligible individuals have not received an advance
16 refund because section 6428, in general, does not provide for an advance refund for those individuals,
17 such as those who do not file tax returns as a general matter. Plaintiffs and provisional class members’
18 claims are therefore premature. Until Plaintiffs can allege that they have been unlawfully denied the
19 CARES Act credit, not just the advance refund, their claims are unripe, they lack standing, and there is
20 no final agency action for which they lack an adequate remedy. Moreover, Plaintiffs have failed to
21 factually establish that they are eligible for the CARES Act credit or the advance refund of that credit,
22 and their motion for summary judgment and request for class certification should be denied on that basis
23 as well.

24
25

4 Mr. Corbin is the Commissioner of the Wage and Investment Division (W&I) of the United States
26 Internal Revenue Service. W&I is responsible for tax return processing, and “annually processes more
27 than 154 million individual tax returns and 49 million business returns, including more than 130 million
28 electronically filed returns, and answers over 54 million phone calls.” Internal Revenue Manual,
1.1.13.1 (02-26-2020), “Introduction to the Wage and Investment (W&I) Division,”
<https://perma.cc/HKH2-3PDX>.

1 **II. BACKGROUND**

2 As discussed in prior briefing and in the Court’s PI Order, the CARES Act creates a refundable
3 tax credit by providing that each eligible individual receives a fully refundable tax credit against their
4 federal income tax liability (as imposed by subtitle A (Income Taxes) of the Code) for the individual’s
5 first taxable year beginning in 2020. 26 U.S.C. § 6428(a). In general, the amount of that credit equals
6 the sum of (1) \$1,200 per eligible individual (\$2,400 in the case of eligible individuals filing a joint
7 return) plus (2) the product of \$500 multiplied by the number of qualifying children (within the meaning
8 of Section 24(c) of the Code) of the eligible individual. *Id.* The total credit amount is then reduced
9 based on the eligible individual’s adjusted gross income. 26 U.S.C. § 6428(c). Section 6428 describes
10 the term “eligible individual” as any individual other than: (1) any nonresident alien individual; (2) any
11 individual who is allowed as a dependent on another taxpayer’s return; or (3) an estate or trust. 26
12 U.S.C. § 6428(d). The statute also provides that the IRS “shall prescribe such regulations or other
13 guidance as may be necessary to carry out the purposes of this section, including any such measures as
14 are deemed appropriate to avoid allowing multiple credits or rebates to a taxpayer.” 26 U.S.C.
15 § 6428(h).

16 **A. Advance payments of the CARES Act tax credit**

17 The CARES Act provides for advance refunds of the credit, instructing that the IRS “shall,
18 subject to the provisions of this title, refund or credit any overpayment attributable to this section as
19 rapidly as possible,” but that no advance refund should be issued any “later than December 31, 2020.”
20 26 U.S.C § 6428(f). Subsection 6428(f)(1) contemplates that the IRS first look to 2019 tax information
21 to determine whether an individual is eligible for an advance refund payment. Subsection (f)(5) then
22 provides that if a 2019 return was not filed that the IRS “may” then look to 2018 information, and then,
23 finally, to certain Social Security and Railroad Retirement benefits information.

24 If the IRS does not have any of this information for an individual otherwise eligible for the
25 advance refund, such individual would not receive an advance refund under the plain language of
26 section 6428. In fact, there are millions of individuals who are otherwise eligible but who have not
27 received an advance refund because they did not file 2018 or 2019 tax returns and did not receive the
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1 specified types of Social Security or Railroad Retirement benefits, including many prisoners who
2 typically do not file tax returns or receive such benefits. Moreover, individuals that did not qualify
3 based on their 2018 or 2019 information because they exceed the income threshold, for example, but
4 who lost their jobs or had a significant decrease in their income due to the pandemic, are not able to
5 obtain an advance refund under the plain language of section 6428.

6 Although it was not required to do so by statute, the IRS voluntarily provided a simplified
7 method for individuals to file information with the IRS either through a simplified paper filing or
8 through the use of an electronic Non-filers tool on IRS.gov (Non-filers tool). *See* Rev. Proc. 2020-28,
9 2020-19 I.R.B. 792. This information would enable the IRS to issue advance refunds to individuals who
10 submitted their information and met all the eligibility requirements. As of early September, it was
11 estimated that there were approximately “nine million Americans who typically don’t file federal
12 income tax returns who may be eligible for, but have not registered to claim,” the advance refunds. IR-
13 2020-203, September 8, 2020 (<https://perma.cc/9U26-J9Y3>).

14 The IRS has been working to disburse advance refunds of the CARES Act credit to eligible
15 individuals, including those for whom section 6428 did not provide a mechanism to enable receipt of
16 advance refunds, including those that are at the lower income level that likely have the greatest need.
17 Currently, it is working on disbursing such refunds to fifteen groups of individuals. Corbin Decl. ¶ 14.
18 For example, the IRS is working to disburse additional advance refunds for qualifying children to certain
19 federal benefits recipients who did not have a return filing requirement for 2019 or 2018, individuals
20 whose portion of an advance refund was diverted to pay their spouse’s past-due child support (and who
21 did not file a Form 8379, Injured Spouse Allocation), and members of the armed forces who filed a joint
22 return with a spouse without a social security number and were incorrectly marked as ineligible. The
23 IRS has dedicated substantial resources and created separate programming for each of these fifteen
24 groups in order to determine eligibility and make disbursements, and that work is still in progress. *Id.* ¶
25 15. There are likely other non-filers who have not been identified by the IRS, who will have to wait to
26 file their 2020 return if they do not submit their information through the Non-filers tool.

27 The original deadline to submit information using the online Non-filers tool was October 15,
28

1 2020, but the IRS extended this deadline to November 21, 2020. Dkt. 65. The IRS has not extended the
2 deadline to submit such information on the simplified paper returns discussed above, however, because
3 if such a return were filed after October 15, 2020, it is unlikely that the IRS could process the return and
4 issue the advance refund before December 31, 2020, the last day that the IRS can issue advance refunds
5 pursuant to subsection 6428(f)(3)(A).⁵ *Id.* This is partly due to the unprecedented challenges that the
6 IRS has faced this year, including the shutting down of its facilities in response to COVID-19 for a
7 significant period of time and sending economic impact payments to millions of eligible individuals in
8 the United States. *Id.* As a result of these challenges, the IRS is facing backlogs in processing paper
9 returns, and it is unlikely that the IRS could issue an advance refund by December 31, 2020, in response
10 to a paper return filed after October 15, 2020. *Id.*; *see also* IRS Operations During COVID-19: Mission-
11 critical functions continue, <https://perma.cc/6SBK-M4JA> (“To protect the public and employees, and in
12 compliance with orders of local health authorities around the country, certain IRS services such as live
13 assistance on telephones, processing paper tax returns and responding to correspondence continue to be
14 extremely limited.”) (Dated August 31, 2020); *see also* Written Testimony of Charles P. Rettig,
15 Commissioner Internal Revenue Service, Before the House Oversight and Reform Committee,
16 Subcommittee on Government Operations, On IRS Operations and COVID-19 Recovery, October 7,
17 2020, attached as Exhibit 1.

18 In sum, the IRS is attempting to issue advance refunds “as rapidly as possible” (subsection
19 (f)(3)(A)), as the statute directs, and using extraordinary efforts to identify those non-filers not captured
20 by the statute. However, the statute did not create a right to an advance refund, but rather provided that
21 an eligible individual who will qualify for a 2020 tax credit under section 6428 will receive it in one of
22 three ways: (1) as an advance refund made on or before December 31, 2020; (2) as a CARES Act credit
23 upon filing a 2020 tax return; or (3) partially as an advance refund and partially as a CARES Act credit.
24 Many individuals who are eligible for the CARES Act credit might not receive an advance refund of that
25

26 ⁵ Plaintiffs’ response to the Court’s order regarding notice refers to an IRS publication that lists
27 October 30, 2020, as the deadline for submitting a simplified paper tax return. (Dkt. 67, 8:23-28). The
28 IRS has informed counsel that this was an internal working document that was mistakenly posted to
IRS.gov, and has since been removed.

1 credit, because this was not mandated by the statute.

2 **B. The payment of advance refunds of CARES Act credits to incarcerated individuals**

3 After initially sending out early payments that were not screened for incarcerated individuals, on
4 May 6, 2020, the IRS issued the FAQ on its website stating that incarcerated individuals do not qualify
5 for these advance refunds. On May 13, 2020, “programming was implemented to discontinue
6 calculating and sending CARES Act credits to prisoners.” Treasury Inspector General for Tax
7 Administration (TIGTA) report (<https://perma.cc/XUU9-L7NG>) entitled “Interim Results of the 2020
8 Filing Season: Effect of COVID-19 Shutdown on Tax Processing and Customer Service Operations and
9 Assessment of Efforts to Implement Legislative Provisions,” dated June 30, 2020. The FAQ addressed
10 the question of whether incarcerated individuals may receive an advance payment of the CARES Act tax
11 credit, and did not address the separate question of whether such individuals are eligible to claim these
12 credits on their 2020 tax returns. Desmond Decl., ¶ 8.

13 As discussed in its response to Plaintiffs’ motion for preliminary injunction, in issuing this FAQ
14 the IRS was concerned about fraud. *Id.* ¶ 5. “The IRS regularly receives information about possible
15 fraudulent tax refunds and/or what is considered “frivolous” tax activity involving prisoners, as well as
16 information about incarcerated individuals using possible “stolen” identities to obtain false refunds. ...
17 Because of the continued prevalence of fraudulent tax activities among the prisoner population, the IRS
18 applies fraud filters to screen all tax returns filed under prisoners’ SSNs that claim refunds and otherwise
19 scrutinizes prisoners’ tax filings and refund claims.” *Id.* ¶ 6. Additionally, various TIGTA reports
20 indicate that “[t]ax refund fraud associated with prisoners remains a significant problem for tax
21 administration.” 2014 TIGTA Report: Prisoner Tax Refund Fraud (<https://perma.cc/24RS-9PQ7>); 2017
22 TIGTA Report: Actions Need to Be Taken to Ensure Compliance With Prisoner Reporting
23 Requirements (<https://perma.cc/FV5U-2G7D>) (identifying “recent examples in which prisoners were the
24 victims of identity theft or committed identity theft while incarcerated for another crime”). *See also*,
25 *e.g.*, DOJ Press Release (<https://perma.cc/RC5Y-E5H4>) from the U.S. Attorney’s Office for the Western
26 District of Pennsylvania dated August 25, 2020 (discussing fraud from prisoners with respect to
27 unemployment benefits during the pandemic); *see also* IRS Blue Bag Program ([28
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1 72DD) (describing a program where “the IRS and cooperating prisons monitor inmates’ tax-related
2 communications to deter inmate tax fraud”). Since Defendants’ September 1 response to the motion for
3 preliminary injunction, fraud concerns related to prisoners and the CARES Act have continued. *See*,
4 *e.g.*, DOJ Press Release from the Eastern District of Pennsylvania dated October 2, 2020,
5 <https://perma.cc/S69F-4VF5> (describing cases being prosecuted and investigated by the Coronavirus
6 Working Group led by the United States Attorney’s Office, including the Internal Revenue Service –
7 Criminal Investigations, the Federal Bureau of Investigation, the United States Postal Inspection
8 Service, and the United States Department of Labor – Office of Inspector General; these cases, like
9 those in the Western District of Pennsylvania, also relate to fraud with respect to CARES Act
10 unemployment benefits).

11 The IRS used information it had available to determine which individuals would not receive
12 advance payments of the CARES Act tax credit. Desmond Decl., ¶ 7. Specifically, individuals who
13 were considered to be incarcerated as of April 30, 2020, were deemed not to qualify for the advance
14 refund. *Id.* This determination and the FAQ at issue, however, were only addressed to the question of
15 whether incarcerated individuals may receive an advance payment of the CARES Act tax credit, not to
16 the question of whether such individuals are ultimately eligible to claim the credit on their 2020 tax
17 returns. *Id.* ¶ 8. On September 1, via the Desmond Declaration, the IRS also supplemented the
18 information in the FAQ by stating that it “currently plans to allow the CARES Act tax credit claimed on
19 2020 returns by otherwise eligible individuals who were only incarcerated for a portion of tax year
20 2020.” *Id.*

21 **III. ARGUMENT**

22 As the Court has noted, at the core of Defendants’ arguments is an interpretation of section 6428
23 in which Congress created a refundable tax credit for eligible individuals for the 2020 tax year, and
24 provided conditions under which an advance refund of that credit might be made, but did not create a
25 right to an advance refund of the credit. (Order, 10:24-26). Plaintiffs have urged, and the Court in its PI
26 Order adopted, a contrary interpretation. But, as discussed below, section 6428 did not create such a
27 right. Thus, Plaintiffs’ motion for summary judgment must be denied.
28

1 Without a statutory right to an advance refund Plaintiffs lack standing under the ripeness
2 doctrine, because there has not been a final determination made with respect to their eligibility for the
3 CARES Act credit. Plaintiffs also lack standing without such a right because they lack any injury-in-
4 fact. Additionally, Plaintiffs' Motion must be denied because there has been no waiver of sovereign
5 immunity for Plaintiffs' APA claims, because there has been no final agency action for which Plaintiffs
6 have no adequate remedy. Finally, summary judgment should be denied because named Plaintiffs
7 Scholl and Strawn have failed to factually support their contentions that they are entitled to the CARES
8 Act credit.

9 **A. Section 6428 does not create a right to an advance refund**

10 Section 6428 does not create a right to an advance refund. The only actual tax benefit created by
11 this section is the tax credit created in subsection (a), which states that “[i]n the case of an eligible
12 individual, there shall be allowed as a credit against the tax imposed by subtitle A for the first taxable
13 year beginning in 2020....” The Motion and Order look, however, to the language of subsection
14 6428(f)(3)(A) to find such a right. This language provides: “The Secretary shall, subject to the
15 provisions of this title, refund or credit any overpayment attributable to this section as rapidly as
16 possible.” 26 U.S.C. § 6428(f)(3)(A). The Motion, citing the Order, argues that the use of the word
17 “shall” indicates a “mandatory command from Congress ... to issue the advance refund and to do so
18 rapidly.” Order, 22:18-23:1 (*citing Serv. Emps. Int’l Union v. United States*, 598 F.3d 1110, 1113 (9th
19 Cir. 2010) (“The word ‘shall’ is ordinarily [t]he language of command.”)).

20 Defendants do not dispute the mandatory nature of the word “shall.” However, subsection
21 6428(f)(3)(A) does not simply state that the IRS “shall issue advance refunds to all eligible individuals
22 before December 31, 2020.” Such a statutory instruction would indeed suggest a mandatory issuance of
23 advance refunds to all eligible individuals and the creation of a statutory right to an advance refund. But
24 instead, this subsection states that the IRS “shall ... refund or credit any overpayment attributable to this
25 section *as rapidly as possible*” (emphasis added). This is a key distinction. The “shall” command in
26 this statute is tied to and modified only by the phrase “as rapidly as possible.” Thus, the mandatory
27 nature of this “shall” command applies only to the speed with which the IRS must issue the advance
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1 refunds, and not to the scope of such issuance. In other words, the plain language of this subsection
2 simply means that the IRS, in issuing advance refunds, must do so as rapidly as possible, not that it must
3 issue advance refunds to all eligible individuals before the end of the year. This interpretation is
4 supported by Plaintiffs' own Motion, which emphasizes how the legislative history "is replete with
5 statements emphasizing that the purpose of the legislation was to provide rapid assistance to
6 Americans." Motion, 8:13-15.

7 More importantly, however, this plain language interpretation is compelled by the remainder of
8 subsection (f), as well as the remainder of section 6428. Subsection (f) itself has various provisions that
9 indicate that Congress was well aware that it was not compelling the IRS to issue advance refunds to all
10 eligible individuals or creating a statutory right to such advance refunds. First, subsection (f)(1)
11 contemplates that the IRS first look to 2019 tax information to determine whether an individual is
12 eligible for an advance refund, and subsection (f)(5) provides that if such 2019 information is not
13 available the IRS may then look to 2018 information, and, if that information is not available either, then
14 to certain Social Security and Railroad Retirement benefits information. Thus, if the IRS does not have
15 any of this information for an individual otherwise eligible for the advance refund, such individual
16 would not receive an advance refund under the plain language of section 6428. In fact, as noted above,
17 millions of individuals are otherwise eligible have not received an advance refund because they did not
18 file 2018 or 2019 tax returns and did not receive the specified types of Social Security or Railroad
19 Retirement benefits. Besides these non-filers, various other groups of individuals who are eligible for
20 the CARES Act credit would not receive an advance refund of that credit under the plain terms of the
21 statute. For example, individuals who did not qualify based on their 2018 or 2019 filings because they
22 exceed the income thresholds, but then in 2020 lost their jobs or had a significant decrease in their
23 income (due to the pandemic, for example), would not receive advance refunds but would ultimately be
24 eligible to claim the credit on their 2020 tax returns. Or, as another example, individuals for whom the
25 IRS is unable to timely verify their Social Security Number⁶ (perhaps because they were the victim of
26 identity fraud, for example) would ultimately be eligible for the credit under the statute but might not

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28 ⁶ Subsection (g) requires a "valid identification number." 26 U.S.C. § 64248(g).

1 receive the advance refund. All these individuals must wait to file their 2020 tax returns because the
2 statute neither confers on them a right to an advance refund, nor provides a mechanism to secure that
3 advance refund before they file their 2020 return. Thus, the interpretation of subsection (f) that finds
4 that Plaintiffs have a right to an advance refund is at odds with the fact that the statute itself did not
5 provide any avenue for various groups of individuals who are eligible for the credit to receive an
6 advance of that credit.

7 In addition, the provision of subsection (f) that provides that “[n]o refund or credit [of an
8 overpayment attributable to this section] shall be made or allowed under this subsection after December
9 31, 2020” suggests that Congress was aware that, under the terms of the statute it was drafting, there
10 would be a subset of refunds or credits that eligible individuals would be entitled to, but that could not
11 be issued as advance refunds after December 31, 2020. 26 U.S.C. § 6428(f)(3)(A). Otherwise, if
12 Plaintiffs’ interpretation were correct, the statute would simply instruct that advance refunds must be
13 issued to all eligible individuals before December 31, 2020.

14 Finally, the other subsections of section 6428 all compel the interpretation that no right to an
15 advance refund is created by subsection (f). First, as discussed, subsection (a) is the only part of section
16 6428 that actually creates a tax benefit, and it creates a “credit against the tax imposed by subtitle A for
17 the first taxable year beginning in 2020.” That the only actual benefit being created was a 2020 (or the
18 first taxable year beginning in that calendar year) income tax credit is further confirmed by subsection
19 (b), which states that it “shall be treated as allowed by subpart C of part IV of subchapter A of chapter
20 1.” Subpart C includes 26 U.S.C. §§ 31-37, which list other refundable credits, such as a wage
21 withholding credit (section 31), or an Earned Income credit (section 32) that, as a general matter, are
22 straightforward tax credits without the possibility of an advance refund, not legally fictional mechanisms
23 designed only to enable an advance refund. Along these lines, the income limitations of subsection (c),
24 which are tied to a “taxpayer’s adjusted gross income” (as reported on a tax return), support an
25 interpretation of section 6428 as providing a tax credit, not simply a \$1,200 stimulus payment. So does
26 subsection (e), which coordinates a payment received as an advance refund under subsection (f) with
27 credits claimed on an individual’s 2020 return. Thus, under subsection (e), credits allowable under
28

1 subsection 6428(a) are reduced (but not below zero)⁷ by aggregate refunds and credits made or allowed
 2 under subsection 6428(f). This reconciliation is necessary because ultimate eligibility for the credit will
 3 be determined after the end of the 2020 calendar year, and an individual's relevant characteristics, such
 4 as AGI and number of qualifying children, may change before the end of the year.⁸

5 Plaintiffs' urged interpretation of section 6428 creates a right for prisoners to an advance refund
 6 that these other individuals do not have under the plain language of section 6428. This is especially
 7 concerning considering the fact that the majority of prisoners likely did not file tax returns for 2018 and
 8 2019 and did not receive, and are ineligible to receive, Social Security or Railroad Retirement or other
 9 federal benefits. (*See* U.S. Response, fn. 11, 16:21-28, explaining that Congress has historically
 10 excluded prisoners from certain benefits such as the Social Security benefits referenced in subsection
 11 6428(f)(5)). Under the plain language of subsection (f), such prisoners cannot possibly be legally
 12 entitled to an advance refund, even if those prisoners who filed 2019 or 2018 tax returns arguably could
 13 (under Plaintiffs' interpretation of the statute).

14 **B. Plaintiffs' claims are not ripe and should be dismissed for lack of jurisdiction**

15 Because the only entitlement to a tax benefit that was created by Section 6428 is a credit to be
 16 ultimately claimed and reconciled on a 2020 return, not an advance refund of that credit, Plaintiffs'
 17 claims are not ripe until they have attempted to claim the credit on their 2020 tax returns, been denied,
 18 and filed a refund claim under 26 U.S.C. § 7422 after meeting the administrative requirements to bring
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20 ⁷ The fact that subsection (e) provides that the credit will not be reduced below zero under this
 21 subsection does not provide support for an interpretation of the statute in which Congress created an
 22 advance refund of the credit, with the actual tax credit being merely a legal fiction designed as a
 23 mechanism to allow for such payment. (Order, 23:14-18). Rather, it simply states that taxpayers will
 24 not have to return any portion of the advance refund they received, even if they received more than they
 were entitled to based on their 2020 return. Subsection 6428(a) still contemplates that the ultimate
 amount of the refund will be determined on the 2020 tax return, and subsection (e) still requires a
 reconciliation with any advance refund amount received, and the credit may thus be adjusted
 accordingly, i.e., either increased, or decreased (but not below zero).

25 ⁸ This reading and the need to look at section 6428 as a whole is reinforced by section 2201(g)
 26 of the CARES Act, which amended 31 U.S.C. § 1324(b) to add a reference to section 6428. This
 27 amendment provides the mechanism for making disbursements from appropriations and applies to the
 28 entire section 6428, not just to subsection(f). In contrast, 31 U.S.C. § 1324 refers to specific subsections
 (section 53(e), for example), indicating that if Congress intended that if the only disbursements pursuant
 to section 6428 would be disbursements of refunds pursuant to subsection (f), it knew how to draft 31
 U.S.C. § 1324 to specify a subsection.

1 such a claim. They have not done so and their claims are therefore not ripe.

2 “Ripeness is a justiciability doctrine designed ‘to prevent the courts, through avoidance of
3 premature adjudication, from entangling themselves in abstract disagreements over administrative
4 policies, and also to protect the agencies from judicial interference until an administrative decision has
5 been formalized and its effects felt in a concrete way by the challenging parties.” *Nat’l Park Hosp.
6 Ass’n v. Dep’t of Interior*, 538 U.S. 803, 807-08 (2003) (quoting *Abbott Laboratories v. Gardner*, 387
7 U.S. 136, 148-149 (1967)). “Absent [a statutory provision providing for immediate judicial review], a
8 regulation⁹ is not ordinarily considered the type of agency action ‘ripe’ for judicial review under the
9 [Administrative Procedure Act (APA)] until the scope of the controversy has been reduced to more
10 manageable proportions, and its factual components fleshed out, by some concrete action applying the
11 regulation to the claimant’s situation in a fashion that harms or threatens to harm him.” *Id.* at 808
12 (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990)).

13 Here, the FAQ regarding the eligibility of prisoners for advanced refunds of the CARES Act
14 credit is not “the type of agency action ‘ripe’ for judicial review under the” APA, for multiple reasons.
15 *Id.* First, and most importantly, the plain language and structure of Section 6428 indicate that it is
16 unripe for this type of challenge, as discussed above. Congress designed the CARES Act credit as a tax
17 credit, not as a simple advance payment. Thus, Congress specifically contemplated that the ultimate
18 eligibility for, or amount of, these credits would not be ultimately determined until those returns are
19 filed. The FAQ addresses only the question of advance refunds for these credits, and is therefore not
20 ripe for judicial review. *See* Desmond Decl., ¶ 8.

21 Moreover, as discussed in more detail below with respect to whether the FAQ is a final agency
22 action, the FAQ is not “an administrative decision [that] has been formalized.” *Nat’l Park Hosp.*, 538
23 U.S. at 807. No regulation has been issued, nor has the FAQ undergone the formal or informal
24 rulemaking process.

25 Finally, as also discussed below, the CARES Act, through the Tax Code, already provides for a
26 litigating remedy if an individual disagrees with a final determination of eligibility for a CARES Act

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28 ⁹ The FAQ is obviously not a regulation, but an even less formal type of agency action.

1 credit, providing more support for the position that plaintiffs’ challenge is unripe.

2 **C. Plaintiffs lack Article III standing because they lack any injury-in-fact**

3 Article III of the Constitution limits the jurisdiction of federal courts to “cases” and
4 “controversies.” U.S. Const., Art. III § 2. To bring a case or controversy before the Court, Plaintiffs
5 must have suffered an “injury in fact” which has a “causal connection” with the injury it complains of
6 and which is likely to be “redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S.
7 555, 560-61 (1992) (internal citations and quotes omitted). An “injury in fact” must rise to the level of
8 an “invasion of a legally protected interest.” *Id.* The injury must also be “concrete and particularized”
9 and “actual or imminent,” as opposed to “conjectural or hypothetical.” *Id.*

10 Because section 6428 did not create a right to an advance refund, there is no violation of
11 Plaintiffs’ “legally protected interest” in this case. *Lujan*, 504 U.S. at 560. Section 6428 did not take
12 anything from Plaintiffs. Nor did this section give Plaintiffs any type of legally protected interest in
13 anything that is being wrongfully withheld. The only right or legally protected interest created by
14 section 6428 is a right to a 2020 tax credit for those eligible individuals. Until Plaintiffs can allege that
15 they are being wrongfully denied that right, or that they are being imminently threatened with a denial of
16 that right, they have no injury-in-fact for Article III standing purposes.

17 The Order stated that because this argument is “predicated on the assumption that their
18 interpretation of the CARES Act is, in fact, correct,” it “goes to the merits of plaintiffs’ claims.” Order,
19 10:26-11:2. This is true to the same extent that the Order’s rejection of this argument is predicated on its
20 rejection of this interpretation. Where a claim of injury arises out of a right that one party contends is
21 nonexistent, then if the claim is meritorious, standing will exist; if not, “standing not only fails but also
22 ceases to be relevant.” *ACLU v. FCC*, 523 F.2d 1344, 1348 (9th Cir. 1975); *Doucet v. Int’l Hair Inst.,*
23 *LLC*, 2017 WL 5563987, at *2 (S.D. Cal. Nov. 20, 2017) (“injuries to supposed interests that are not
24 legally-protected do not amount to an injury-in fact”) (*citing Lujan v. Defenders of Wildlife*, 504 U.S.
25 555, 560–61 (1992)); *Arjay Assoc. v. Bush*, 891 F.2d 894, 898 (Fed. Cir. 1989) (no standing where
26 injury was to a “nonexistent right”); *see also State of Utah v. Babbitt*, 137 F.3d 1193, 1207-10 (10th Cir.
27 1998) *compare Parker v. D.C.*, 478 F.3d 370, 377 (D.C. Cir. 2007) (discussing application of standing
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1 doctrine versus a merits determination in this context), *aff'd sub nom. D.C. v. Heller*, 554 U.S. 570
 2 (2008). Plaintiffs' claim that section 6428 creates a right to an advance refund is not meritorious, and
 3 standing therefore fails.

4 **D. There is no waiver of sovereign immunity under the APA**

5 Plaintiffs seek injunctive and declaratory relief under the APA, but the APA does not apply, and
 6 sovereign immunity is not waived, if the decision under review does not constitute a "final agency
 7 action for which there is no other adequate remedy in a court..." 5 U.S.C. § 704; *Gallo Cattle Co. v.*
 8 *U.S. Dep't of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998). "The requirement of finality is interpreted
 9 pragmatically." *Cal. Dep't of Educ. v. Bennett*, 833 F.2d 827, 833 (9th Cir. 1987). Here, there has been
 10 no final agency action, and Plaintiffs also have an adequate remedy provided for by statute. Thus, there
 11 is no waiver of sovereign immunity for Plaintiffs' APA claims.

12 **1. There has been no final agency action**

13 There are two conditions that must be satisfied for an agency action to be "final" under the APA:
 14 "First, the action must mark the consummation of the agency's decision making process – it must not be
 15 of a merely tentative or interlocutory nature. And second, the action must be one by which rights or
 16 obligations have been determined, or from which legal consequences will flow." *U.S. Army Corps of*
 17 *Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016) (*quoting Bennett v. Spear*, 520 U.S. 154, 177-
 18 178 (1997)); *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) ("[T]he core
 19 question is whether the agency has completed its decisionmaking process, and whether the result of that
 20 process is one that will directly affect the parties." (brackets in original) (citation omitted)). "[C]ertain
 21 factors provide an indicia of finality, such as whether the action amounts to a definitive statement of the
 22 agency's position, whether the action has a direct and immediate effect on the day-to-day operations of
 23 the party seeking review, and whether immediate compliance with the terms is expected." *Indus.*
 24 *Customers of Nw. Utilities v. Bonneville Power Admin.*, 408 F.3d 638, 646 (9th Cir. 2005) (internal
 25 quotations omitted).

26 Plaintiffs contend that the "IRS's policy of excluding incarcerated people from advance refund
 27 payments constitutes final agency action." Motion, 10:22-23. The Motion also lists several facts that it
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1 contends “indicate that the IRS’s decision to withhold advance refunds from incarcerated persons is
2 final, such as the fact that the IRS, after initially disbursing some advance refunds to prisoners, reversed
3 that decision, the fact that the Desmond Declaration states that the FAQ was addressed to the question of
4 whether incarcerated persons may receive an advance payment, and the fact that the IRS updated its
5 Internal Revenue Manual (IRM). Motion, 11:8-28. However, these same facts indicate that the IRS’s
6 policy is not the consummation of a decision-making process, but rather a response to a rapidly
7 developing situation that has continued to evolve in the months following the enactment of the CARES
8 Act. Because the statute did not require the IRS to issue advance refunds, the IRS therefore has not
9 needed to reach a final decision with respect to the issuance of such refunds to prisoners.

10 Most importantly, however, the IRS’s policy is not one by which rights or obligations have been
11 determined, or from which legal consequences will flow. Rather, because section 6428 does not create a
12 right to an advance refund, but only a tax credit to be claimed on a 2020 tax return, the IRS’s decision
13 denying the issuance of advance refunds to prisoners is akin to the “denial of interim relief” that the
14 Ninth Circuit found to not be final agency action in *Gallo Cattle*, because the ultimate entitlement of
15 Plaintiffs to the legal benefit created by section 6428 has not yet been determined. *Gallo Cattle*, 159
16 F.3d at 1199. This policy “imposes no obligation on” Plaintiffs, and “there are no legal consequences
17 arising from the decision denying interim relief, nor does the decision fix the rights of the parties.” *Id.*
18 Plaintiffs contend that this policy does determine their rights because “they were entitled to advance
19 refunds, but did not receive them.” Motion, 12:6-7. As discussed above, however, Plaintiffs have no
20 such right to an advance refund.

21 **2. Plaintiffs have an adequate remedy**

22 “Even if final, agency action is reviewable under the APA only if there are no adequate
23 alternatives to APA review in court.” *U.S. Army Corps of Engineers*, 136 S. Ct. at 1815; 5 U.S.C. § 704.
24 Here, as discussed above, the only right that Plaintiffs can possibly claim under section 6428 is the right
25 to a tax credit, the eligibility for which, and the amount of which, is to be determined on a 2020 tax
26 return. By designing the CARES Act credit in this way through section 6428, Congress also provided
27 the mechanism for judicial review for a taxpayer’s challenge to the IRS’s decisions regarding eligibility
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1 for a CARES Act credit, or denial of a claimed CARES Act credit. Namely, after exhausting their
2 administrative remedies with the IRS, taxpayers “may bring an action against the Government either in
3 United States district court or in the United States Court of Federal Claims,” provided they “comply
4 with the tax refund scheme established in the Code.” *United States v. Clintwood Elkhorn Mining Co.*,
5 553 U.S. 1, 4-5 (2008) (referencing 28 U.S.C. § 1346(a)(1), 26 U.S.C. § 7422, and the jurisdictional
6 prerequisites to bring such a suit).

7 Because Plaintiffs may bring a refund claim (if they otherwise meet the jurisdictional
8 requirements for such claims) if they are ultimately denied this credit, their claims do not fall within the
9 APA’s immunity waiver. *Clintwood*, 553 U.S. at 8-12; *Bowen v. Mass.*, 487 U.S. 879, 903 (1988)
10 (“Congress did not intend the general grant of review in the APA to duplicate existing procedures for
11 review of agency action.”).

12 3. Plaintiffs’ APA claims fail on the merits

13 Similarly, Plaintiffs’ claims that the IRS’s alleged final action is arbitrary and capricious, or
14 contrary to law and in excess of statutory authority, fail. Because section 6428 does not require the IRS
15 to issue advance refund payments to Plaintiffs, the IRS has not acted unlawfully, or arbitrarily and
16 capriciously, in not yet having done so, particularly given the concerns cited regarding prisoner-related
17 fraud.

18 E. As a factual matter, named Plaintiffs have not established their entitlement to the 19 CARES Act credit

20 Putting aside the question of whether section 6428 creates a right to an advance refund of the
21 CARES Act credit, Plaintiffs’ motion for summary judgment should be denied because they have not
22 established, as a factual matter, that they are entitled to the CARES Act credit itself.

23 In order to prevail on summary judgment, Plaintiffs must show “that that there is no genuine
24 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ.
25 P. 56(a). To support the contention that “a fact cannot be genuinely disputed,” Plaintiffs “must support
26 the assertion” by “citing to particular parts of materials in the record, including . . . affidavits or
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1 declarations[.]” Fed. R. Civ. P. 56(c)(1)(A). Plaintiffs’ motion should be denied because they have
2 failed to establish their burden with competent evidence.

3 Named plaintiffs, Colin Scholl and Lisa Strawn, have failed to produce admissible evidence to
4 support their contentions that they satisfy the eligibility requirements to receive an advance refund of the
5 CARES Act credit. Specifically, Plaintiffs’ only support for their contention that they satisfied these
6 statutory requirements is in the form of their unsworn declarations, neither of which contains a valid
7 signature. Dkts. 13 and 14. In lieu of a signature, Plaintiffs’ declarations have their typed names with a
8 footnote that each “authorized use of his [or her] electronic signature.” The footnotes further state that
9 “[d]ue to slowdowns in mail handling and processing related to the COVID-19 pandemic, Counsel will
10 file an updated declaration with a physical signature as soon as it becomes available.” It has been over
11 two months, and counsel have not provided updated declarations. Such declarations do not comply with
12 the requirements of Federal Rule of Civil Procedure 56(e) or 28 U.S.C. § 1746, and therefore, they
13 cannot be considered as evidence to justify summary judgment. Without such evidence, Plaintiffs’
14 Motion must be denied. Moreover, neither declaration indicates that either Plaintiff has even seen the
15 declaration or knows the content of the declaration. Indeed, it appears from the declarations that their
16 counsel could not obtain Plaintiffs’ signatures because they could not get the declarations to them.

17 Finally, if Scholl and Strawn, the provisional class representatives, do not satisfy each of the
18 statutory requirements for the CARES Act credit, they are not entitled to advance refunds of that credit,
19 even under their interpretation of section 6428, and their motion for summary judgment must be denied.
20 The only evidence Plaintiffs have presented to show that they are entitled to the CARES Act credit are
21 the two unsigned declarations referred to above. These declarations fail to establish that Plaintiffs are
22 entitled to CARES Act credits (or advance refunds of these credits). Among other items, section 6428
23 requires that an individual must: (1) have a valid Social Security Number (subsection (g)); (2) fall within
24 the income limitations of subsection (c); and (3) not be claimed as a dependent on someone else’s tax
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1 return (subsection(d)(2)). Plaintiffs’ declarations establish none of these facts, but merely allege in a
2 conclusory fashion that they meet “the eligibility criteria of Congress.” Such conclusory allegations are
3 an insufficient basis to grant summary judgment. *Arc of Washington State Inc. v. Braddock*, 129 F.
4 App’x 348, 351 (9th Cir. 2005) (“Conclusory allegations are an insufficient basis upon which to grant a
5 motion for summary judgment.”) (*citing Walker v. Sumner*, 917 F.2d 382, 387 (9th Cir. 1990)).
6 Moreover, with respect to an advance refund of the credit, subsection 6428(f) requires that an individual
7 must have filed a 2018 or 2019 tax return or received certain federal benefits in order for the IRS to
8 consider them for issuance of an advance refund under this subsection. Plaintiffs’ declarations contain
9 no facts relating to these requirements, and are therefore insufficient to support a claim that they should
10 receive an advance refund.
11

12 **F. Plaintiffs’ request to confirm class certification should be denied**

13 Because named Plaintiffs lack standing, have failed to establish a waiver of sovereign immunity,
14 and have failed to factually establish that they meet the eligibility criteria of section 6428 for a CARES
15 Act credit or advance refund of that credit, their request to confirm the Court’s provisional class
16 certification should be denied.
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18 **IV. CONCLUSION**

19 For the above reasons, the Court should deny Plaintiffs’ motion for summary judgment, and
20 instead enter summary judgment in favor of Defendants.
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1 Dated this 7th day of October, 2020.

2
3 RICHARD E. ZUCKERMAN
Principal Deputy Assistant Attorney General

4 /s/ Landon M. Yost
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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing has been made this 7th day of October, 2020, via the Court’s ECF system to all users.

/s/ Landon M. Yost
LANDON M. YOST
Trial Attorney, Tax Division
U.S. Department of Justice

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