No. 20-17077

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellees

v.

STEVEN T. MNUCHIN, *et al.*,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY PENDING APPEAL OF THE DISTRICT COURT'S PERMANENT INJUNCTION ORDER OF OCTOBER 14, 2020 AND FOR ADMINISTRATIVE STAY, REQUESTING RELIEF BY 1:00PM ON OCTOBER 23, 2020

RICHARD E. ZUCKERMAN
Principal Deputy Assistant Attorney General

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SUMMARY

If not stayed, the District Court's order of permanent injunction will obligate the IRS *today* to initiate the distribution of enormous sums in advance tax refunds to millions of class members. The Government cannot reasonably hope to recover these millions of dollars in cash payments, which the District Court lacked the jurisdiction to order in the first instance. For these reasons, the Government respectfully requests that this Court enter an immediate administrative stay of the injunction pending disposition of this motion, and grant a stay of the injunction pending appeal.

ARGUMENT

The Government has demonstrated that an immediate stay of the District Court's order is appropriate here

Plaintiffs claim to be challenging an "agency policy," in the abstract, that is "unconnected to the collection or assessment of taxes." (*E.g.*, Opp. 12-13.) Yet the first page of their complaint asked the District Court to order the IRS "to automatically issue EIP [Economic Impact Payment] benefits to those who are entitled to an automatic payment based on the IRS's records but for their incarcerated status . . . and [ ] to issue EIP benefits to all incarcerated persons otherwise

eligible for those benefits." (Doc. 1, ¶1.) "EIP benefits" is a colloquial term for the advance refund of the § 6428(a) tax credit, which, as explained in our stay motion, is payable only because the Code deems it to be an overpayment of tax. *See* I.R.C. § 6428(f). Thus, contrary to plaintiffs' protestations, this case *is* about obtaining a tax refund, regardless of plaintiffs' other purposes for bringing suit.

In order to bring this suit for a tax refund, plaintiffs and class members had to establish that they filed a claim for an advance refund with the IRS, as required by I.R.C. § 7422(a). That patently did not occur for the entire class, as evidenced by the fact that the District Court (at plaintiffs' request) separately ordered the IRS to mail paper claim forms to all prisoners (Doc. 90), *after* it adjudicated the merits of this suit. By the Government's estimate, a significant portion of the class members have never submitted the claim required by § 7422(a) to maintain this suit – even assuming *arguendo* that those who filed 2019 or 2018 returns prior to the CARES Act meet the refund claim requirements – let alone had that claim adjudicated by the IRS. Thus, the District Court's injunction places the cart before the horse. This is

the opposite of what Congress provided for in § 7422(a), and is not sustainable on appeal.

It is immaterial, as plaintiffs suggest (Opp. 8), that the Government's emergency motion for stay does not make a complete case for reversal on the merits. The motion identifies a fatal jurisdictional defect, which, at the very least, makes class certification premature. And plaintiffs are simply wrong in stating that the IRS has confirmed that incarcerated persons will not be eligible to claim the § 6428(a) tax credit on a 2020 tax return. (Opp. 5.) The cited declaration of IRS Chief Counsel Michael Desmond says no such thing, but rather explains that due to concerns about fraud and identity theft on prisoner returns, the IRS determined that it should not issue *advance refunds* to such individuals. (Doc. 44-1, ¶¶ 7-8 (attached).) Indeed, the declaration states that the IRS's guidance "was addressed to the question of whether incarcerated individuals may receive an advance payment of the CARES Act tax credit (referred to by the IRS as Economic Impact Payments). *It did not address whether such individuals are ultimately eligible to claim the credit on their 2020 tax returns*." (*Id.* ¶8 (emphasis added).)

A. Plaintiffs have not refuted the Government's showing that it is likely to succeed on the merits of its § 7422(a) claim

Plaintiffs incorrectly claim that their suit took no position as to class members' statutory entitlement to advance refunds. Instead, they maintain that they merely brought an APA challenge to the administrative policy of not promptly paying out advance refunds of the § 6428(a) credit to incarcerated persons. Yet their complaint sought both an order compelling the IRS to issue advance refunds and money damages per claimant in precisely the amount of the § 6428(a) credit. (Doc. 1 at 17, ¶¶ E,F.) Thus, contrary to plaintiffs' claim (Opp. 10), the class request in this suit is unlike the one in *Sorenson*, where, as this Court stated, "Sorenson [ ] no longer seeks a class-wide refund. The only relief she seeks on behalf of the class is declaratory and injunctive." *Sorenson v. Sec'y of Treasury*, 752 F.2d 1433, 1440 (9th Cir. 1985), *aff'd*, 475 U.S. 851 (1986).

As the Internal Revenue Code makes clear, and as plaintiffs effectively concede (Opp. 13-14, Opp. 18), this is not the case here. An advance refund of the § 6428(a) credit is, by definition, a tax refund. *See* I.R.C. §§ 6402, 6428(f). *See, e.g., Sorenson,* 475 U.S. at 859 ("The

refundability of the [ ] credit is thus inseparable from its classification as an overpayment of tax."). Indeed, plaintiffs admit as much: In attempting to discount the irreparable harm to the government, plaintiffs contend that the government could recover advance refunds in individual suits brought under I.R.C. § 7405, which they accurately characterize as "authoriz[ing] civil actions to recover erroneously issued tax refunds" (Opp. 18). Plaintiffs thus admit that an advance refund under § 6428 is indeed a species of tax refund. That the District Court adopted plaintiffs' framing of their claims does not exempt plaintiffs from complying with the requirements of the Internal Revenue Code to claim refunds of the § 6428(a) credit.

On the facts here, such an action is premature with respect to the vast majority of class members, even assuming that a 2019 or 2018 filed prior to the CARES Act meets the refund claim requirements. As the Supreme Court has emphasized, a tax refund suit can be brought only if certain jurisdictional prerequisites have been met. *See United States v. Clintwood Elkhorn Min. Co.,* 553 U.S. at 5-8 (2008); *United States v. Dalm*, 494 U.S. 596 (1990); *see also John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008) (explaining that statutes

designed "to achieve a broader-system related goal," such as "limiting the scope" of the waiver of "sovereign immunity," are "jurisdictional") (citing *Dalm*). The administrative exhaustion requirement applies to all refund suits. *See Clintwood*, 553 U.S. at 9.

Courts considering challenges to advance refund criteria under the 2008 Economic Stimulus Act, a statute analogous to present § 6428, upheld the statutory requirement of administrative exhaustion before a waiver of sovereign immunity sufficient for subject matter jurisdiction could be in evidence. *See Sarmiento v. United States,* 678 F.3d 147, 151 (2d Cir. 2012); *Brest v. Lewis*, 2009 WL 4679649, at *3 (N.D. Ill. Dec. 7, 2009) (court lacked jurisdiction to consider challenge to withholding of advance refund of economic stimulus payment because plaintiff failed to exhaust administrative remedies); *Fatani v. I.R.S.*, 2009 WL 763059, at *1 (D. Utah Mar. 23, 2009) (same). Plaintiffs' attempt to distinguish *Sarmiento* (Opp at 12-13), on the grounds that their challenge is to a "policy," rather than their failure to receive an advance refund, does not withstand scrutiny for the reasons described above. In any event, the proper means for challenging a policy in order to obtain a tax refund is to comply with § 7422(a).

The District Court also was incorrect to state that the refund procedures prescribed by the Internal Revenue Code are an inadequate remedy for plaintiffs seeking tax refunds simply because they can be burdensome and take time. The Supreme Court has long held that a refund suit is an adequate remedy at law for a taxpayer seeking a refund of tax, notwithstanding the delays associated with adhering to the procedures of § 7422(a).[1] *See, e.g., Flora v. United States,* 362 U.S. 145, 175 (1960); *Clintwood Elkhorn*, 553 U.S. at 11. To the contrary, if that claimant is entitled to a refund of the § 6428(a) credit, a proceeding under § 7422(a) is the mode by which the Internal Revenue Code ensures that the claimant may obtain such relief. Similarly, plaintiffs' contention that proceedings under § 7422 do not provide "prospective relief" (Opp. 2) does not square with their position on the injunction here. The deemed overpayment of 2019 has already been established by I.R.C. § 6428, and plaintiffs' right to a payment pursuant to I.R.C.

[1] At all events, plaintiffs' theory that cost and effort render a legal remedy inadequate is inconsistent with their own argument (Opp. 13) that the potential need for federal lawsuits against millions of incarcerated taxpayers to recover erroneous refunds is irrelevant to a showing of irreparable harm.

§ 7422 is no less "prospective" than any right to payment under the instant injunction order.

Based on the foregoing, the Government has a strong likelihood of succeeding on the merits of its claim that I.R.C. § 7422(a) bars this suit. As mentioned, the District Court undertook no inquiry into whether any of the named plaintiffs or class members meet the requirements of § 7422(a). Any individuals who have not met those requirements would have to be dismissed from this suit, and class certification was therefore premature.

B. Plaintiffs have not refuted the Government's showing of irreparable harm absent an immediate stay

As noted above, plaintiffs' contention that an erroneous refund suit under I.R.C. § 7405 would be available to the Government here is a telling admission that a § 6428 advance payment is indeed a tax refund. Plaintiffs cannot have it both ways, *i.e.,* they cannot argue that they are *not* seeking tax refunds, but also maintain that the Government is not harmed because it can seek to collect any incorrect payments as erroneous tax refunds.

But as explained in our stay motion, bringing such individual lawsuits against each person who incorrectly or fraudulently receives a

$1,200 payment is a patently insufficient way to protect up to $2.5 billion in public funds. It is not the Government, but rather the plaintiffs, who are being "speculative" and "conclusory" (Opp. 18-19) in assuming that the Government would have any viable legal recourse. Plaintiffs do not dispute that the Government otherwise has very limited means to recoup any advance refunds made in error. They assert that prisoners may eventually earn enough income to have a filing obligation, which would allow the IRS to offset any erroneous advance refund, but this only proves our point that there are few, if any, viable means for recouping payments made in error.

C. Plaintiffs have not refuted the Government's showing that the public interest favors a stay, which will not injure the class

In their effort to demonstrate injury to class members, plaintiffs focus on sub-sets of the class, or on those who are not even class members. Plaintiffs contend that "even upon release," class members "will face numerous obstacles to obtaining employment or secure housing" and that it will be difficult for them to "meet[ ] their basic needs, particularly for those re-entering society during the pandemic." (Opp. 19-20.) These contentions are beside the point. Class members

"re-entering society" during the 2020 tax year – *i.e.*, those incarcerated for only part of the year – may be eligible for the § 6428(a) credit on their 2020 returns, like any other Americans, irrespective of the outcome of this lawsuit.

Likewise, plaintiffs point to "families with an incarcerated loved one" as being statistically more like to be "unable to meet basic food needs" or "housing insecure." (Opp. 20.) But the families of incarcerated individuals can get advance payments on the same terms as anyone else. What the District Court's order does is require payments to the incarcerated individuals themselves, a population that – by definition – is being provided with food and housing, and is in no need of finding employment, so long as they remain incarcerated.

As to the actual plaintiffs here, any further delay in the receipt of advance refunds of the § 6428(a) credit will cause little injury. Plaintiffs posit that the IRS will deny eligible individuals the § 6428(a) credit based on the public statement regarding advance refunds, but the IRS has clearly stated that that statement applied *only* to advance refunds, based on concerns of fraud and identity theft. It has *not* announced an intention to deny § 6428(a) credits claimed on a 2020 tax

return. (A credit claimed on a tax return is subject to greater scrutiny and fraud checks.)

Finally, plaintiffs' claim (Opp. 21) that the government "has already completed" the process of re-determining the "eligibility of incarcerated people who were previously denied payments" is misleading. Plaintiffs point to some 977,000 incarcerated individuals already deemed eligible under the District Court's order, but do not dispute that the plaintiff class contains more than twice that number; the others are individuals for whom the IRS does not have 2019 or 2018 tax returns, or other sufficient information, and as to whom it must rely on information yet to be submitted by class members – a hurried process that the Government has substantial concerns could lead to fraudulent claims and misdirected payments. Processing that information and attempting to address those concerns about fraud will require considerable time and resources, which will necessarily be diverted toward incarcerated payees at the expense of other categories of persons eligible for advanced refunds.

CONCLUSION

The Government respectfully requests that this Court enter a stay pending appeal of the District Court's permanent injunction order of October 14, 2020, and an immediate administrative stay of the Order pending the resolution of this motion.

Respectfully submitted,

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/s/ Julie Ciamporcero Avetta

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OCTOBER 23, 2020

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Case No. 20-17077

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(s) Julie Ciamporcero Avetta
Attorney for the Government Appellants
Dated: October 23, 2020

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing reply with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 23, 2020. Service on this motion was made this same day via CM/ECF on counsel for plaintiffs, all of whom are registered CM/ECF filers.

/s/ Julie Ciamporcero Avetta

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

COLIN SCHOLL and LISA STRAWN, on behalf of themselves and all others similarly situated, Plaintiffs, v. STEVEN MNUCHIN, et al., Defendants.	Case No. 4:20-cv-05309-PJH **DECLARATION OF MICHAEL J. DESMOND**

I declare the following pursuant to 28 U.S.C. § 1746:

1. I am the Chief Counsel for the Internal Revenue Service (IRS). In this role, I am the chief legal officer for the IRS and in that role perform duties as prescribed by the Secretary, including those enumerated by statute. 26 U.S.C. § 7803(b)(3). I make this declaration from my personal knowledge and from my review of relevant documents.

2. On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Public Law 116-136, 134 Stat. 281 (2020), was signed into law. Section 2201 of the CARES Act

added a new section, Section 6428, to the Internal Revenue Code (Code), providing a tax year 2020 credit that will ultimately be claimed or reconciled on a taxpayer's 2020 income tax return. 26 U.S.C. § 6428.

3. The CARES Act provides for an advance of this 2020 tax credit, and it tasked the IRS and the Department of the Treasury with making such advances "as rapidly as possible." 26 U.S.C. § 6428(f).

4. As part of its efforts to implement the CARES Act, the IRS established a dedicated webpage providing information on the credit, which it updated frequently (https://www.irs.gov/coronavirus/economic-impact-payment-information-center).

5. On May 6, 2020, the IRS posted on that website a response to what is currently FAQ number 14, part of a series of FAQs on "EIP Eligibility and General Information." This FAQ stated that incarcerated individuals do not qualify for the advance payments. In issuing this FAQ, the IRS was concerned about possible fraud and the possibility that Congress intended to exclude prisoners.

6. The IRS regularly receives information about possible fraudulent tax refunds and/or what is considered "frivolous" tax activity involving prisoners, as well as information about incarcerated individuals using possible "stolen" identities to obtain false refunds. For example, the IRS receives information from an intelligence unit of the federal Bureau of Prisons that directly monitors suspicious federal prisoner activity. The information is then shared with appropriate parts of the IRS for further analysis. Fraudulent activity involving tax refunds is prevalent among the prison population. For example, in calendar year 2018, the IRS found 6,799 returns filed under the Social Security numbers (SSNs) of prisoners under Federal, state or District of Columbia custody to be false and fraudulent returns. Those returns, all suspended or rejected, claimed tax refunds totaling $118.60 million. These 6,799 returns included returns filed by prisoners as well as returns filed by unknown individuals using prisoners' SSNs. The IRS findings for 2018 are not an isolated case and, in fact, reflect progress from earlier years in reducing fraudulent tax activities involving prisoners. Because of the continued prevalence of fraudulent tax activities among the prisoner population, the IRS applies fraud filters to

screen all tax returns filed under prisoners' SSNs that claim refunds and otherwise scrutinizes prisoners' tax filings and refund claims.

7. The IRS also receives information regarding incarcerated individuals from the Social Security Administration. Additionally, pursuant to 26 U.S.C. § 6116, the IRS receives a variety of information regarding inmates incarcerated with the state and federal prison systems. Included in that information are identifying information and the dates of release, or the anticipated dates of release, for such inmates. The IRS used this information to determine which individuals would not receive advance payments of the CARES Act tax credit. Specifically, individuals who were deemed to be incarcerated based on these dates as of April 30, 2020, were deemed not to qualify for the advance payments.

8. FAQ 14 was addressed to the question of whether incarcerated individuals may receive an advance payment of the CARES Act tax credit (referred to by the IRS as Economic Impact Payments). It did not address whether such individuals are ultimately eligible to claim the credit on their 2020 tax returns. Subject to the administrative and judicial procedures that apply to all tax returns and subject to possible retroactive amendment of the statute, the IRS currently plans to allow the CARES Act tax credit claimed on 2020 returns by otherwise eligible individuals who were only incarcerated for a portion of tax year 2020.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 1st day of September, 2020.

/s/ Michael J. Desmond (original on file)
MICHAEL J. DESMOND
Chief Counsel
U.S. Internal Revenue Service