Case 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 MNUCHIN, in his official capacity as the Secretary of the U.S. Department of Treasury; CHARLES RETTIG, in his official capacity as U.S. Commissioner of Internal Revenue; U.S. DEPARTMENT OF THE TREASURY; the U.S. INTERNAL REVENUE SERVICE; and, the UNITED STATES OF AMERICA,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California
Hon. Phyllis J. Hamilton
No. 4:20-cv-5309-PJH

OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING APPEAL OF THE DISTRICT COURT'S PERMANENT INJUNCTION ORDER OF OCTOBER 14, 2020 AND FOR ADMINISTRATIVE STAY, REQUESTING RELIEF B Y 1:00PM ON OCTOBER 23, 2020

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

Statutes

TABLE OF AUTHORITIES
(continued)

Page

Other Authorities

I. INTRODUCTION

On March 27, 2020, Congress passed the CARES Act, providing in part for direct cash relief known as Economic Impact Payments ("EIPs") to statutorily-defined "eligible individuals," to support people during the economic crisis caused by the COVID-19 pandemic. *See* 26 U.S.C. § 6428. The statute does not condition eligibility for an EIP on one's incarcerated status, but the IRS adopted a policy announced on May 6, deeming incarcerated people ineligible. Dkt. 11, Ex. 4. It offered no explanation, justification, or legal authority for the policy.

On August 1, Plaintiffs Colin Scholl and Lisa Strawn brought suit on behalf of themselves and those similarly situated against Defendants (collectively, "the Government" or "IRS") to challenge the IRS's policy. Dkt. 1. On September 24, the District Court certified a class of people incarcerated in the United States as of March 27 and who met certain criteria relevant to EIP-eligibility, and concluded that, based on Plaintiffs' showing of irreparable harm and a likelihood of success under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2) claim, a preliminary injunction prohibiting enforcement of the policy and requiring the IRS to re-determine Class Members' eligibility by October 24 was warranted. Dkt. 50 (Ex. A). On October 14, the District Court converted its preliminary injunction

into a permanent injunction and awarded Plaintiffs summary judgment on their Section 706(2) APA claim. Dkt. 87 (Ex. B).[1]

In its emergency motion to stay the District Court's permanent injunction, the IRS does not argue that incarcerated individuals are ineligible for stimulus relief under the CARES Act. It makes no attempt to defend the challenged policy of excluding incarcerated people on the merits. Rather, it argues a likelihood of success on purely procedural grounds: that the so-called "tax refund" statute, 26 U.S.C. § 7422, precludes judicial review of its policy under the APA. As explained below, Section 7422 does not apply because Plaintiffs do not seek and the District Court did not award the recovery of a wrongfully assessed or collected tax or sum; rather, they sought and won only declaratory and injunctive relief enjoining enforcement of an unlawful agency policy and requiring the IRS to re-determine their eligibility for an EIP using the correct legal standard, without considering their incarceration. In any case, Section 7422 is not an adequate alternative to APA review because it would not provide the prospective relief sought by the Plaintiffs, would require a long, arduous process that is futile because its results are pre-ordained by the IRS's policy, and would expose many Class Members to risk of sanction from certain prison authorities who are currently

[1] The District Court denied judgment on Plaintiffs' 5 U.S.C. § 706(1) claim. Plaintiffs' Little Tucker Act claim was not advanced at either the preliminary injunction or summary judgment stage. Neither remains at issue.

treating attempts to obtain CARES Act stimulus relief as a basis for discipline in light of the IRS's policy.

More importantly, even if the IRS prevails on the merits with respect to Section 7422—the only merits argument it makes—it would fall short of demonstrating that a stay pending appeal is necessary to avoid irreparable harm. An IRS win on Section 7422 grounds would not establish that the IRS may withhold (and therefore be entitled to recover) stimulus relief payments from Class Members under Section 6428. It has confirmed that Class Members who will receive a payment meet the statutory criteria. Dkt. 86-1 ¶ 18. It also intends to provide stimulus payments to Class Members released during 2020 if they file a tax return next year. Dkt. 44-1 ¶ 8. Thus, the alleged harm is not caused by the part of the District Court's injunction challenged by the IRS on appeal, and cannot be redressed by a stay.

For reasons explained below, Defendants' motion should be denied.

II. STATEMENT

Section 6428 operates through a legal fiction deeming "eligible individuals" to have made an overpayment in tax years beginning in 2019 (whether or not they made any payment at all), and commanding the Secretary to provide an advance "refund" of $1,200 for an eligible individual, or $2,400 for eligible individuals filing a joint return, plus $500 per qualifying child. 26 U.S.C. §§ 6428(a), (f)(1)-(2). The statute defines an "eligible individual" as "any individual other than (1)

any nonresident alien individual, (2) any individual [claimed as a dependent by another taxpayer], and (3) an estate or trust." *Id.* § 6428(d). The statute does not exclude incarcerated individuals. Because the purpose of the EIP is emergency relief, the statute directs that "[t]he Secretary [of the Treasury] shall . . . refund or credit any overpayment attributable to this section as rapidly as possible," no later than December 31, 2020. 26 U.S.C. § 6428(f)(3)(A).

As required by the statute, the IRS issues EIPs to people who filed 2018 or 2019 tax returns automatically, based on the information in those tax returns. Dkt. 50 at 3-4. The statute provides that if an individual receives an advance refund in an amount greater than what they are ultimately entitled in tax year 2020, they are not required to repay the excess. 26 U.S.C. § 6428(e). Americans exempt from tax filing requirements may obtain an EIP by applying through the IRS's "non-filers tool" or on a simplified IRS Form 1040. *See* Dkts. 56-1 ¶ 3 and 62 at 3.

On May 6, the IRS announced incarcerated individuals were ineligible for the EIP. Dkt. 11, Ex. 4. Under its policy, it instructed incarcerated individuals and people who had received a payment attributable to an incarcerated spouse to return it. Dkt. 11, Ex. 7. It told state and federal prison authorities that incarcerated people were ineligible for EIPs, and to intercept and return any checks mailed to them. *Id.*

By June 3, the IRS had issued "159 million Economic Impact Payments, worth more than $267 billion" to eligible individuals. Dkt. 11, Ex. 3. (If the IRS's

estimates are credited, payments to Class Members constitute less than 1% of that amount.)

On June 30, the Treasury Inspector General for Tax Administration ("TIGTA") reported that approximately 85,000 payments issued by the IRS by April 10 were sent to incarcerated individuals. Dkt. 55, Ex. 6 at 4. When asked, "IRS management noted that payments to these populations of individuals were allowed because the CARES Act does not prohibit them from receiving a payment. However, the IRS subsequently changed its position, noting that individuals who are prisoners or deceased are not entitled to an EIP." *Id*. at 5.

In a declaration from the IRS's Chief Counsel filed in opposition to Plaintiffs' preliminary injunction motion, Defendants confirmed their policy of withholding EIPs from incarcerated individuals, and their intention to continue doing so even in 2021 with respect to credits claimed on 2020 tax returns for people incarcerated during 2020. Dkt. 44-1 ¶¶ 7-8.

On September 24, the District Court granted Plaintiffs' motion for a preliminary injunction and class certification. Dkt. 50. It held Plaintiffs were likely to succeed on their Section 706(2) APA claim because "[t]here is no indication that Congress left the definition of 'eligible individual' open-ended or otherwise up to the Secretary's discretion to change.'" *Id*. at 24. The District Court further reasoned there was no indication Congress intended to exclude incarcerated persons from the CARES Act, and that if Congress had wanted to, it

knew how. *Id*. The District Court found persuasive that the IRS had shifted its position several times, and put forward "virtually no public explanation concerning its decision to withhold payments to incarcerated persons." *Id*. at 27. Under the injunction, the IRS was prohibited from withholding EIPs from Class Members solely because they are incarcerated, and was required by October 24 to re-adjudicate the eligibility of Class Members already denied EIPs without considering their incarceration. *Id.* at 44.

The District Court also held Plaintiffs had demonstrated a likelihood of irreparable harm to themselves and the Class, a conclusion the IRS does not challenge here. It found that prisons do not provide all basic necessities to people in their custody; most incarcerated people have few means to purchase basic food, hygiene, and other necessary products, and the pandemic has limited their ability to earn an income in or out of prison or receive assistance from family and friends also affected by the economic downturn. Dkt. 50 at 28-33. Consequently, the District Court held, "the harm suffered by these individuals cannot be adequately remedied with later monetary relief." *Id.* at 33.

On September 29, Plaintiffs moved for summary judgment and requested that the District Court convert its preliminary injunction into a permanent injunction. Dkt. 54. On October 1, the IRS filed an appeal of the District Court's preliminary injunction order in this Court, and filed a motion for stay of the preliminary injunction pending the appeal in the District Court. On October 14,

the District Court denied the IRS's motion for a stay pending appeal, granted summary judgment on Plaintiffs' APA claim under Section 706(2) but denied it under Section 706(1), confirmed certification of the Class for all purposes, and converted its preliminary injunction into a permanent injunction. Dkt. 87.

On October 20, the IRS filed the instant emergency motion to stay the District Court's October 14 permanent injunction. Case No. 20-17077, Dkt. 5-1.

III. LEGAL STANDARD

"A stay [pending appeal] is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citations omitted). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id*. at 433-34. Courts consider:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The first two factors are the most critical, and the mere *possibility* of success or irreparable injury is insufficient to satisfy them. *Id*. Weighing the factors "is committed to the

exercise of judicial discretion." *Doe #1 v. Trump*, 957 F.3d 1050, 1058 (9th Cir. 2020).

IV. ARGUMENT

A. The Government Has Not Shown a Strong Likelihood of Success on the Merits

The Government does not defend its policy of withholding EIPs from incarcerated people on the merits, but rather argues on procedural grounds that 26 U.S.C. § 7422 precludes APA review.[2] That is wrong because the relief requested by Plaintiffs and awarded by the District Court is unavailable under Section 7422, and the latter would not provide an adequate remedy.

1. The APA Waives Sovereign Immunity

The APA waives sovereign immunity for lawsuits concerning agency action "seeking relief other than money damages . . . ." *See* 5 U.S.C. § 702. In *Bowen v. Massachusetts*, the Supreme Court held that a complaint seeking "declaratory and injunctive relief" is "not [an] action[] for money damages" as far as Section 702 is concerned because "[t]he fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" 487 U.S. 879, 893-94 (1988). *Accord Marceau v. Blackfeet Housing Auth.*, 540 F.3d 916, 929 (9th Cir. 2008).

[2] Plaintiffs therefore do not respond to the Government's unfounded innuendo concerning fraud, Mot. at 6-7, rejected by the District Court, Dkt. 50 at 34-35 and 87 at 34. *See also* Dkt. 54 at 14-15.

Here, the District Court entered only the type of declaratory and injunctive relief authorized by *Bowen*. It did not award Plaintiffs or the Class money damages, nor did it adjudicate whether any Plaintiff or Class Member was entitled to an EIP. Rather it entered: (1) a declaration "that Defendants' policy violated the APA and is hereby VACATED," Dkt. 87 at 38; (2) an order enjoining Defendants "from withholding benefits pursuant to 26 U.S.C. § 6428 from plaintiffs or any class member on the sole basis of their incarcerated status," *id.*; and (3) an order that Defendants re-adjudicate the eligibility of Class Members for stimulus relief without considering their incarceration, *id.* at 38-39. The District Court took "no position on whether plaintiffs or class members are in fact owed advance refund payments or the amount of those payments," leaving those determinations to IRS. *Id.* at 36. The APA waives sovereign immunity for this relief.

2. Section 7422(a) Does Not Cover Plaintiffs' Claims

Defendants argue Section 7422(a) precludes review under the APA. By its plain text, Section 7422(a) does not apply here because Plaintiffs do not seek "the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive in any manner wrongfully collected . . . ." 26 U.S.C. § 7422(a). Rather, as the District Court explained, Plaintiffs allege the IRS's policy—final agency action—is unlawful under the APA. Dkt. 50 at 18-20. Indeed, the CARES Act's individual stimulus relief

provisions do not involve the imposition of any tax, nor the collection of money. Rather, Section 6428 creates a mechanism for the IRS to provide stimulus payments to eligible individuals through a fictional overpayment of past taxes, regardless of whether the individual paid any taxes at all. *Id.* at 22-24. The entire purpose of Section 6428 is to give money to taxpayers during a national emergency, not to take it away from them, so it does not implicate the governmental interest in the collection of revenue that Section 7422(a) vindicates.

Defendants rely on *Sorenson v. Secretary of Treasury*, 752 F.2d 1433 (9th Cir. 1985), *aff'd*, 475 U.S. 851 (1986), for the proposition that "this is a tax-refund suit" and "Plaintiffs cannot use the APA to circumvent [Section 7422(a)'s] statutory bar." Mot. at 15. *Sorenson* involved whether the IRS could divert a tax refund to which it agreed a taxpayer was entitled towards the spouse's overdue child support. 752 F.2d at 1435-36.[3] In contrast, here, the District Court ruled on the lawfulness of a generally-applicable IRS policy under the APA; it did not adjudicate any individual's entitlement to a refund or payment. Dkt. 87 at 36. Indeed, *Sorenson* confirmed that to the extent the plaintiff sought class-wide declaratory and injunctive relief, the APA waived sovereign immunity, so Section 7422's requirements were "irrelevant." 752 F.2d at 1440.

[3] The plaintiff there "concede[d] that section 702 does not apply because it provides for a waiver of immunity only in actions seeking relief other than money damages," *Sorenson*, 752 F.2d at 1438. The case pre-dates *Bowen*.

Two other appellate courts have held that similar APA claims challenging an agency policy, as opposed to an individual tax dispute, are not subject to Section 7422(a). In *King v. Burwell*, the Fourth Circuit heard an APA challenge to an IRS rule implementing the premium tax provision of the Patient Protection and Affordable Care Act ("ACA"). *See* 759 F.3d 358, 363 (4th Cir. 2014), *aff'd*, 576 U.S. 473 (2015). The IRS interpreted the ACA to authorize it to grant tax credits to people who purchased health insurance on both state-run insurance exchanges and federally-facilitated exchanges. *Id.* The plaintiffs were residents of a state, Virginia, which had not established a state-run insurance exchange. *Id.* at 365. The IRS rule thus subjected the plaintiffs to the ACA's minimum coverage penalty by forcing them to purchase health insurance or pay the individual mandate penalty. *Id.* There, as here, the IRS argued that Section 7422 precluded the plaintiffs' APA claims. *Id.* at 366. But the Fourth Circuit rejected that argument because the plaintiffs "are not seeking a tax refund" but rather pressing "claims for declaratory and injunctive relief" concerning the lawfulness of agency action. *Id.* at 366-67. Like here, the challenge "is simply not a typical tax refund action in which an individual taxpayer complains of the manner in which a tax was assessed or collected and seeks reimbursement for wrongly paid sums," but rather a "challenge [to] the legality of a final agency action, which is consistent with the APA's underlying purpose of remov[ing] obstacles to judicial review of agency action.'" *Id.* at 367 (quoting *Bowen*, 487 U.S. at 904).

The D.C. Circuit reached a similar conclusion in *Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2011) (en banc). There, the plaintiffs challenged, under the APA, "the administrative procedures by which the IRS allows taxpayers to request refunds for [a] wrongfully collected excise tax" related to phone calls. *Id.* at 731-32. It explained the challenge was not within the scope of Section 7422(a) because the plaintiffs did not seek the recovery of a tax, but rather, to alter the administrative procedures used by the IRS. *Id.* at 732. Similarly, here, Plaintiffs sought to, and the District Court did, alter (invalidate) an IRS policy.

Unlike the cases cited by Defendants, this case challenges an agency policy unconnected to the collection or assessment of taxes. *See Brennan v. Sw. Airlines Co.*, 134 F.3d 1405 (9th Cir. 1998) (passengers challenged airlines' collection of an excise tax); *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1 (2008) (taxpayer alleged taxes on coal exports were collected in violation of the Export Clause of the Constitution); *Kent v. N. Cal. Reg'l Off. Am. Friends Serv. Comm.*, 497 F.2d 1325 (9th Cir. 1974) (plaintiffs argued the collection of federal taxes to fund undeclared war in Vietnam was unconstitutional).

The final case cited by Defendants, *Sarmiento v. United States*, 678 F.3d 147 (2d Cir. 2012), does not support their argument. *Sarmiento* did not discuss whether Section 7422 precludes review under the APA. Rather, it considered only whether, under the terms of an Offer-In-Compromise between the plaintiffs and the IRS, the IRS could withhold and offset tax refunds (including under the 2008

stimulus package) against the plaintiffs' overdue taxes. Unlike this case, the challenge was to an individual adjudication of tax liability after filing of a tax return, not the lawfulness of an agency policy. 678 F.3d at 151.

3. Section 7422 Does Not Provide An Adequate Alternative to the APA

Defendants argue that "jurisdiction under the APA inheres only where no other statute permits consideration of the plaintiff's alleged injury." Mot. at 16. But to foreclose review under the APA, an alternative judicial avenue must not only exist, but also be "adequate." 5 U.S.C. § 704. An alternative remedy is inadequate if it would be "arduous, expensive, and long," *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1815 (2016), "carr[ies] the risk of serious criminal and civil penalties," *id.* (citation omitted), or would provide only "doubtful and limited relief," *Bowen*, 487 U.S. at 901. Similarly, administrative exhaustion is not required where it "would be a futile gesture." *Aleknagik Natives Ltd. v. Andrus*, 648 F.2d 496, 499 (9th Cir. 1980).

The Government's proposed alternative solution here is grossly inadequate. First, the entire purpose of CARES Act stimulus relief is to provide emergency economic assistance during a time of crisis, not to delay it until the emergency is over. That purpose would be defeated if Plaintiffs and the Class were required to wait until 2021, file 2020 tax returns, and wait for the IRS to process those filings to know whether the IRS will provide relief, despite its clear policy to the contrary. *See* Dkt. 50 at 19-20.

Second, the IRS's proposed alternative is arduous and expensive. *See* Dkt. 50 at 19-20 and Dkt. 87 at 20. Unlike for other eligible Americans, it would require approximately 2 million Class Members to, at the very least: (1) individually file a 2020 tax return in spring 2021, under a procedure not yet announced or developed by the IRS; (2) await the IRS's predictable decision to deny stimulus relief pursuant to its unlawful policy, Dkt. 44-1 ¶¶ 7-8; (3) file an administrative claim challenging that improper denial; (4) wait for the IRS's inevitable decision to confirm the denial according to its policy; and then (5) flood the courts with 2 million lawsuits seeking to adjudicate the same question the District Court already resolved in an efficient class proceeding lasting 10 weeks.

Third, the Section 7422 process would be futile. The IRS confirmed its policy of denying economic impact payments to people who are in prison in a declaration from its chief counsel, and has not changed it. Dkt. 44-1 ¶¶ 7-8.

Fourth, the relief sought here—declaratory and prospective injunctive relief invalidating the policy—would not be available under Section 7422. *See King*, 759 F.3d at 366; *Cohen*, 650 F.3d at 732. *See also* Dkt. 50 at 19 and Dkt. 87 at 19-20.

Fifth, it is doubtful many Class Members would even be able to pursue future relief under Section 7422, given that a pre-requisite for doing so is filing a Form 1040 requesting the CARES Act credit, and prisons are not permitting such filings in the absence of a change in IRS policy. Accordingly, if Class Members

are required to file a Form 1040 in contravention of known IRS guidance, prison authorities around the country will undoubtedly do what they did earlier this year, actively intercept and destroy the forms, and consider them contraband worthy of enhanced punishment under the IRS policy challenged here. *See*, *e.g.*, Dkt. 68 ¶ 3 (state prison warned, based on IRS's policy, that asking for a stimulus check "will jeopardize your opportunity for parole and lengthen your incarceration"); Dkt. 84 ¶ 23. That is why the District Court ordered the IRS to send two memos to prisons advising them not to interfere with claim filing. Dkts. 51 at 3-4 and 90 at 1-2. The undersigned certifies that, even in the past few days, Class Counsel continued receiving reports of interference by correctional administrators and personnel, including one Arizona prison threatening solitary confinement for those discussing stimulus payments or found with the EIP claim forms in their possession.

In these circumstances, a doubtful, limited, and arduous process under Section 7422 with relief afforded at an uncertain future time is *not* an adequate alternative to immediate relief under the APA, especially given the purpose of the CARES Act of providing expeditious aid. Three other district courts have reached the same conclusion in similar challenges. *See Amador v. Mnuchin*, --- F.3d ----, 2020 WL 4547950, at *7-10 (D. Md. Aug. 5, 2020); *Doe v. Trump*, 8:20-cv-00858-SVW-JEM, 2020 WL 5076999, at *5-6 (C.D. Cal. July 8, 2020) (same); *R.V. v. Mnuchin*, 20-cv-1148, 2020 WL 3402300, at *7 (D. Md. June 19, 2020).

The Court should deny the Government's emergency motion because it has not shown a strong likelihood of success on the merits.

B. Defendants Have Not Proven Irreparable Harm Is Likely

On appeal, the Government has abandoned its argument to the District Court that it was also likely to succeed in defending its policy under the APA, *see* Dkt. 58 at 2-8, limiting its likelihood of success argument here to whether Section 7422 precludes APA review. *See* Mot. at 10-18. It acknowledges that those who will receive payments as a result of the District Court's order meet the CARES Act's statutory eligibility requirements for stimulus relief. Dkt. 86-1 ¶ 18.

In these circumstances, the Government cannot establish that "a stay is *necessary* to avoid likely irreparable injury," *Al Otro Lado v. Wolf*, 952 F.3d 999, 1007 (9th Cir. 2020) (emphasis added), because its asserted harm (the issuance of stimulus payments to purportedly ineligible persons) is not tethered to or caused by the alleged legal error (whether Section 7422 precludes APA review). Even if the Government establishes that Section 7422 precludes an APA claim, it would not follow that the IRS properly withheld stimulus relief from Class Members under Section 6428. Further, the IRS admits it intends to issue stimulus payments next year to Class Members who did not serve a full calendar year of incarceration during 2020. Dkt. 44-1 ¶ 8. The IRS's argument thus does not go to *whether* Class Members are entitled to stimulus payments, but *when*. This missing link in the chain of causation between the challenged aspects of the District Court's order

and the purported harm is, standing alone, fatal to the Government's request for a stay. *See Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011) (explaining "bedrock requirement that stays must be denied to all petitioners who d[o] not meet the applicable irreparable harm threshold, regardless of their showing on the other stay factors"). Because the Government does not argue that Section 6428 bars incarcerated individuals from receiving stimulus relief, it cannot assert irreparable harm by providing them those payments. *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013) (government "cannot suffer harm from an injunction that merely ends an unlawful practice").

Even if the Government overcomes this critical flaw, it has not established that it lacks an adequate remedy to redress harm resulting from the erroneous issuance of stimulus relief. *Cf. Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) ("Irreparable harm is traditionally defined as harm for which there is no adequate legal remedy, such as an award of damages."). It states only that it has vague "concerns" that certain administrative tax collection tools under 26 U.S.C. § 6201(a) may not be available to recover those payments, or that that their availability "is not clear." Mot. at 19. This speculative worry is unexplained and unsupported by citation to legal authority. The mere "possibility" of injury is insufficient to warrant a stay. *Doe #1*, 957 F.3d at 1058-60 (citing *Nken*, 556 U.S. at 434). Rather, "the government has the burden of showing that irreparable injury is *likely* . . . ." *Id.* at 1059 (emphasis added). In any case, hundreds of thousands

of Class Members leave prison every year and presumably will earn an income. *See* https://aspe.hhs.gov/incarceration-reentry#:~:text=Each%20year%2C%20more%20than%20600%2C000,release%20and%20half%20are%20reincarcerated (U.S. Health and Human Services report recognizing that more than 600,000 individuals are released from state and federal prisons each year). The IRS may administratively recoup debts due to erroneous payments through tax refund offsets. *See* IRS, *Tax Refund Offsets Pay Unpaid Debts*, IRS Tax Tip 2016-44 (Mar. 21, 2016), https://www.irs.gov/newsroom/tax-refund-offsets-pay-unpaid-debts.

Moreover, the Government concedes it *would* have numerous legal avenues to recover erroneously issued payments. Mot. at 15. Indeed, 26 U.S.C. § 7405 authorizes civil actions to recover erroneously issued tax refunds. *See also Erroneous Refunds*, IRM 21.4.5.2(2) (defining erroneous refund as "the receipt of any money from the Service to which the recipient is not entitled"), https://www.irs.gov/irm/part21/irm_21-004-005r. *See also Warner v. C.I.R.*, 526 F.2d 1 (9th Cir. 1975); *United States v. Wurts*, 303 U.S. 414, 415 (1938). *Cf. Woods v. U.S.*, 724 F.2d 1444, 1448 (9th Cir. 1984); *Indus. Customers of Nw. Utils. v. Bonneville Power Admin.*, 767 F.3d 912, 923 (9th Cir. 2014).

Tellingly, the Government fails to adduce evidence to support its irreparable harm assertions, instead claiming that such harms are "patently clear." Mot. at 20-21. But "[t]he government cannot meet this burden by submitting conclusory

factual assertions and speculative arguments that are unsupported in the record." *Doe #1*, 957 F.3d at 1059-60. *See also Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2014) (faulting government for "submitt[ing] no evidence" to support its assertion of irreparable harm). To the extent the Government cites the burden and expense associated with such enforcement actions, that does not constitute irreparable harm. *Al Otro Lado*, 952 F.3d at 1008 ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended . . . are not enough." (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)).

Finally, Section 6428(e) itself suggests recovery of overpayments was not a legislative priority; Congress prioritized erring on the side of over-assistance.

For these reasons, the Government has not met its burden to show irreparable harm will result absent a stay.

C. A Stay Will Substantially Injure the Class, and the Public Interest Does Not Favor a Stay

The Government blithely argues that Plaintiffs and the Class Members—among the poorest and most marginalized members of society who, even upon release, will face numerous obstacles to obtaining employment or secure housing—will not suffer irreparable harm if they must wait until an appeal is resolved, possibly over a year. This ignores the District Court's detailed evidentiary findings (which the Government does not challenge) that delay of economic assistance to Class Members is causing them irreparable harm and preventing them from meeting their basic needs, particularly for those re-entering

society during the pandemic. Dkt. 50 at 28-33. The record includes substantial evidence from Plaintiffs and amici of irreparable harm to Class Members, and their families and communities who support or are supported by them. *See* Dkt. 8 at 5-10; *see also* Dkt. 40-1. *Cf. Doe #1*, 957 F.3d at 1068.

Moreover, Defendants' argument ignores that the point of Section 6428 is to provide assistance during a national emergency, "as rapidly as possible," and by December 31, 2020. 26 U.S.C. § 6428(f)(3)(A). *See, e.g.*,166 Cong. Rec. S2007 (Mar. 24, 2020) (statement of Sen. McConnell) (purpose of Act was to "*rush* financial assistance to Americans through direct checks to households from the middle class on down") (emphasis added); 166 Cong. Rec. S1929 (Mar. 23, 2020) (statement of Sen. Lankford) (same).

Likewise, a stay does not serve the public interest. Congress determined that the public interest required providing immediate economic aid to those defined eligible by statute. Congress did not exclude incarcerated people. Even prior to the pandemic, 49% of families with an incarcerated loved one were unable to meet basic food needs and 48% were housing insecure. Dkt. 11, Ex. 35. They need the assistance Congress allocated to them, too.

Finally, contrary to Defendants' assertion, the District Court's injunction does not favor incarcerated people over other eligible individuals. It merely requires that they be treated like everyone else. The Government complains it must re-determine eligibility of incarcerated people who were previously denied

payments, but fails to disclose that, according to a declaration it filed in the District Court, *it has already completed that process.* *See* Dkt. 86-1 ¶ 18 (confirming that approximately 977,000 incarcerated individuals have already been deemed eligible by the IRS). The equities cannot be implicated by work already performed. In its motion, the IRS relies instead on an earlier October 9 declaration, *see* Dkt. 78-1, but that declaration does not claim that compliance with the District Court's injunction would interfere with the IRS's ability to issue payments to other individuals. Rather, the October 9 declaration argued that "requiring the IRS to provide individualized notice to members of the provisional class would require [it] to reallocate resources from making disbursements to these fifteen groups of individuals." *Id.* ¶ 40. The District Court later modified the notice program, which is no longer at issue. *See* Dkt. 90. The District Court's order does not require the IRS to prioritize claims from incarcerated people over any other person's.

The Government has not established the public interest favors a stay.

V. CONCLUSION

Defendants' motion should be denied.

Dated: October 22, 2020 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief contains 5,185 words, excluding the items exempted by Fed. R. App. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6). I certify that this brief complies with the word limit of Fed. R. App. P. 27(d)(2), in that it contains fewer than 5,200 words.

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I hereby certify that on October 22, 2020, I caused the foregoing document to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit, via the appellate CM/ECF system. Participants in the case will be served by the appellate CM/ECF system.

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