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.*,

Defendants-Appellants

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

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

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CIRCUIT RULE 27-3 CERTIFICATE

The undersigned counsel certifies that the following is the information required by Circuit Rule 27-3:

9th Cir. Case Number: 20-17077

Case Name: *Scholl et al. v. Mnuchin et al.*

The relief I request in the emergency motion that accompanies this certificate is:

A stay pending appeal, and administrative stay pending resolution of this motion, of the District Court's October 14, 2020 summary judgment order, which granted a nationwide permanent injunction and class certification.

Relief is needed no later than: 1:00 p.m. (PST) on October 23, 2020

The following will happen if relief is not granted within the requested time:

The IRS will be required to take irreversible steps, starting on Friday October 23, 2020 (the last business day before the deadline set forth in the District Court's injunction), to initiate the disbursement of millions of dollars in payments to incarcerated individuals, from whom such funds will not be recoverable should the Government prevail on appeal. Without a stay pending appeal, the amount disbursed will increase over the coming weeks to approximately $2.5 billion.

I could not have filed this motion earlier because: A stay of the preliminary injunction, which ordered the same relief, was first sought in the District Court on October 1, 2020. That motion was denied on October 14, 2020. *See* Fed. R. App. P. 8(a)(1). In the same October 14 order, the district court converted its preliminary injunction into a permanent injunction, and the injunctions are identical in all respects. We infer from the district court's refusal to stay the preliminary

injunction that it likewise would refuse to stay the identical permanent injunction, as the facts and arguments supporting a stay of either injunction are identical and have been rejected by the District Court in the context of the preliminary injunction.

I requested this relief in the district court or other lower court:
[x] Yes [ ] No

I notified 9th Circuit court staff via voicemail or email about the filing of this motion: [x] Yes [ ] No

I have notified all counsel and any unrepresented party of the filing of this motion:

On (date): October 20, 2020
By (method): email
Position of other parties: opposed

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

Signature __s/ Julie Ciamporcero Avetta
Date ___October 20, 2020_

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INTRODUCTION

The Department of the Treasury, Internal Revenue Service, and individual Government defendants respectfully ask this Court to stay the District Court's permanent injunction of October 14, 2020, pending the Government's appeal of that order. If not stayed, this injunction will obligate the IRS to begin taking irrevocable steps to disburse up to $2.5 billion in advance tax refunds to more than 2 million incarcerated individuals under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), with no viable legal avenue to recoup the funds should the Government prevail on appeal. Moreover, the injunction inequitably privileges a class of payees – the incarcerated, who are at minimal risk of food or housing insecurity – over the far broader class of individuals suffering the economic effects of the COVID-19 pandemic, whose CARES Act payments will be delayed because the district court's order effectively requires the IRS to prioritize the prison population.

In its order denying the Government's request for a stay of the preliminary injunction (which was converted without change into a permanent injunction), the District Court dismissed these patent harms based on the Government's failure to adduce *proof* of harm. But no

such proof is required because there is no dispute in this case that the court's order will require the IRS to disburse approximately $2.5 billion from the public fisc, and the Government's claim that there is no feasible legal avenue to recoup these funds is a legal claim, not a factual one. Thus, the Government did not need to—and indeed, could not—provide factual evidence of its inability to force repayment of disbursed funds.

For the reasons explained herein, we respectfully request 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.

BACKGROUND

The COVID-19 pandemic has had consequences far beyond the spread of the disease and the efforts to contain it. The pandemic has caused severe economic effects, as businesses have reduced or ceased operations, millions of workers have been furloughed or permanently lost their jobs, and families across the country have struggled to afford food, shelter, and health care. In response, Congress passed, and the President signed, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) on March 27, 2020, to help these businesses, workers, and families, and to stabilize the economy by putting money into the hands of those consumers who participate in it. *See* P.L. 116-136, 134 Stat. 281 (2020).

The CARES Act contains numerous measures to address hardships resulting from the COVID-19 pandemic. One such measure, section 2201 of the Act, added a new section to the Internal Revenue Code (I.R.C.) (26 U.S.C.) entitled "2020 Recovery Rebates for Individuals." *See* I.R.C. § 6428. These "recovery rebates" consist, in the main, of a tax credit for eligible individuals that will ultimately be claimed or reconciled on a taxpayer's 2020 income tax return. I.R.C.

§ 6428(a). The CARES Act also provided, in certain circumstances, for advance refunds of these credits in the form of cash payments made directly to taxpayers.

In order to allow taxpayers, in general, to receive the tax credit before filing their 2020 tax returns during 2021, the CARES Act provides for an advance refund of the § 6428(a) credit. The statute states that the IRS "shall, subject to the provisions of this title, refund or credit any overpayment attributable to this section as rapidly as possible," but that "[n]o refund or credit shall be made or allowed under this subsection after December 31, 2020." I.R.C. § 6428(f)(3)(A). In general, each individual who would be an "eligible individual" for taxable year 2019 is treated as having made a payment against the individual's federal income tax liability for taxable year 2019 in an amount equal to the § 6428(a) credit. *Id.* For the most part, the advance refund of the § 6428(a) credit is made automatically; there is no requirement that recipients file anything to request the payment. *Id.*; *see also* Rev. Proc. 2020-28, 2020-19 I.R.B. 792.

However, advance refunds are not the only means by which the statute contemplates that § 6428(a) credits would be claimed or received

by taxpayers. Subsection (e) provides a coordinating mechanism to reconcile the advance refunds received under subsection (f) with the credit available to an eligible individual under § 6428(a). I.R.C. § 6428(e). Thus, the eligibility of a taxpayer for the subsection (a) credit, and the amount of that credit, are ultimately determined on that taxpayer's 2020 federal income tax return. The CARES Act also granted specific authority to the IRS to prescribe "regulations or other guidance as may be necessary to carry out the purposes" of § 6428, "including any such measures as are deemed appropriate to avoid allowing multiple credits or rebates to a taxpayer." I.R.C. § 6428(h).

As particularly relevant here, I.R.C. § 6428(f)(1) contemplates that the IRS will first look to 2019 tax information to determine whether an individual is eligible for an advance refund of the § 6428(a) credit. Subsection (f)(5) provides that, if the individual has not filed a 2019 return, the IRS may look to 2018 tax information, and then, finally, to information provided in certain 2019 Social Security or Railroad Retirement benefit statements if the individual has not filed a 2018 return either. Thus, under the plain language of § 6428, if the IRS does not have any of this information for an individual otherwise eligible to

receive an advance refund of the § 6428(a) credit, that individual would not receive an advance refund.

Although the statute did not require it, the IRS created a simplified method for individuals to submit information to enable the IRS to issue advance refunds to individuals who met all the eligibility requirements. This was to be done either through a simple paper filing or through the use of an electronic Non-Filers tool on IRS.gov. Information collected by these means would enable the IRS to issue advance refunds to individuals who met all the eligibility requirements. On May 4, 2020, the IRS issued Revenue Procedure 2020-28, which notified the public of these options. *See* Rev. Proc. 2020-28, 2020-19 I.R.B. 792. Eligible individuals were encouraged "to use the 'Non-Filers: Enter Payment Info Here' tool, available at www.irs.gov/coronavirus, to submit information to the Internal Revenue Service (IRS) to receive their allowed economic impact payment much more quickly than if they filed a paper return." *Id.*, § 1.02. The revenue procedure further informed eligible individuals that, "as soon as possible but not later than October 15, 2020, a simplified return filer following the procedure set forth in this section 3 must file a Federal

income tax return. This filing deadline ensures that the IRS will have sufficient time to process all Federal income tax returns filed under section 3 of this revenue procedure and make all resulting economic impact payments before December 31, 2020, the last day economic impact payments may be made under § 6428(f)(3)(A)." *Id.*, § 3.03.

The IRS made several other announcements encouraging eligible individuals to submit requests through the Non-filers tool, or file a 2019 or 2018 federal income tax return by October 15, 2020, to allow the IRS sufficient time to disburse advance refunds of the § 6428(a) credit in advance of the December 31, 2020, statutory deadline. (Doc. 56-1, ¶ 7.) The IRS also sent letters to approximately 9 million individuals who had not filed tax returns for 2018 or 2019 but who may be eligible for the advance credit. (*Id.*, ¶ 8.) These were individuals who would not typically be required to file an income tax return, but whom the IRS can identify based on Forms W-2, Forms 1099, and other third-party statements available to the IRS. (*Id.*)

On April 10, 2020, two weeks after the passage of the CARES Act, the IRS began issuing advance refunds of the § 6428(a) credit. The IRS published, and frequently updated, a webpage; undertook extensive

computer programming and testing necessary to issue advance refunds of the § 6428(a) credit; and gathered data from other agencies so that payments could be sent automatically to eligible individuals who do not regularly interact with the IRS. *See* "Interim Results of the 2020 Filing Season: Effect of COVID-19 Shutdown on Tax Processing and Customer Service Operations and Assessment of Efforts to Implement Legislative Provisions," Treasury Inspector General for Tax Administration (TIGTA) report, June 30, 2020. (Doc. 11, Ex. 6.) "As a result of its efforts, the IRS issued more than 81.4 million payments totaling more than $147.6 billion on April 10, 2020, [and by] May 21, 2020, the IRS [had] issued more than 157 million payments totaling more than $264 billion." *Id.* However, in its efforts to comply rapidly with the law, the IRS at times issued duplicative or erroneous payments, and some eligible individuals still had not received their advance refunds as of June 30, 2020. *Id*. at pp. 6-8.

The IRS also initially issued payments to incarcerated individuals, but reconsidered that position in light of longstanding concerns regarding fraud and identity theft in prisons. *See* 2014 TIGTA Report: Prisoner Tax Refund Fraud; 2017 TIGTA Report: Actions Need to Be

Taken to Ensure Compliance With Prisoner Reporting Requirements ("By 2011, the amount of tax refund fraud associated with prisoners had increased to over $1 billion, and remained that way through at least 2015."). On May 6, 2020, the IRS updated the Frequently Asked Questions (FAQ) section of its website to advise that incarcerated individuals did not qualify for these advance refunds. And on May 13, 2020, "programming was implemented to discontinue calculating and sending [advance refunds of the § 6428(a) credit] to prisoners." 2020 TIGTA report (Doc. 11, Ex. 6.) pp. 5-6.

On August 1, 2020, plaintiffs filed this class action suit, seeking a nationwide injunction that would force the IRS to issue advance refunds of the § 6428(a) credit, within 14 days, to prisoners across the country. Three days later, they moved for class certification and a preliminary injunction. On September 24, 2020, the District Court granted plaintiffs' motion, provisionally certified a class, and ordered the Government to provide prompt notice to class members of their ability to seek advance refunds of the § 6428(a) credit. (Doc. 50.) The Government moved the District Court for an emergency stay of the preliminary injunction on October 1 (Doc. 58, attached), but the court

denied that motion, in conjunction with its entry of a final judgment and permanent injunction, on October 14, 2020.[1] (Doc. 85, attached.)

That final judgment and permanent injunction "enjoined [the Government] from withholding benefits pursuant to [I.R.C.] § 6428 from plaintiffs or any class member on the sole basis of their incarcerated status." (Doc. 85 at 38.) The court further ordered that, "[w]ithin 30 days of the court's September 24, 2020 order"—*i.e.*, by October 24—the Government "shall reconsider advance refund payments to those who are entitled to such payment based on information available in the IRS's records (i.e., 2018 or 2019 tax returns), but from whom benefits have thus far been withheld" because the claimant was incarcerated. *Id.* The court also ordered the Government by October 24 to "reconsider any claim filed through the 'non-filer' online portal or otherwise that was previously denied solely on the basis of the claimant's incarcerated status." *Id.* at 38-39. By November 8, the court ordered, the Government "shall file a declaration confirming these steps have been

[1] On October 9, 2020, the Government also moved for an emergency stay of another District Court order, which prescribed the form and manner of notice to be provided to class members. (Doc. 78; *see also* 9th Cir. No. 20-16963.) The District Court reconsidered and amended the challenged order (Doc. 90), which is not at issue here.

implemented, including data regarding the number and amount of benefits that have been disbursed." *Id.* at 39.

The Government now seeks an emergency stay of this order. The order obligates the Government to begin taking irrevocable steps on October 24 to issue cash payments totaling as much as $2.5 billion (*i.e.,* $1,200 x approximately 2.3 million incarcerated individuals (Doc. 86-1 at ¶ 18)) to individuals who are at negligible risk of the harms that the payments were designed to remedy. The Government also has no viable legal means to recoup these funds if it prevails in this appeal. As noted above, the Government has previously sought an emergency stay from the District Court of the identical provisions of the preliminary injunction order, and its motion was denied. (*See* attached motion and order.)

ARGUMENT

An Emergency Stay Pending Appeal of the District Court's Permanent Injunction is Warranted Here

"A request for a stay pending appeal is committed to the exercise of judicial discretion. A party requesting a stay pending appeal 'bears the burden of showing that the circumstances justify an exercise of that discretion.'" *Doe #1 v. Trump*, 957 F.3d 1050, 1058 (9th Cir. 2020),

quoting Nken v. Holder, 556 U.S. 418, 433–34, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009). In the exercise of this discretion, this Court considers (1) whether the movant has made a strong showing of the likelihood of success on the merits; (2) whether the movant will be irreparably injured absent a stay; (3) whether a stay will substantially injure other parties; and (4) where the public interest lies. *Doe #1*, 957 F.3d at 1058; *Nken*, 556 U.S. at 426. As discussed below, these factors, especially factor (2), weigh in favor of a stay.

A. The Government is likely to prevail on the merits

Section 7422(a) of the Internal Revenue Code states that "[n]o suit or proceeding shall be maintained in any court for 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 or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof." In the proceedings below, the Government argued that this statute bars this suit because (i) this suit is essentially a tax

refund suit, and (ii) plaintiffs have not filed a refund claim with the IRS prior to bringing suit.

The District Court rejected the argument that this is a tax-refund suit. It held that plaintiffs are not seeking a recovery of erroneously collected or assessed tax, but instead are challenging the IRS's decision to exclude prisoners from receiving advance refunds. (Doc. 85 at 18-19.) As explained below, however, the advance refund is a creation of statute, and the relevant statute, § 6428, plainly provides that the advance refund arises from a deemed overpayment of tax. Thus, however plaintiffs characterize their suit, what they are seeking is a recovery of a statutorily-created overpayment of tax. Such overpayments may be recovered only through tax refund claims and refund suits that comply with § 7422(a).

1. This suit, in substance, seeks tax refunds, and the only applicable waiver of sovereign immunity is under the Internal Revenue Code

The United States and its officials cannot be sued without an "unequivocally expressed" statutory waiver of sovereign immunity. *Lane v. Pena*, 518 U.S. 187, 192 (1996); *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). Waivers of sovereign immunity are strictly construed "so

that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires[.]" *F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012).

The CARES Act contains no waiver of sovereign immunity. *See* Pub. L. No. 116-136. But in suits to obtain a tax refund, "it is well established that the [Internal Revenue Code] provides the exclusive remedy" and the required waiver of sovereign immunity. *Brennan v. Sw. Airlines Co.*, 134 F.3d 1405, 1409 (9th Cir. 1998); *see also United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 4 (2008); *Kent v. Northern Cal. Regional Office of Am. Friends Serv. Comm.*, 497 F.2d 1325, 1328 (9th Cir. 1974) ("the procedures for obtaining judicial review of tax liability were designed to be the exclusive methods for litigating federal tax liability").

Contrary to the District Court's ruling, this case is a tax-refund suit. The advance refund emanates from a statutorily-created tax overpayment by virtue of I.R.C. § 6428(f)(1), which states that "each individual who was an eligible individual for such individual's first taxable year beginning in 2019 shall be treated as having made a payment against the tax imposed by chapter 1 for such taxable year in

an amount equal to the advance refund amount for such taxable year." In other words, section 6428(f) creates a deemed tax overpayment from 2019 and allows that amount to be paid out as an advance refund. *See* § 6428(f)(2), (3)(A). This situates a claim for recovery of that deemed overpayment squarely within the language of I.R.C. § 7422(a), *i.e.,* this suit seeks "the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . or of any sum alleged to have been excessive." That is the necessary predicate for a claim to an advance refund: tax paid in 2019 is treated by § 6428(f) as having been *over*paid, *i.e.,* "excessive." The plain language of § 6428(f) bolsters this point by referring repeatedly to this amount as an "advance *refund* amount," *i.e.*, a refund of tax.

The Government's position here is consistent with the decision of the only court of appeals to consider the operation of a prior version of § 6428, *i.e., Sarmiento v. United States,* 678 F.3d 147 (2d Cir. 2012). That case involved the 2008 version of § 6428, enacted in the wake of the Great Recession and, like the current version, designed to prop up a failing economy through nationwide stimulus payments. In *Sarmiento*, the taxpayers had a settlement agreement with the IRS for certain

unpaid taxes, and the agreement allowed the IRS to use other "refunds" to apply against the unpaid balance. The IRS accordingly withheld the taxpayers' stimulus payment to apply against that balance. Notably, to bring suit, the taxpayers filed a refund claim with the IRS, as required by § 7422(a), and when their claim was denied, they filed suit in the district court. *See id.* at 151.

The taxpayers argued that the stimulus payment was not a true "refund" of tax because it did not result from an actual overpayment of tax, but the Second Circuit rejected this argument. It stated that the settlement agreement was "a specialized tax document whose terms and conditions take their meaning from the Internal Revenue Code" and that "the tax credits at issue in this action are rightly considered 'overpayments' under the Code." *Sarmiento*, 678 F.3d at 153. So too here, the payments that plaintiffs seek to recover are defined by the Code as overpayments of tax, making this case (like *Sarmiento*) subject to I.R.C. § 7422(a).

2. There is no waiver of sovereign immunity under the APA because plaintiffs have an adequate remedy at law under the Internal Revenue Code

The District Court held that this suit could proceed under the Administrative Procedure Act, 5 U.S.C. § 702 (the "APA"), because it did not view this suit as a tax-refund suit. As explained above, that latter ruling was incorrect. And because this is a tax-refund suit, I.R.C. § 7422(a) bars plaintiffs from bringing it unless they have first filed refund claims with the IRS. Plaintiffs cannot use the APA to circumvent that statutory bar. *Cf. Sorenson v. Sec'y of Treasury of U.S.*, 752 F.2d 1433, 1438-39 (9th Cir. 1985), *aff'd,* 475 U.S. 851 (1986) (in putative class action suit to obtain refund of intercepted tax overpayments, plaintiff conceded on appeal that individual action was properly a tax refund suit, in which "section 702 does not apply because it provides for a waiver of sovereign immunity only in actions seeking relief other than money damages").

The APA supplies a right to seek judicial review of federal agency action and waives sovereign immunity for lawsuits seeking declaratory and injunctive relief. *See* 5 U.S.C. § 702; *see also Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1172 (9th Cir. 2017). However, review

under the APA is limited to cases challenging a final agency action where the plaintiff otherwise has no adequate remedy at law. *Navajo Nation*, 876 F.3d at 1172. Thus, jurisdiction under the APA inheres only where no other statute permits consideration of the plaintiff's alleged injury. *See U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) ("agency action is reviewable under the APA only if there are no adequate alternatives to APA review in court").

The District Court incorrectly concluded that this was the case here. To the contrary, the existence of judicial review through a § 7422 tax refund action precludes jurisdiction under the APA. Congress specifically waived sovereign immunity and authorized a cause of action for a taxpayer to challenge the denial of a tax credit under § 7422. *See Clintwood Elkhorn Mining Co.*, 553 U.S. at 5-8. Section 7422(a) contains the only specific waiver of sovereign immunity permitting a challenge to the denial of a refundable tax credit, like the CARES Act credit. *Id.*

This, plainly, is the relief which plaintiffs seek here, grounded in the text of I.R.C. § 6428: they seek an advance *refund* of the § 6428(a) *credit*. This is not equitable relief. It is a remedy granted them by a

statutory provision codified under the Internal Revenue Code. Because the Internal Revenue Code precisely prescribes plaintiffs' remedy at law for their claims, those claims do not fall within the APA's immunity waiver. *Id.*; *see also Bowen v. Massachusetts*, 487 U.S. 879, 903, (1988) ("Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action.").

The District Court here stated that, even if plaintiffs are seeking a tax refund, a tax refund suit under § 7422(a) is an inadequate remedy because the process is arduous, long and potentially expensive. (Doc. 85 at 20.) But the Supreme Court has rejected similar arguments about the inadequacy of refund suits for over 100 years. *See G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352 n.18 (1977) (collecting cases); *see, e.g., Phillips v. Commissioner*, 283 U.S. 589, 595 (1931); *Dodge v. Osborn*, 240 U.S. 118, 121-122 (1916). "[M]ere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate." *Phillips*, 283 U.S. at 596-597.

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 complied with § 7422(a) would have to be dismissed from this suit, and class certification was therefore premature.[2]

B. The Government will be irreparably harmed absent a stay

As described above, the permanent injunction requires the IRS to reconsider, within 30 days of September 24, the eligibility of roughly 2 million incarcerated individuals to receive advance refunds of the § 6428(a) credit, notwithstanding the complete lack of inquiry into whether any of these individuals have met the requirements of I.R.C. § 7422(a) to maintain this suit. In the absence of a stay, the IRS must, starting on Friday, October 23, begin the irrevocable process of releasing payments to eligible individuals in this group. As described at

[2] The complaint alleges that plaintiff Colin Scholl filed a claim with the IRS for an advance refund and was told by the IRS (via telephone) that his claim was denied. (Doc. 1, ¶4.) If these allegations are true, then Mr. Scholl may be a proper plaintiff. Plaintiff Lisa Strawn admits she has filed no such claim. (Doc. 1, ¶5.) As such, there is no basis for awarding relief to her, or to other incarcerated individuals who do not satisfy the prerequisites of § 7422(a) (who may well make up the majority of the certified class).

length in the Government's motion for stay of the preliminary injunction (Doc. 58), the Government has no viable legal means to force repayment of these funds (which will total roughly $2.5 billion), should the Government prevail in this appeal.

As we explained to the District Court, there are legitimate Government concerns that traditional tax collection tools will not be effective to recover advance refund payments once they are made. While the IRS has general authority to determine and assess tax liabilities, including interest, additional amounts, additions to the tax, and assessable penalties, *see* I.R.C. § 6201(a), it is not clear that this provision authorizes the IRS to assess an erroneous refund that did not arise out of a redetermination of tax liability. And if it later became clear that an advance refund of a § 6428(a) credit was an unassessable erroneous refund, the Government's ability to recover that refund would be limited to individual lawsuits brought against each individual who received a payment, common-law setoff rights (which right is unlikely to even arise in the context of individuals, such as prisoners, who do not have enough income to have a tax-return filing obligation), and reliance on voluntary repayments.

The District Court rejected these concerns out of hand, stating that "[w]hile defendants argue that they have provided an example of real harm in the form of payments to incarcerated individuals that it will not be able to recover, that example is not supported by any evidentiary filing." (Doc. 85 at 21.) Yet the District Court failed to grasp that the Government's harm stems from the unavailability of viable *legal* means to force repayment. This was a legal argument, not a factual one. And to the extent the District Court expected the Government to quantify the cost of bringing lawsuits against 2 million individuals to recover a $1,200 payment from each one, we respectfully submit that it is patently clear that the cost to the Government (and to the courts) of each such lawsuit would exceed the $1,200 that could be awarded.

The District Court also cited the fact that the IRS has asked prisoners, and other members of the public, to voluntarily return advance refunds that were made in error. (Doc. 85 at 21.) The court appeared to suggest that this is an option for the Government here, in the absence of a stay. We respectfully submit that asking roughly 2 million incarcerated persons voluntarily to return a $1,200 payment is a

patently insufficient mechanism to attempt to recover $2.5 billion of public funds and that the Government should not have been required to submit factual evidence to support this claim.

In sum, in the absence of an emergency stay, the IRS will have to begin taking irrevocable actions on Friday October 23 that will result in the issuance of millions of dollars in advance refunds to plaintiffs. Over the coming weeks, that number will increase to $2.5 billion, with no viable legal avenues to recoup the payments if the Government prevails on appeal.

C. A stay will not substantially injure plaintiffs, and the public interest favors a stay

A stay is warranted because further delay in the receipt of advance refunds of the § 6428(a) credit will cause little injury to plaintiffs. Any advance refunds that do not issue by December 31, 2020 may be claimed by plaintiffs on a 2020 tax return. From there, the § 6428(a) credit will be applied to any outstanding tax liability or child-support obligation of the eligible individual, or will be available in the form of a refund when eligible individuals file their 2020 tax returns. And individuals may begin filing 2020 tax returns in late January 2021, only three months from now.

Finally, a stay is in the larger public interest. Expediting advance refunds of the § 6428(a) credit to class members would inequitably privilege one category of payees – the incarcerated – over other, broader classes of individuals suffering the economic effects of the COVID-19 pandemic, many of whom are still awaiting the advance refunds for which they are eligible. The IRS is currently working to disburse advance refunds of the CARES Act credit to fifteen categories of eligible individuals. (Doc. 78-1, ¶ 37.) For example, the IRS is working to disburse, among other things:

- additional advance refunds for qualifying children to Federal benefit recipients who did not have a filing requirement;
- advance refunds to individuals whose portion of an advance refund was diverted to pay their spouse's past-due child support and who did not file a Form 8379, Injured Spouse Allocation;
- advance refunds to members of the armed forces who filed a joint return with a spouse who had an individual tax

identification number (ITIN) and were incorrectly marked as ineligible; and others. *Id.*

Determining eligibility and making disbursements to each of these fifteen groups requires creating separate programming for each group and the dedication of substantial resources. *Id.,* ¶ 38. Disbursements will need to be made to each of these fifteen groups over the remainder of the 2020 calendar year. *Id.* Pausing these efforts while the IRS expedites the claims of class members will require the reallocation of IRS resources away from providing assistance to these fifteen groups of individuals. *Id.*, ¶ 40.

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.

Respectfully submitted,

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OCTOBER 20, 2020

Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

Case No. 20-17077

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(s) Julie Ciamporcero Avetta
Attorney for the Government Appellants
Dated: October 20, 2020

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing motion 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 20, 2020. Service of 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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Attorney