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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

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

Plaintiffs,

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.

Case No. 4:20-cv-5309-PJH

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

In their third round of briefing on the merits (first in opposition to Plaintiffs' motion for preliminary injunction, then in their motion for a stay of the Court's order, and now here in opposition to summary judgment), Defendants have not marshalled a single new fact or legal argument that should alter the Court's legal analysis.

As Defendants acknowledge, all of their arguments derive from a flawed interpretation of the CARES Act provisions regarding economic stimulus relief for taxpayers, 26 U.S.C. § 6428, that the Court has already rejected. In Defendants' view, no American is entitled to an Economic Impact Payment ("EIP") in 2020; instead, eligible individuals are only entitled to tax credits after they file their 2020 tax returns in 2021. That interpretation assumes an alternate reality. The statute makes clear that Congress's express purpose in passing the legislation was to provide *immediate* economic assistance to eligible people, not simply to give taxpayers an opportunity to obtain a future tax refund in 2021 after filing their 2020 taxes. And while those who do not receive an advance refund now may have an opportunity to obtain a credit at some unknown time in 2021, that does not mean they do not also have a current entitlement to an advance refund under the statute. None of these procedural arguments explain why the IRS categorically excluded incarcerated individuals from eligibility, including those who filed 2018 or 2019 tax returns or otherwise made timely requests to obtain the stimulus relief from Defendants.

Because nothing has changed, the Court should grant Plaintiffs' motion for summary judgment in full.

II. ARGUMENT

A. The Court Correctly Concluded that Section 6428's Text, Structure, and Purpose Confirm That Defendants Are Required to Issue Advance Refunds

As the Court correctly observed, "the language of the statute unambiguously mandates disbursement of the advance refund and requires the Secretary to do so expeditiously." Dkt. 50 at 24. This conclusion is supported by the statute's legislative history, as well as contemporaneous comments by the President and Defendants. *See, e.g.*, Dkt. 8 at 10-12 (collecting authorities); Dkt. 47 at 5-7 (same); Dkt. 11 at Ex. 39 (166 Cong. Rec. S2007, Mar. 24, 2020) (statement of

Sen. McConnell) (stating that purpose of Act was to "rush financial assistance to Americans through *direct checks to households* from the middle class on down") (emphasis supplied); Dkt. 11 at Ex. 40 (166 Cong. Rec. E339, Mar. 31, 2020) (statement of Rep. Jayapal) (stating the CARES Act provides "relief to the vast majority of everyday people to *immediately help put cash in people's pockets* to pay those mounting bills") (emphasis supplied). Defendants continue to ignore this additional evidence which belies their interpretation of Section 6428.

Defendants also ignore the courts that have considered and rejected precisely the interpretation of Section 6428 that Defendants advance again here. *See Amador v. Mnuchin*, No. ELH-20-1102, 2020 WL 4547950, at *11 (D. Md. Aug. 5, 2020) (non-receipt of stimulus payments was "pocketbook injury[,] the textbook example of injury in fact"); *R.V. v. Mnuchin*, No. 20-cv-1148, 2020 WL 3402300, at *2-5 (D. Md. June 19, 2020) (same); *Doe v. Trump*, 8:20-cv-00858-SVW-JEM, 2020 WL 5076999, at *3-4 (C.D. Cal. July 8, 2020) (same).

Defendants do not present any persuasive argument to the contrary. They do not claim their interpretation is entitled to any special deference, so the Court should stand by its original conclusion that no deference applies. *See* Dkt. 50 at 21 (holding *Chevron* deference does not apply). Defendants' only new argument is that the word "shall" in Section 6428(f)(3) is modified by the phrase "as rapidly as possible," and, as a result, Defendants maintain the statute requires only that the IRS act quickly *if* it provides advance refunds, not that it *must* provide advance refunds to eligible persons where possible. Opp. at 8.

This tortured reading makes little sense. Under the IRS's interpretation, the agency could unilaterally choose not to issue advance refunds to *anyone*, but still be in compliance with the statute because the requirement to act "rapidly" would not be at issue if no advance refunds were issued at all. This would eviscerate Congress's plain purpose, which was to provide immediate stimulus relief. The more reasonable interpretation of this clause is the one adopted by this Court and others. *See* Dkt. 50 at 24 ("[T]he language of the statute unambiguously mandates disbursement of the advance refund and requires the Secretary to do so expeditiously."); *R.V.*, 2020 WL 3402300, at *7 ("The Act therefore requires the government to pay the fictional overpayment, and be quick about it.").

Defendants also argue that their interpretation is "compelled" by the fact that Section 6428 contemplates that the IRS will use information found in 2019 or 2018 tax returns, or certain Social Security/Railroad Retirement benefits, to issue advance refunds. Opp. at 9; 26 U.S.C. § 6428(f)(5). But subsection (f)(5) suggests the contrary: that the IRS must look to various readily available sources of information to identify eligible persons in order to facilitate the rapid provision of the required advance refunds. It does not provide discretion to the IRS on whether to issue an advance refund when it has the information necessary to determine a person's eligibility.

The IRS notes that not all eligible people can be identified through the statutorily-identified sources of information. That the IRS nevertheless "voluntarily" created a mechanism for those unknown persons to identify themselves to the IRS—through, *e.g.*, its "Non-Filer" portal and simplified paper tax returns—actually suggests that the agency construed its mandate under Section 6428(f) just like this Court did: to provide advance refunds to eligible persons as rapidly as possible. That is bolstered by the fact that the IRS undertook efforts to proactively solicit applications from people it otherwise lacked sufficient information about so that it could issue advance refunds to them, as it has acknowledged. *See* Dkt. 56 at 3 ("The IRS has also sent letters to approximately 9 million individuals who have not filed tax returns for 2018 or 2019 but who may be eligible for the advance credit."). That the IRS might not be able to obtain information for *every* eligible person does not mean it has no obligation to issue any advance refunds at all; that is why the statute mandates rapid payments where "possible." 26 U.S.C. § 6428(f)(3). Moreover, the question is academic because Plaintiffs are not asking the IRS to issue advance refunds to people about whom it lacks information necessary to confirm eligibility.

In any case, whether the statute required the IRS to create a "Non-Filer" claim mechanism or to otherwise solicit information from unknown eligible persons is irrelevant here. Now that the IRS has done so, it is indisputably "possible" for the IRS to make payments to people who avail themselves of the tool because it has all necessary information about them to determine their eligibility; Defendants do not argue otherwise. The IRS has not cited any authority permitting it to arbitrarily exclude people whose eligibility it is capable of adjudicating solely because they are incarcerated, regardless of whether the information it uses to determine their eligibility comes

from prior tax returns, records of federal benefits programs, or claims made through the "Non-Filer" program.

Defendants also argue that Section 6428(b)'s proviso that the benefit "shall be treated as allowed by subpart C of part IV of subchapter A of chapter 1," somehow supports their interpretation. Opp. at 10. That language provides that the tax credit created by Section 6428 is refundable rather than non-refundable, meaning that any amount in excess of tax liability can be paid out as cash to a taxpayer.[1] It is an essential part of the "legal fiction" underlying the statute, as the credit must be refundable in order to result in the provision of cash to eligible individuals. Further, Defendants acknowledge that the CARES Act refundable credit is different in kind from other refundable credits because others, such as the Earned Income Tax Credit, do not provide for advance refunds at all. Opp. at 10. The unique quality of the CARES Act stimulus relief further supports the Court's analysis.

Finally, Defendants once again point to Section 6428(e)'s mechanism for reconciling the advance payment amount on 2020 tax returns. As the Court has already held, though, this subparagraph "provides that the amount of the tax credit will be reduced by the amount of any advance refund, but not below zero," which means that "if a taxpayer's status changes between the time of the advance refund and the tax credit, the taxpayer will not be penalized." Dkt. 50 at 23. Far from suggesting that the statute does not entitle anyone to an advance refund, this subparagraph, the Court reasoned, supports a conclusion that the statute's "structure indicates that Congress intended for the advance refund to be paid first and then reconciled later on a taxpayer's 2020 returns." Dkt. 50 at 23.

In sum, the statute clearly requires Defendants to issue advance refunds to eligible persons as rapidly as possible. There is no merit to Defendants' suggestion that Plaintiffs are seeking a right for incarcerated individuals that other eligible people do not have; they are merely seeking the same right as others. Defendants advance no argument that the statute excludes incarcerated

[1] *See* IRS, *Credits and Deductions for Individuals*, https://www.irs.gov/credits-deductions-for-individuals (accessed Oct. 8, 2020) ("There are two types of tax credits: A nonrefundable tax credit means you get a refund only up to the amount you owe. A refundable tax credit means you get a refund, even if it's more than what you owe.").

people from eligibility for the tax credit or refund.[2]

B. Plaintiffs' Claims Are Ripe and Satisfy Article III's Standing Requirements

Defendants acknowledge that their arguments regarding ripeness rise and fall with their flawed premise that nobody is injured unless and until they file a 2020 tax return in 2021 and are then denied a CARES Act tax credit. Opp. at 11-12. The Court has already rejected Defendants' arguments, and should do so again. *See* Dkt. 50 at 11-13.

1. Constitutional Ripeness

As the Court already explained, the ripeness inquiry "contains a constitutional and a prudential component." Dkt. 50 at 11 (quoting *Bishop Paiute Tribe v. Inyo Cty.*, 863 F.3d 1144, 1153 (9th Cir. 2017)). "Constitutional ripeness is often treated under the rubric of standing because ripeness coincides squarely with standing's injury in fact prong." *Id.* at 12 (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138-39 (9th Cir. 2000) (en banc)).

Here, Defendants' denial of an advance refund to Plaintiffs for which they are eligible under the statute is a concrete financial injury that has already occurred. *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) ("[A] loss of even a small amount of money is ordinarily an 'injury.'"); *Bishop Paiute*, 863 F.3d at 1153 (constitutional ripeness "often treated under the rubric of standing because 'ripeness coincides squarely with standing's injury in fact prong'"). Plaintiffs do not need to wait until they are *also* denied a tax credit in 2021 based on their 2020 tax returns, because even the "temporary deprivation" of money gives rise to article III standing. *Van v. LLR, Inc.*, 962 F.3d 1160, 1161 (9th Cir. 2020) ("The inability to have and use money to which a party is entitled is a concrete injury" because "[e]very day that a sum of money is wrongfully withheld, its rightful owner loses the time value of the money." (citations and quotations omitted)). Even if a court were to indulge Defendants' argument that "[t]he only right or legally protected interest created by section 6428 is a right to a 2020 tax credit," not an advance refund, Opp. at 13, Article III would still be satisfied because the future denial of the

[2] Defendants also argue, in a footnote, that the fact that 31 U.S.C. § 1324 refers to Section 6428 as a whole rather than just Section 6428(f) supports their interpretation. Opp. at 11 n.8. The fact that the IRS will disburse some refunds upon review of a 2020 tax return in 2021, however, does not undercut the notion that it is also obligated to issue advance refunds in 2020 where possible.

2020 tax credit is also concrete and imminent here. Defendants confirm they will not extend the credit to people like Plaintiff Scholl, who will be incarcerated for the entirety of 2020. Dkt. 44-1 ¶ 8; Scholl Decl. (Dkt. 13) ¶ 3. *See In re Coleman*, 560 F.3d 1000, 1004-05 (9th Cir. 2009) (court could review whether debtor would eventually qualify for "undue hardship" exception to discharge student loans even before conditions to obtain discharge were actually met).

As the Court already concluded, Defendants' argument that Plaintiffs lack standing because the statute does not require the issuance of advance refunds goes to the merits of Plaintiffs' claim. Dkt. 50 at 10-11. Standing is a threshold issue to determine whether a court has jurisdiction under Article III to resolve the merits; thus, in general, the analysis is distinct. *See also Ariz. State Legislature v. Ariz. Independent Redistricting Comm'n*, 576 U.S. 787, 800 (2015) (cautioning that "one must not 'confuse weakness on the merits with the absence of Article III standing'" (citation and alteration omitted)); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) ("Our threshold inquiry into standing in no way depends on the merits of the petitioner's contention that particular conduct is illegal."). Here, Plaintiffs' alleged injury is the non-receipt of money, which the Court has already held confers standing. Further, Defendants' actions impose a barrier to obtaining the CARES Act benefit that others do not face, and "the need to hurdle special obstacles is itself a detriment which confers standing." *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 507 n.6 (9th Cir. 1988); *cf. Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993) (injury in fact can arise from denial of equal treatment resulting from a government-imposed barrier to obtaining a benefit). Whether the delay and imposition of these obstacles are unlawful goes to the merits. Nevertheless, even if the standing and merits analyses converge here, Plaintiffs are right on the merits. Thus, the distinction makes no practical difference at this juncture, and the cases cited by Defendants are of no import.

2. Prudential Ripeness

Defendants do not appear to advance any argument that Plaintiffs' case is not prudentially ripe for review. The Court has already rejected that notion. Dkt. 50 at 13-17. Briefly, Plaintiffs' claims are prudentially ripe for two reasons.

First, the legal issues are "fit" for judicial consideration because they involve "pure legal questions that require little factual development" and because any further factual development "would do little to aid the court's decision." *In re Coleman*, 560 F.3d at 1009 (citation omitted). Indeed, Defendants confirm that Plaintiffs and members of the proposed Class were "deemed not to qualify for the advance payments." Dkt. 44-1 ¶ 7.

Second, withholding adjudication would cause "hardship to the parties." *In re Coleman*, 560 F.3d at 1006. As the Court has already explained, withholding review now "would put plaintiffs in an untenable position" because if they wait until after December 31, 2020 to challenge the IRS's withholding of the benefit here, "then the advance refunds will not be available to them" and their only recourse will be to "pursue a claim pursuant to the Little Tucker Act or claim the tax credit on their 2020 tax returns—either option entails months or years of legal and practical barriers—and defeats the entire theory of plaintiffs' case, that they are *presently* being harmed by the decision not to issue advance refunds to them." Dkt. 50 at 17 (emphasis in original).

The Court was right that Plaintiffs' claims were and are ripe for review.

C. The APA Waives Sovereign Immunity

1. Defendants' Policy Excluding Incarcerated People From Advance Refunds Is Final Agency Action

For the third time, Defendants argue that their denial of advance refunds to Plaintiffs is not final agency action reviewable under the APA. Opp. at 14. To support this specious argument, Defendants claim that the various actions cited by the Plaintiffs—such as the IRS intercepting and retrieving payments initially sent to incarcerated individuals, asking prison administrators to do the same, confirming their policy in the Declaration of Michael Desmond, and operationalizing the policy through updates to the FAQ and IRS Manual—somehow "indicate that the IRS's policy is not the consummation of a decision-making process, but rather a response to a rapidly developing situation that has continued to evolve . . . ." Opp. at 15.

Defendants' argument is illogical. As the Court held, these factors clearly establish that the IRS has made a final decision not to issue advance refunds to incarcerated people. Dkt. 50 at

14-15 (citing various factors to conclude the same). Despite claiming a "rapidly developing situation," Defendants do not suggest that they are still considering whether to issue advance refunds, and have submitted no evidence to credibly establish that.

These facts are similar to those in *San Francisco Herring Ass'n v. Dep't of the Interior*, where the Ninth Circuit recognized agency action as final when the agency "repeatedly declared" its position, "refused to change its position when pressed," and then "enforced" its position by taking various steps to implement it. 946 F.3d 564, 575 (9th Cir. 2019). Defendants here have done the same thing, announcing that incarcerated individuals were ineligible, telling them to return payments if they received them, and instructing state and federal prison authorities to intercept any such payments. To hold that Defendants may take all these actions to operationalize a policy of excluding incarcerated people from advance refunds, and then to allow them to evade judicial review on the basis that there is somehow "nothing conclusive here for the [plaintiffs] to even challenge," frustrates the purpose of the APA, which "prevent[s] precisely this 'heads I win, tails you lose' approach." *Id.*

Defendants ignore *S.F. Herring*, and rely instead on *Gallo Cattle Co. v. U.S. Dep't of Agriculture*, 159 F.3d 1194 (9th Cir. 1998), in which a milk producer asked an agency to permit it to make assessment payments to escrow pending an agency's final resolution of the producer's challenge to the lawfulness of the assessments. The producer's request was expressly one for "interim relief" from the agency "pending [the agency's] decision on the merits of [the producer's] petition." *Id.* at 1196. In contrast, here, Defendants do not suggest that they have merely made an interim decision not to provide Plaintiffs and the Class with advance refunds; that is their final decision on the matter. Though the IRS says that it *might* acknowledge credits claimed by *some* Class Members after a 2020 tax return is filed in 2021, that has nothing to do with whether those Class Members receive advance refunds. Moreover, the IRS declared it will deny even those future credits to people like Plaintiff Scholl who will be incarcerated for all of 2020, so there is no pending decision-making underway with respect even to the IRS's policy towards incarcerated people who will claim the credit on 2020 tax returns. Dkt. 44-1 ¶ 8.

Defendants' argument that the IRS's policy of excluding incarcerated people from

advance refund payments has no legal consequences or does not affect the rights of Plaintiffs or other Class Members is also meritless. Denial of an advance refund has an immediate impact on Plaintiffs and Class Members, as the Court has already observed. *See* Dkt. 50 at 15-16 ("[T]he IRS's decision has clearly determined a right. In this case, the IRS has determined that incarcerated persons are not eligible to receive an advance refund. Plaintiffs . . . were demonstrably affected by this decision, alleging they are otherwise eligible to receive the EIP but did not receive the payment. More broadly, the impact of the IRS's decision is evidenced by the fact that the IRS initially issued EIPs to incarcerated persons and then, because of its decision, intercepted payments or ordered recipients to return payments.").

2. The Possibility of Future Relief under Section 7422 Is Not An Adequate, Alternative Remedy

Defendants press the same argument the Court has already rejected, that Section 7422 provides an adequate alternative remedy foreclosing litigation under the APA. Opp. at 15-16. As Defendants raise no new arguments and cite no new cases, the Court should affirm its earlier holding on this matter for the same reasons, namely, that Section 7422 does not apply here because Plaintiffs are not challenging the wrongful assessment of a tax, and, in any case, would not provide an adequate alternative remedy because it does not permit the relief sought here (injunctive and declaratory relief) and would not provide a timely remedy. *See* Dkt. 50 at 18-20. *See also* Dkt. 47 at 10-11 and Dkt. 66 at 8-10. *See also Amador*, 2020 WL 4547950, at *7-10 (Section 7422 is not an adequate alternative remedy to APA for denial of advance refunds); *R.V.*, 2020 WL 3402300, at *5 (rejecting that Section 7422 is exclusive way to challenge withholding of CARES Act advance refund); *King v. Burwell*, 759 F.3d 358, 367 (4th Cir. 2014), *aff'd*, 576 U.S. 473 (2015) (distinguishing "typical tax refund action in which individual taxpayer complains of the manner in which a tax was assessed or collected and seeks reimbursement for wrongly paid sums" from challenge to "the legality of a final agency action").

D. Defendants' Policy Violates the APA

Defendants devote fewer than 5 lines of their brief to address the merits of Plaintiffs' claims under 5 U.S.C. §§ 706(1) and 706(2). Opp. at 16:13-17. This response is so cursory as to

constitute a tacit surrender on the merits. *See Doubt v. NCR Corp.*, 668 Fed. App'x 238, 239-40 (9th Cir. 2016) (noting "waiver would also have been an appropriate ground for granting summary judgment" where opposition brief was "woefully inadequate, containing only two pages of cursory legal argument on eight causes of action").

In light of Defendants' failure to make any substantive argument on the merits, the Court should award summary judgment to Plaintiffs on Count One under 5 U.S.C. § 706(1) for the reasons stated in Plaintiffs' opening brief, *see* Mot. at 9-10, and on Count Two under 5 U.S.C. § 706(2) for the reasons stated in the Court's preliminary injunction order and Plaintiffs' briefing, *see* Dkt. 50 at 20-28 and Mot. at 12-15.

To the extent that Defendants allude in passing to a concern about fraud with respect to tax returns filed by people in prison or by others mis-using their social security numbers, as Plaintiffs explained, the Court has already pointed out the disconnect between their goal and the means to achieve it which the APA does not tolerate. *See* Mot. at 12-15. Further, it is worth noting that Defendants' anti-fraud rationale is undercut by the fact that they would face the same concerns whether dealing with the issuance of advance refunds in the present, or refunds in the future upon review of a 2020 tax return. Even if the Court credits that this was actually the agency's rationale at the time the challenged policy was adopted, Defendants' solution of categorically excluding incarcerated people from advance refunds and permitting some of them to claim future tax credits is illogical and arbitrary and capricious.

E. Plaintiffs Have Established Their Entitlement to a CARES Act Credit

Defendants now argue for the first time that Plaintiffs have not produced admissible evidence showing they are eligible for a stimulus payment under the CARES Act because they do not affirmatively demonstrate they have valid social security numbers, are below the maximum income limit, and are not claimed as dependents. Defendants also argue that Plaintiffs' declarations are supposedly unsigned and therefore do not comply with Rule 56 or 28 U.S.C. Section 1746. Both arguments are meritless.

Plaintiffs' declarations establish their eligibility for relief, even though the Court is not called upon to hold they are eligible (the IRS will make that determination after entry of final

judgment, when it re-considers their eligibility without taking incarceration into consideration). Both Plaintiffs aver that they meet the statutory criteria, and Defendants do not dispute that they do. Scholl Decl. ¶ 2 (Dkt. 13) ("I have not received an Economic Impact Payment ('EIP') despite meeting the eligibility criteria of Congress."); Strawn Decl. ¶ 2 (Dkt. 14) (same). This assertion means that they meet *all* the statutory criteria, including those flagged by Defendants. Because each of these statutory requirements is an objective fact rather than an abstract legal conclusion, they require no further detail; Plaintiffs' statements are not conclusory in the sense discussed in the cases cited by Defendants. *See Walker v. Sumner*, 917 F.2d 382, 386-87 (9th Cir. 1990) (defendants' assertion that mandatory AIDS test "has a logical connection to legitimate governmental interests" and "bears a logical connection to the health, safety and welfare of all of the inmates [in their custody]," without explanation, was conclusory).[3]

Defendants do not marshal *any* evidence to dispute Plaintiffs' declarations, despite having comprehensive databases with information about incarcerated people (including whether their social security numbers are valid, *see* 26 U.S.C. § 6116(b)(8)) and prior tax return information in their possession. In these circumstances, Defendants' unfounded suspicions are insufficient to create a genuine dispute of material fact. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts" in order for a dispute to be "genuine"); *Poole v. City of Sacramento*, 857 F.2d 1478, *1 (9th Cir. 1988) ("Mere suspicion that the opposing party's affiant may be lying, without more, does not raise a genuine issue of material fact." (citing *Alsbury v. U.S. Postal Serv.*, 530 F.2d 852, 855-56 (9th Cir. 1976)).

Further, Defendants' speculative concerns are easily dispelled by any reasonable review of the record. Both Plaintiffs were incarcerated for all of 2018 and 2019, meaning that they could not have been claimed as dependents because they were incarcerated for more than half of the year. *See* 26 C.F.R. § 1.152-1 (general definition of dependent is that over half of their support for the year was received from another taxpayer); Scholl Decl. ¶ 3 (stating he will be incarcerated

[3] Defendants also cite *Arc of Washington State, Inc. v. Braddock*, 129 F. App'x 348, 351 (9th Cir. 2005), but that unpublished memorandum disposition does not discuss what statement was deemed conclusory, so provides no guidance.

until 2021); Salahi Decl., Ex. 8 (CDCR record showing Mr. Scholl has been incarcerated since before 2018); Strawn Decl. ¶ 3 (Dkt. 14) (released in late July 2020). *See also* Supp. Strawn Decl. ¶ 4.

The remaining issues—their social security number and their income—are relevant only to the amount of payment they receive, not to whether they are "eligible individuals." *See* 26 U.S.C. §§ 6428(c), (g). This issue is thus immaterial because the Court will not be adjudicating how much each Plaintiff should receive; the IRS will do that upon entry of final judgment.[4] Nevertheless, both Plaintiffs also provide sufficient facts under oath to support a reasonable inference that they would receive a payment because they do not have an annual income greater than $99,000.[5] Scholl Decl. ¶ 5 (income in normal times is approximately $120/month); Strawn Decl. ¶ 9 (Dkt. 14) (no job and has to rely on the support of friends and family). Moreover, both Plaintiffs aver that they are United States citizens, and it is reasonable to infer they also have valid social security numbers. Scholl Decl. ¶ 1; Strawn Decl. ¶ 1. Plaintiffs submit a supplemental declaration from Ms. Strawn confirming these details, Supp. Strawn Decl. ¶¶ 2-6, and, if the Court deems it necessary, can submit one from Mr. Scholl too as soon as feasible, as he could not be reached in prison in the fewer than 48 hours between the government's opposition and this reply brief, Supp. Salahi Decl. ¶¶ 2-3. Nevertheless, Plaintiffs have produced Mr. Scholl's social security number to Defendants directly, confirming the number Defendants already have from Mr. Scholl's 2019 tax return. *Id.*, Ex. 10.

Finally, Defendants' argument that the declarations are invalid because Plaintiffs signed them electronically is specious. The local rules expressly authorize the use of electronic signatures like those used in Plaintiffs' declarations. *See* Local Civil Rule 5-1(i)(3) ("[i]n the case

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[4] The requested judgment would require the IRS to re-process claims under the correct legal standard, and at that point, the IRS would consider Mr. Scholl's eligibility based on information in his 2019 tax return or Non-Filer claim, and Ms. Strawn's based on the latter. *See* Mot. at 15-16. The Court itself is not called upon to adjudicate their ultimate entitlement.

[5] This is the amount they would have to earn in order for their $1,200 entitlement to be reduced to zero: ($99,000-$75,000) x 0.05 = $1,200. *See* 26 U.S.C. § 6428(c) (entitlement "shall be reduced (but not below zero) by 5 percent of so much of the taxpayer's adjusted gross income as exceeds—(1) $150,000 in the case of a joint return, (2) $112,500 in the case of a head of household, and (3) $75,000 in the case of a taxpayer not described in paragraph (1) or (2)").

of a Signatory who is not an ECF user . . . the filer of the document shall attest that concurrence in the filing of the document has been obtained from each of the other Signatories, which shall serve in lieu of their signatures on the document."). The declarations contain the required attestation. Scholl Decl. (Dkt. 13) at 3 ("Mr. Scholl authorized use of his electronic signature."); Strawn Decl. (Dkt. 14) at 3 ("Ms. Strawn authorized use of her electronic signature."). There are no circumstances in which the undersigned would file a witness declaration that had not been approved, word-for-word, by the declarant, and that is what occurred here. Supp. Salahi Decl. ¶ 5. In any case, Plaintiffs attach to this brief signed copies of those declarations. *Id.*, Ex. 9.

F. Final Judgment Should Be Entered for the Class

Defendants do not allege that any of the requirements of Rule 23(a) or 23(b)(2) are not met. Thus, the Court need not disturb its earlier class certification order, and should enter final judgment for the Class, retaining jurisdiction to enforce said judgment.

III. CONCLUSION

For the reasons above, Plaintiffs respectfully request that the Court grant their motion.

Dated: October 9, 2020

Respectfully submitted,

By: */s/ Kelly M. Dermody*
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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2020, I caused the foregoing to be electronically filed and served with the Clerk of the Court using the CM/ECF system to all parties of record.

/s/ Kelly M. Dermody
Kelly M. Dermody