

1 Kelly M. Dermody (SBN 171716)  
Yaman Salahi (SBN 288752)  
2 Jallé Dafa (SBN 290637)  
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP  
3 275 Battery Street, 29th Floor  
San Francisco, CA 94111-3339  
4 Telephone: 415.956.1000  
Facsimile: 415.956.1008  
5 kdermody@lchb.com  
ysalahi@lchb.com  
6 jdafa@lchb.com

7 Eva Paterson (SBN 67081)  
Mona Tawatao (SBN 128779)  
8 Christina Alvernaz (SBN 329768)  
EQUAL JUSTICE SOCIETY  
9 1939 Harrison St., Suite 818  
Oakland, CA 94612  
10 Telephone: 415-288-8703  
Facsimile: 510-338-3030  
11 epaterson@equaljusticesociety.org  
mtawatao@equaljusticesociety.org  
12 calvernaz@equaljusticesociety.org

13 [Additional counsel listed on signature page]

14 *Attorneys for Plaintiffs and the Proposed Class*

15 UNITED STATES DISTRICT COURT  
16 NORTHERN DISTRICT OF CALIFORNIA  
17 OAKLAND DIVISION

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

21 Plaintiffs,

22 v.

23 STEVEN MNUCHIN, in his official  
capacity as the Secretary of the U.S.  
24 Department of Treasury; CHARLES  
RETTIG, in his official capacity as U.S.  
25 Commissioner of Internal Revenue; U.S.  
DEPARTMENT OF THE TREASURY;  
26 the U.S. INTERNAL REVENUE  
SERVICE; and, the UNITED STATES OF  
27 AMERICA.

28 Defendants.

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

**PLAINTIFFS' NOTICE OF MOTION,  
MOTION, AND MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION FOR SUMMARY  
JUDGMENT**

Date: November 4, 2020  
Time: 9:00 a.m.  
Location: Courtroom 3, 3rd Floor  
Judge: The Honorable Phyllis J. Hamilton

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

	<b>Page</b>
NOTICE OF MOTION AND MOTION .....	i
I. INTRODUCTION AND SUMMARY OF ARGUMENT .....	1
II. BACKGROUND .....	1
A. The CARES Act.....	1
B. Defendants’ Implementation of the CARES Act.....	2
C. Defendants’ Exclusion of Incarcerated People From EIP Benefits .....	3
III. LEGAL STANDARD.....	5
IV. ARGUMENT .....	7
A. The CARES Act Provides Americans With Immediate Economic Assistance.....	7
1. Defendants Are Required to Issue Advance Refunds As Rapidly As Possible .....	7
2. Defendants Are Not Authorized to Exclude Incarcerated People.....	8
B. Defendants Have Unlawfully Withheld or Unreasonably Delayed Stimulus Payments Belonging to Plaintiffs and the Class (5 U.S.C. Section 706(1)) .....	9
C. Defendants’ Policy Is Contrary to Law and Exceeds Statutory Authority (5 U.S.C. § 706(2)).....	10
1. The IRS’s Policy Is Final Agency Action.....	10
2. The Policy Is Contrary to Law and Exceeds Statutory Authority.....	12
3. The Policy Is Also Arbitrary and Capricious.....	13
D. The Court Should Enter Summary Judgment for Plaintiffs and Grant Their Requests for Declaratory and Injunctive Relief.....	15
V. CONCLUSION .....	16

**TABLE OF AUTHORITIES**

		<b>Page</b>
1	<b>TABLE OF AUTHORITIES</b>	
2		
3	<b><u>CASES</u></b>	
4	<i>Alameda Health Sys. v. Ctrs. For Medicare &amp; Medicaid Servs.</i> ,	
5	287 F. Supp. 3d 896 (N.D. Cal. 2017).....	6
6	<i>Bresgal v. Brock</i> ,	
7	843 F.2d 1163 (9th Cir. 1987).....	16
8	<i>Cal. Wilderness Coal. v. U.S. Dep’t of Energy</i> ,	
9	631 F.3d 1072 (9th Cir. 2011).....	16
10	<i>California v. Trump</i> ,	
11	963 F.3d 926 (9th Cir. 2020).....	13
12	<i>City &amp; Cnty. of S.F. v. Sessions</i> ,	
13	372 F. Supp. 3d 928 (N.D. Cal. 2019).....	13
14	<i>Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.</i> ,	
15	698 F.3d 1101 (9th Cir. 2012).....	14
16	<i>East Bay Sanctuary Covenant v. Trump</i> ,	
17	932 F.3d 742 (9th Cir. 2018).....	13
18	<i>Encino Motorcars, LLC v. Navarro</i> ,	
19	136 S. Ct. 2117 (2016).....	13
20	<i>Genuine Parts Co. v. Env’t Prot. Agency</i> ,	
21	890 F.3d 304 (D.C. Cir. 2018).....	15
22	<i>Hells Canyon Preservation Council v. U.S. Forest Serv.</i> ,	
23	593 F.3d 923 (9th Cir. 2010).....	10
24	<i>Hernandez v. Williams, Zinman &amp; Parham PC</i> ,	
25	829 F.3d 1068 (9th Cir. 2016).....	7
26	<i>Jimenez v. Quarterman</i> ,	
27	555 U.S. 113 (2009).....	9
28	<i>La. Pub. Serv. Comm’n v. F.C.C.</i> ,	
29	476 U.S. 355 (1986).....	13
30	<i>Lands Council v. Powell</i> ,	
31	395 F.3d 1019 (9th Cir. 2005).....	6, 14
32	<i>League of Wilderness Defs. Blue Mountains Biodiversity Project v. Allen</i> ,	
33	615 F.3d 1122 (9th Cir. 2010).....	14
34	<i>Los Angeles Lakers, Inc. v. Fed. Ins. Co.</i> ,	
35	869 F.3d 795 (9th Cir. 2017).....	7
36	<i>Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.</i> ,	
37	463 U.S. 29 (1983).....	15
38	<i>Norton v. S. Utah Wilderness Alliance</i> ,	
39	542 U.S. 55 (2004).....	10
40	<i>Nw. Motorcycle Ass’n v. USDA</i> ,	
41	18 F.3d 1468 (9th Cir. 1994).....	6
42	<i>Occidental Eng’g Co v. I.N.S.</i>	
43	753 F.2d 766 (9th Cir. 1985).....	6

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<i>Ore. Natural Desert Ass’n v. U.S. Forest Serv.</i> , 465 F.3d 977 (9th Cir. 2006).....	12
<i>Portland Audubon Soc’y v. Endangered Species Comm.</i> , 984 F.2d 1534 (9th Cir. 1993).....	6
<i>Pub. Power Council v. Johnson</i> , 674 F.2d 791 (9th Cir. 1982).....	6
<i>R.V. v. Mnuchin</i> , No. 20-cv-1148, 2020 WL 3402300 (D. Md. June 19, 2020).....	7, 8
<i>S.F. Herring Assoc. v. Dep’t of the Interior</i> , 946 F.3d 564 (9th Cir. 2019).....	11, 12
<i>Safer Chemicals, Healthy Families v. U.S. Env’t Prot. Agency</i> , 943 F.3d 397 (9th Cir. 2019).....	9, 13
<i>Serv. Emps. Int’l Union v. United States</i> , 598 F.3d 1110 (9th Cir. 2010).....	8
<i>Thompson v. U.S. Dep’t of Labor</i> , 885 F.2d 551 (9th Cir. 1989).....	6
<i>U.S. Army Corps. of Eng’rs v. Hawkes Co.</i> , 136 S. Ct. 1807 (2016).....	11
<i>United States v. Mead</i> , 533 U.S. 218 (2001).....	7
<i>United States v. Trident Seafoods Corp.</i> , 60 F.3d 556 (9th Cir. 1995).....	7
<i>Util. Air Regulatory Grp. v. E.P.A.</i> , 573 U.S. 302 (2014).....	9, 13
<i>Vietnam Veterans of Am. v. Central Intelligence Agency</i> , 811 F.3d 1068 (9th Cir. 2016).....	9, 10
<b><u>STATUTES</u></b>	
26 U.S.C. § 32.....	9
26 U.S.C. § 6428.....	passim
42 U.S.C. § 402.....	3
5 U.S.C. § 551(11)(A)-(B).....	10
5 U.S.C. § 703.....	15
5 U.S.C. § 706.....	passim
<b><u>OTHER AUTHORITIES</u></b>	
166 Cong. Rec. E339 (Mar. 31, 2020).....	8
166 Cong. Rec. S1929 (Mar. 23, 2020).....	8
166 Cong. Rec. S2007 (Mar. 24, 2020).....	8
IR-2020-61 (Mar. 30, 2020).....	2

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
IRS, <i>Treasury, IRS Announce Delivery of 159 Million Economic Impact Payments</i> (June 3, 2020) .....	3
Pub. L. 116-136, 135 Stat. 335 (Mar. 27, 2020) .....	1
Pub. L. No. 110-185, 122 Stat. 613 (2008) .....	9
Treasury Inspector General for Tax Administration, <i>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</i> , Ref No. 2020-46-041 (June 30, 2020) .....	4
<i>US inmates got virus relief checks, and IRS wants them back</i> , Associated Press (June 24, 2020) .....	5

**NOTICE OF MOTION AND MOTION**

**TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:** Please take notice that Plaintiffs Colin Scholl and Lisa Strawn, on behalf of themselves and the certified Class in this case, hereby move for summary judgment. Plaintiffs respectfully request that the Court enter summary judgment in favor of Plaintiffs and the Class, including:

(1) an order declaring that:

(a) 26 U.S.C. § 6428 does not authorize Defendants to withhold advance refunds or credits from Class Members solely because they are or were incarcerated;

(b) Defendants unlawfully withheld or unreasonably delayed delivery of advance refunds to Class Members pursuant to 5 U.S.C. § 706(1);

(c) Defendants' policy of withholding advance refunds or credits from Class Members because they are or were incarcerated is contrary to law and in excess of statutory authority under 5 U.S.C. § 706(2); and,

(d) Defendants' policy is arbitrary and capricious under 5 U.S.C. § 706(2); and,

(2) adopting its preliminary injunction as a permanent injunction which:

(a) enjoins Defendants from withholding advance refunds or credits under 26 U.S.C. § 6428 from any Class Member, including Plaintiffs, on the sole basis that they are or were incarcerated;

(b) invalidates Defendants' policy of withholding refunds or credits from people who are or were incarcerated; and,

(c) requires Defendants to re-consider the eligibility of any person for whom an Economic Impact Payment was previously withheld or denied on the basis of incarcerated status alone.

Plaintiffs also respectfully request that the Court confirm its order granting provisional class certification in order to enter summary judgment for the Class.

This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Law and Points and Authorities; and the papers, records, and pleadings on file in this matter.

1 Dated: September 29, 2020

Respectfully submitted,

2  
3 By: /s/ Kelly M. Dermody  
4 Kelly M. Dermody

5 Kelly M. Dermody (SBN 171716)  
6 Yaman Salahi (SBN 288752)  
7 Jallé H. Dafa (SBN 290637)  
8 LIEFF CABRASER HEIMANN & BERNSTEIN, LLP  
9 275 Battery Street, 29th Floor  
10 San Francisco, CA 94111-3339  
11 Telephone: 415.956.1000  
12 Facsimile: 415.956.1008  
13 kdermody@lchb.com  
14 ysalahi@lchb.com  
15 jdafa@lchb.com

16 Eva Paterson (SBN 67081)  
17 Mona Tawatao (SBN 128779)  
18 Christina Alvernaz (SBN 329768)  
19 EQUAL JUSTICE SOCIETY  
20 1939 Harrison St., Suite 818  
21 Oakland, CA 94612  
22 Telephone: 415-288-8703  
23 Facsimile: 510-338-3030  
24 epaterson@equaljusticesociety.org  
25 mtawatao@equaljusticesociety.org  
26 calvernaz@equaljusticesociety.org

27 Lisa Holder (SBN 212628)  
28 EQUAL JUSTICE SOCIETY  
P.O. Box 65694  
Los Angeles, CA 90065  
Telephone: 323-683-6610  
lisaholder@yahoo.com

*Co-Lead Class Counsel*

1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 Plaintiffs Colin Scholl and Lisa Strawn and other members of the Class are persons who  
 3 are or were incarcerated at some point from March 27, 2020 to the present. Plaintiffs challenge  
 4 Defendants' failure to issue Economic Impact Payments ("EIPs") under the Coronavirus Aid,  
 5 Relief, and Economic Security (CARES) Act, 26 U.S.C. § 6428, to them and the Class pursuant  
 6 to their policy of withholding such payments from incarcerated persons. In entering a preliminary  
 7 injunction on September 24, 2020, the Court held that Plaintiffs were likely to succeed on the  
 8 merits of their claims because Defendants' policy was likely contrary to law and arbitrary and  
 9 capricious. Dkt. 50. Because no further factual development is needed to enter final  
 10 adjudication on the merits, Plaintiffs respectfully move now for summary judgment for  
 11 themselves and the Class on their claims under the Administrative Procedure Act, 5 U.S.C. §  
 12 706(1)-(2).<sup>1</sup>

13 **II. BACKGROUND**

14 **A. The CARES Act**

15 Congress passed the CARES Act on March 27, 2020, and the President signed it into law  
 16 on the same day. *See* Pub. L. 116-136, 135 Stat. 335 (Mar. 27, 2020). Section 2201(a) of the  
 17 CARES Act, codified at 26 U.S.C. Section 6428, created a mechanism to issue direct cash  
 18 support called "Economic Impact Payments" (EIP) to American citizens and legal permanent  
 19 residents through the federal government's tax infrastructure. *Id.*

20 **How the Benefit Works:** The Act creates a 2020 tax-year "credit" of \$1,200 for an  
 21 eligible individual, or \$2,400 for eligible individuals filing a joint return, plus \$500 per qualifying  
 22 child. 26 U.S.C. § 6428(a). Payments are reduced by 5% of the amount of a taxpayer's income  
 23 above \$150,000 if a joint return, \$112,500 if a head of household, and \$75,000 for all others. 26  
 24 U.S.C. § 6428(c). The statute deems all eligible individuals to have made an overpayment in tax  
 25 years beginning in 2019 (whether or not they made any payment at all), such that the EIP is  
 26 termed a "refund." *Id.* §§ 6428(f)(1)-(2). The statute directs that EIP benefits may be issued

27 \_\_\_\_\_  
 28 <sup>1</sup> If summary judgment is granted on Plaintiffs' class-wide APA claims, Plaintiffs' Little Tucker Act claim (which has not been certified for class treatment) will be mooted. Compl. ¶¶ 50-54.



1 automatically through electronic deposits for people who filed 2018 or 2019 tax returns, *id.* §  
2 6428(f)(3)(B), or otherwise receive Social Security or Railroad Retirement Benefits.

3 **Eligible Individuals:** The statute defines an “eligible individual” as:

4 any individual other than—

5 (1) any nonresident alien individual,

6 (2) any individual with respect to whom a deduction under section  
7 151 is allowable to another taxpayer for a taxable year beginning in  
the calendar year in which the individual’s taxable year begins, and

8 (3) an estate or trust.

9 26 U.S.C. § 6428(d).<sup>2</sup>

10 **Timing:** Because the purpose of the EIP is emergency relief, the statute directs that “[t]he  
11 Secretary shall . . . refund or credit any overpayment attributable to this section as rapidly as  
12 possible,” no later than December 31, 2020. 26 U.S.C. § 6428(f)(3)(A).

13 **B. Defendants’ Implementation of the CARES Act**

14 Three days after the CARES Act’s passage, on March 30, 2020, the IRS issued a news  
15 release explaining that “distribution of economic impact payments will begin in the next three  
16 weeks and will be distributed automatically, with no action required for most people. However,  
17 some taxpayers who typically do not file returns will need to submit a simple tax return to receive  
18 the economic impact payment.” *See IRS, Check IRS.gov for the latest information: No action  
19 needed by most people at this time*, IR-2020-61 (Mar. 30, 2020),

20 <https://www.irs.gov/newsroom/economic-impact-payments-what-you-need-to-know> (Salahi  
21 Decl., Ex. 1).<sup>3</sup> It explained that for “[t]he vast majority of people,” “[t]he IRS will calculate and  
22 automatically send the economic impact payment to those eligible.” *Id.*

23 For those for whom EIP benefits cannot be issued automatically, the IRS established an  
24 online “Non-Filer” claim portal. *See IRS, Economic Impact Payments*,

25 \_\_\_\_\_  
26 <sup>2</sup> The statute also directs that “[n]o credit shall be allowed . . . to an eligible individual who does  
27 not include” a valid social security number on a tax return for themselves, for their spouses, or for  
any qualifying children, with limited exceptions for members of the Armed Forces. 26 U.S.C. §  
6428(g)(1)-(3).

28 <sup>3</sup> The Court previously took judicial notice of Exhibits 1-6, re-attached for convenience to the  
concurrently-filed Declaration of Yaman Salahi. Dkt. 50 at 4, n.3.

1 <https://www.irs.gov/coronavirus/economic-impact-payments> (accessed Aug. 3, 2020) (attached as  
 2 Salahi Decl., Ex. 2). The portal is intended for people who “are not required to file federal  
 3 income tax returns for 2018 and 2019 for any reason including: Your income is less than \$12,200;  
 4 You’re married filing jointly and together your income is less than \$24,400; You have no  
 5 income.” *Id.*

6 By June 3, 2020, the IRS and Treasury Department had announced that “159 million  
 7 Economic Impact Payments, worth more than \$267 billion, have been distributed to Americans in  
 8 two months. Payments have been sent to *all* eligible Americans for whom the IRS has the  
 9 necessary information to make a payment.” *See IRS, Treasury, IRS Announce Delivery of 159*  
 10 *Million Economic Impact Payments* (June 3, 2020), [https://home.treasury.gov/news/press-](https://home.treasury.gov/news/press-releases/sm1025)  
 11 [releases/sm1025](https://home.treasury.gov/news/press-releases/sm1025) (Salahi Decl., Ex. 3). The IRS instructed that “[i]ndividuals who do not  
 12 normally file taxes and have not yet received their Economic Impact Payment should use the  
 13 [online] Non-Filers Tool” which “will remain available until October 15,” stating that “anyone  
 14 who registers by October 15 will receive their payment by the end of the year.” *Id.* As explained  
 15 below, contrary to its statements, the IRS has not made payments to all eligible persons and,  
 16 instead, has taken steps to prevent eligible persons who are incarcerated from receiving these  
 17 critical benefits.

18 **C. Defendants’ Exclusion of Incarcerated People From EIP Benefits**

19 On May 6, 2020, more than five weeks after the passage of the CARES Act, the IRS  
 20 announced that it would treat incarcerated individuals as ineligible for the EIP. The IRS stated:

21 Q15. Does someone who is incarcerated qualify for the Payment?

22 A15. No. A Payment made to someone who is incarcerated  
 23 should be returned to the IRS by following the instructions about  
 24 repayments. A person is incarcerated if he or she is described in  
 25 one or more of clauses (i) through (v) of Section 202(x)(1)(A) of  
 26 the Social Security Act (42 U.S.C. § 402 (x)(1)(A)(i) through (v)).<sup>4</sup>  
 For a Payment made with respect to a joint return where only one  
 spouse is incarcerated, you only need to return the portion of the  
 Payment made on account of the incarcerated spouse. This amount  
 will be \$1,200 unless adjusted gross income exceeded \$150,000.

27 \_\_\_\_\_  
 28 <sup>4</sup> The Class only includes persons who fall within 42 U.S.C. § 402(x)(1)(A)(i) (confined pursuant to the conviction of a criminal offense) and (v) (held to be in violation of probation or parole).

1 Salahi Decl., Ex. 4.<sup>5</sup> On June 18, 2020, the IRS updated its internal procedures manual to reflect  
 2 this change in policy. Salahi Decl., Ex. 5 at 2 (stating that “[a]n eligible individual is any  
 3 individual other than . . . an incarcerated individual . . .”).

4 A report by the Treasury Department’s Inspector General for Tax Administration confirms  
 5 that the IRS implemented the policy announced on May 6, 2020.<sup>6</sup> The IRS made at least three  
 6 disbursements of funds, on April 10, May 1, and May 8, 2020. Salahi Decl., Ex. 6 at 4-5. The  
 7 IRS apparently included payments to incarcerated people in the April 10, 2020 disbursement. *Id.*  
 8 When questioned on April 14, 2020, “IRS management noted that payments to these populations  
 9 of individuals were allowed because the CARES Act does not prohibit them from receiving a  
 10 payment. However, the IRS subsequently changed its position, noting that individuals who are  
 11 prisoners . . . are not entitled to an EIP.” *Id.* To prevent the subsequent disbursement of EIPs to  
 12 incarcerated people, “the IRS provided the [Bureau of the Fiscal Service] with a file that  
 13 contained the Taxpayer Identification Numbers of prisoners . . . and requested that the BFS  
 14 remove these individuals from payment files. This approach was applied to the May 1, 2020 and  
 15 May 8, 2020 payment files.” *Id.* In addition, “IRS management informed [the IG] that on May  
 16 13, 2020, programming was implemented to discontinue calculating and sending EIPs to  
 17 prisoners . . .” *Id.* The IRS also “issued new guidance on May 6, 2020” concerning prisoners,  
 18 as described above. *Id.*

19 According to the IG report, as of May 21, 2020, and before the IRS had taken measures to  
 20 exclude incarcerated people from future payments, EIPs had been issued to 84,861 of them,  
 21 totaling approximately \$100 million. Salahi Decl., Ex. 6 at 5-6. In response:

22 [T]he IRS included steps that should be taken to return these  
 23 payments as part of its Frequently Asked Questions. Individuals  
 24 who received a direct deposit payment in error that was not returned  
 to the IRS by the bank were instructed to submit a personal check

25 <sup>5</sup> As noted by the Court, the number of the FAQ has changed over time, but the substance has  
 26 remained the same. *See* Dkt. 50 at 4, n.4. Plaintiffs refer to number 15 because that is the  
 numbering used in the attached evidence.

27 <sup>6</sup> *See* Treasury Inspector General for Tax Administration, *Interim Results of the 2020 Filing*  
 28 *Season: Effect of COVID-19 Shutdown on Tax Processing and Customer Service Operations and*  
*Assessment of Efforts to Implement Legislative Provisions*, Ref No. 2020-46-041, at 4-5 (June 30,  
 2020), <https://www.treasury.gov/tigta/auditreports/2020reports/202046041fr.pdf> (Ex. 6).

1 or money order for the payment amount, notate the check as an EIP  
2 along with their Taxpayer Identification Number, and mail the  
3 check with a short note to the IRS at a specified address based on  
4 where the individual lives. Individuals who received a paper EIP  
check in error were instructed to return the voided check with a  
short note to the IRS at the address provided based on where the  
individual lives.

5 *Id.* at 6. The IRS has taken proactive steps to intercept and retrieve any payments that were  
6 previously sent to some incarcerated persons: “the IRS directed state correction departments to  
7 intercept payments to prisoners and return them.” Rebecca Boone, *US inmates got virus relief*  
8 *checks, and IRS wants them back*, Associated Press (June 24, 2020),  
9 <https://apnews.com/0810bb67199c9cef34d4d39ada645a92> (Salahi Decl., Ex. 7). Pursuant to the  
10 IRS’s directive, “[t]he Kansas Department of Correction alone intercepted more than \$200,000 in  
11 checks by early June. Idaho and Montana combined had seized over \$90,000.” *Id.* Other states,  
12 including Washington, Vermont, Mississippi, Pennsylvania, Arizona, California, Oregon, and  
13 Utah, intercepted stimulus payments to incarcerated persons at the IRS’s behest. *Id.*

14 On September 1, 2020, in response to Plaintiffs’ motion for preliminary injunction and  
15 class certification, Defendants submitted a declaration from the Chief Counsel of the Internal  
16 Revenue Service, Michael J. Desmond. Dkt. 44-1. Mr. Desmond’s declaration confirms the  
17 IRS’s final policy with respect to incarcerated persons. Specifically, Mr. Desmond confirmed  
18 that “individuals who were deemed to be incarcerated . . . as of April 30, 2020, were deemed not  
19 to qualify for the [CARES Act] advance payments.” *Id.* ¶ 7. Mr. Desmond also stated that the  
20 IRS’s position with respect to advance payments does “not address whether [incarcerated]  
21 individuals are ultimately eligible to claim the credit on their 2020 tax returns.” *Id.* ¶ 8. Per Mr.  
22 Desmond’s declaration, “the IRS currently plans to allow the CARES Act tax credit claimed on  
23 2020 returns by otherwise eligible individuals who were only incarcerated for a portion of tax  
24 year 2020.” *Id.* Because Mr. Desmond’s statement does not have the force of law, a ruling in  
25 Plaintiffs’ favor is necessary to ensure the IRS abides by the statute.

### 26 **III. LEGAL STANDARD**

27 Pursuant to Section 706 of the Administrative Procedure Act (APA):

28 To the extent necessary to decision and when presented, the

1 reviewing court shall decide all relevant questions of law, interpret  
 2 constitutional and statutory provisions, and determine the meaning  
 or applicability of the terms of an agency action. The review court  
 shall—

3 (1) compel agency action unlawfully withheld or unreasonably  
 4 delayed; and,

5 (2) hold unlawful and set aside agency action, findings, and  
 6 conclusions found to be—

7 (A) arbitrary, capricious, an abuse of discretion, or  
 otherwise not in accordance with law;

8 . . .

9 (C) in excess of statutory jurisdiction, authority, or  
 10 limitations, or short of statutory right . . . .

11 5 U.S.C. §§ 706(1)-(2).

12 In such cases, there are no genuine disputes of material fact and review is limited to the  
 13 administrative record. *Nw. Motorcycle Ass’n v. USDA*, 18 F.3d 1468, 1471-72 (9th Cir. 1994).  
 14 Thus, at summary judgment, “the function of the district court is to determine whether or not as a  
 15 matter of law the evidence in the administrative record permitted the agency to make the decision  
 16 it did.” *Occidental Eng’g Co v. I.N.S.*, 753 F.2d 766, 769 (9th Cir. 1985). *See also Alameda*  
 17 *Health Sys. v. Ctrs. For Medicare & Medicaid Servs.*, 287 F. Supp. 3d 896, 910-11 (N.D. Cal.  
 18 2017) (Hamilton, J.). The scope of review is generally limited to “the administrative record in  
 19 existence at the time of the [agency] decision and [not some new] record that is made initially in  
 20 the reviewing court.” *Lands Council v. Powell*, 395 F.3d 1019, 1029 (9th Cir. 2005). The  
 21 administrative record for purposes of an APA claim consists of all materials considered by the  
 22 agency when making the decision in question. *Thompson v. U.S. Dep’t of Labor*, 885 F.2d 551,  
 23 555-56 (9th Cir. 1989); *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534,  
 24 1548 (9th Cir. 1993). When a challenging party contends the record is incomplete, a court may  
 25 enable discovery to supplement the record with materials considered by the agency  
 26 decisionmakers. *Pub. Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982); *Portland*  
 27 *Audubon Soc’y*, 984 F.2d at 1548.

28 Based on the declaration from the IRS’s chief counsel explaining the agency’s

1 contemporaneous reasons for its decisions, Dkt. 44-1, the absence of any indication from  
2 Defendants that additional reasons or factors were considered at the time of the challenged  
3 decision, and the fact that “[P]laintiffs’ challenge is a purely legal one,” Dkt. 50 at 14, Plaintiffs  
4 do not seek to supplement the record or conduct discovery for purposes of this motion.

5 **IV. ARGUMENT**

6 **A. The CARES Act Provides Americans With Immediate Economic Assistance**

7 As the Court has already held, Defendants have not adopted any formal interpretation of  
8 the CARES Act entitled to special judicial deference. *See* Dkt. 50 at 20-21; *see also United*  
9 *States v. Mead*, 533 U.S. 218, 230 (2001); *United States v. Trident Seafoods Corp.*, 60 F.3d 556,  
10 559 (9th Cir. 1995) (“No deference is owed when an agency has not formulated an official  
11 interpretation of its regulation, but is merely advancing a litigation position.”). Thus, the Court  
12 must proceed to interpret the relevant provisions of the CARES Act, looking to the statute’s text,  
13 structure, and purpose. *See Los Angeles Lakers, Inc. v. Fed. Ins. Co.*, 869 F.3d 795, 802 (9th Cir.  
14 2017); *see also Hernandez v. Williams, Zinman & Parham PC*, 829 F.3d 1068, 1072-73 (9th Cir.  
15 2016) (courts “must presume that [the] legislature says in a statute what it means and means in a  
16 statute what it says there,” so a court’s “sole function” when “the statutory meaning is plain and  
17 unambiguous” is “to enforce it according to its terms”).

18 Here, the two pertinent questions are whether the CARES Act requires Defendants to  
19 issue advance refunds, and if so, whether the CARES Act authorizes Defendants to exclude  
20 incarcerated people from that program.

21 **1. Defendants Are Required to Issue Advance Refunds As Rapidly As**  
22 **Possible**

23 The CARES Act’s central purpose was to provide emergency assistance to Americans  
24 affected by the pandemic. It operates through a legal fiction providing that eligible individuals  
25 “shall be treated as having” overpaid their taxes in 2019 by an amount defined by statute. 26  
26 U.S.C. § 6428(f)(1). *See R.V. v. Mnuchin*, No. 20-cv-1148, 2020 WL 3402300, at \*7 (D. Md.  
27 June 19, 2020) (explaining this provision “creat[es] a legal fiction that qualified individuals  
28 ‘overpaid’ on previously filed taxes”). The Act provides for an advance refund equal to “the

1 amount that would have been allowed as a credit under this section for such taxable year if this  
2 section . . . had applied to such taxable year.” 26 U.S.C. § 6428(f)(2). The amount of the credit is  
3 defined by Section 6428(a).

4 The statute further provides that “[t]he Secretary *shall*, subject to the provisions of this  
5 title, refund or credit any overpayment attributable to this section *as rapidly as possible*.” 26  
6 U.S.C. § 6428(f)(3)(A) (emphasis added). As the Court has already held, “[t]he use of the word  
7 ‘shall’ indicates a mandatory command from Congress to the Treasury Department and the IRS to  
8 issue the advance refund and to do so rapidly.” Dkt. 50 at 22 (citing *Serv. Emps. Int’l Union v.*  
9 *United States*, 598 F.3d 1110, 1113 (9th Cir. 2010) (“The word ‘shall’ is ordinarily [t]he  
10 language of command.”); *R.V.*, 2020 WL 3402300, at \*7 (the statute “requires the government to  
11 pay the fictional overpayment, and be quick about it”). Thus, the statute does not afford the IRS  
12 discretion whether or not to issue the advance refunds.

13 This interpretation is also supported by the legislative history, which is replete with  
14 statements emphasizing that the purpose of the legislation was to provide rapid assistance to  
15 Americans. *See, e.g.*, 166 Cong. Rec. S2007 (Mar. 24, 2020) (statement of Sen. McConnell)  
16 (stating that purpose of Act was to “rush financial assistance to Americans through direct checks  
17 to households *from the middle class on down*”) (emphasis added); 166 Cong. Rec. E339 (Mar. 31,  
18 2020) (statement of Rep. Jayapal) (stating the CARES Act provides “relief to the vast majority of  
19 *everyday people* to immediately help put cash in people’s pocket to pay those mounting bills”)  
20 (emphasis added); 166 Cong. Rec. S1929 (Mar. 23, 2020) (statement of Sen. Lankford) (same).

## 21 **2. Defendants Are Not Authorized to Exclude Incarcerated People**

22 The statute does not leave open the question of who is eligible to receive an advance  
23 refund. As the Court has already held, “[o]n this question, the statute is brief and to the point.”  
24 Dkt. 50 at 24. It provides that an “eligible individual” is any person who is a U.S. citizen or  
25 Legal Permanent Resident (i.e., a “nonresident alien individual”), who has not been claimed as a  
26 dependent by another taxpayer, and who is not an estate or a trust. 26 U.S.C. § 6428(d). “There  
27 is no indication that Congress left the definition of ‘eligible individual’ open-ended or otherwise  
28 up to the Secretary’s discretion to change.” Dkt. 50 at 24 (citing *Jimenez v. Quarterman*, 555

1 U.S. 113, 118 (2009) (“It is well established that, when the statutory language is plain, we must  
2 enforce it according to its terms.”). *See also Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302,  
3 327 (2014) (holding that the “power of executing the laws” “does not include a power to revise  
4 clear statutory terms”); *Safer Chemicals, Healthy Families v. U.S. Env’t Prot. Agency*, 943 F.3d  
5 397, 425 (9th Cir. 2019) (“Where congress has explicitly provided a definition for a term, and that  
6 definition is clear, an agency must follow it.”).

7 Furthermore, as the Court previously indicated, this interpretation is supported by the fact  
8 that Congress knew how to exclude incarcerated people from this refund package if it wanted to.  
9 Dkt. 50 at 24. In connection with the 2008 stimulus bill, Congress excluded any income earned  
10 by persons housed at a penal institution from counting towards the minimum income requirement  
11 for a refund. *See* Pub. L. No. 110-185, 122 Stat. 613 (2008); 26 U.S.C. § 6428(e)(4) (2012)  
12 (defining qualifying income for purposes of a refund in reference to 26 U.S.C. § 32(c)(2)); 26  
13 U.S.C. § 32(c)(2)(B)(iv) (“no amount received for services provided by an individual while the  
14 individual is an inmate at a penal institution shall be taken into account”). “The fact that  
15 Congress previously devised a method to indirectly exclude incarcerated persons from the 2008  
16 stimulus but included no such provision here indicates that Congress did not intend to exclude  
17 incarcerated persons from the definition of ‘eligible individual’ [under the CARES Act].” Dkt.  
18 50 at 25.

19 In short, the CARES Act clearly requires the IRS to issue advance refunds to eligible  
20 individuals as rapidly as possible. It does not provide any basis to exclude people from eligibility  
21 simply because they are incarcerated.

22 **B. Defendants Have Unlawfully Withheld or Unreasonably Delayed Stimulus**  
23 **Payments Belonging to Plaintiffs and the Class (5 U.S.C. Section 706(1))**

24 Section 706(1) of the APA provides that a court “shall compel agency action unlawfully  
25 withheld or unreasonably delayed.” 5 U.S.C. § 706(1); *see* Compl. ¶¶ 40-43. “A court can  
26 compel agency action under this section only if there is ‘a specific, unequivocal command’ placed  
27 on the agency to take a ‘discrete agency action,’ and the agency has failed to take that action.”  
28 *Vietnam Veterans of Am. v. Central Intelligence Agency*, 811 F.3d 1068, 1075 (9th Cir. 2016).



1 The CARES Act provides such a command. Congress gave the Secretary *zero* discretion  
 2 in deciding whether to issue a payment to an eligible person. The statute unequivocally  
 3 commands that “[t]he Secretary *shall*, subject to the provisions of this title, refund or credit any  
 4 overpayment attributable to this section *as rapidly as possible*.” 26 U.S.C. § 6428(f)(3)(A)  
 5 (emphasis added). The delivery of this financial assistance constitutes “discrete agency action.”  
 6 *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004) (“discrete agency actions”  
 7 include, *inter alia*, an “agency rule, order, license, sanction [or] relief”); 5 U.S.C. § 551(11)(A)-  
 8 (B) (“relief” includes the “grant of money” and the “recognition of a claim [or] right”).

9 Defendants have “both a legal duty to perform a discrete agency action [i.e., issue  
 10 stimulus payments to eligible persons] and [have] fail[ed] to perform that action.” *Vietnam*  
 11 *Veterans*, 811 F.3d at 1079. Defendants have thus “ignored a specific legislative command.”  
 12 *Hells Canyon Preservation Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010).

13 **C. Defendants’ Policy Is Contrary to Law and Exceeds Statutory Authority (5**  
 14 **U.S.C. § 706(2))**

15 Notwithstanding the unambiguous text of the statute, Defendants on May 6, 2020  
 16 announced their policy that incarcerated persons were ineligible for a stimulus payment, and have  
 17 refused to issue payments to such persons. Salahi Decl., Exs. 4 & 6; *see* Section II.C, *supra*.  
 18 Defendants subsequently submitted a declaration from the IRS’s chief counsel confirming the  
 19 policy: “Specifically, individuals who were deemed to be incarcerated . . . as of April 30, 2020,  
 20 were deemed not to qualify for the advance payments.” Dkt. 44-1 ¶ 7.

21 **1. The IRS’s Policy Is Final Agency Action**

22 The IRS’s policy of excluding incarcerated people from advance refund payments  
 23 constitutes final agency action, as the Court has already held. Dkt. 50 at 14-15. Specifically,  
 24 “[s]ince the advance refund is a grant of money, the denial of the advance refund is an agency  
 25 action.” Dkt. 50 at 14. *See* 5 U.S.C. § 551(13) (defining “agency action” as “the whole or a part  
 26 of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to  
 27 act”); *id.* § 551(11)(A) (defining relief in part as “the whole or part of an agency grant of  
 28 money . . .”).

1 The denial of the advance refunds to Plaintiffs and the Class is also final, not preliminary.  
2 Agency action is final when (1) it “mark[s] the consummation of the agency’s decision-making  
3 process,” *i.e.*, it is not “of a merely tentative or interlocutory nature,” and (2) is “one by which  
4 rights or obligations have been determined, or from which legal consequences will flow.” *S.F.*  
5 *Herring Assoc. v. Dep’t of the Interior*, 946 F.3d 564, 577 (9th Cir. 2019) (quoting *U.S. Army*  
6 *Corps. of Eng’rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016)). This analysis is “pragmatic.” *Id.*  
7 *Hawkes*, 136 S. Ct. at 1815. Both conditions are met here.

8 The Policy Is Not Tentative. Defendants’ policy is not “merely tentative or interlocutory.”  
9 *S.F. Herring*, 946 F.3d at 577. The Court previously observed three reasons supporting the  
10 conclusion that the policy was final.

11 First, “[a]fter initially disbursing EIPs to incarcerated persons, the IRS reversed its  
12 decision and, as described in its FAQs, unequivocally took the position that someone who is  
13 incarcerated does not qualify for the EIP and should return any prior payments.” Dkt. 50 at 15.  
14 *See also* Salahi Decl., Ex. 4.

15 Second, the IRS’s chief counsel submitted a declaration confirming that the FAQ  
16 addresses the issue of whether incarcerated individuals may receive advance payments, and  
17 confirmed that the IRS decided that anyone deemed incarcerated as of April 30, 2020 would not  
18 receive a payment. Dkt. 44-1 ¶¶ 7-8. These statements “indicate[] that the IRS’s decision  
19 regarding the advance refund is final.” Dkt. 50 at 15.

20 Third, the Court cited the IRS’s internal manual, which codified and implemented this  
21 policy, as further support for the conclusion “that the IRS considers the issue of advance refund  
22 payments to incarcerated persons to be settled.” Dkt. 50 at 15. *See also* Salahi Decl., Ex. 5 at 2.

23 Furthermore, Defendants operationalized their policy by asking state correctional facilities  
24 to intercept and return any refunds that had been inadvertently sent to incarcerated people, Salahi  
25 Decl., Ex. 7, and took preventative action to ensure no checks would be sent to incarcerated  
26 people in disbursements issued in early May 2020 or thereafter by cross-referencing the payment  
27 data files with a list of known incarcerated people and implementing programming to exclude  
28 them. Salahi Decl., Ex. 6 at 5.

1 This behavior “does not suggest [Defendants are] still in the middle of trying to figure out  
2 [their position] on whether [incarcerated persons are eligible for CARES Act relief], and that this  
3 action somehow prematurely inserts the counts into the mix.” *S.F. Herring*, 946 F.3d at 578.

4 The Policy Determines Class Members’ Rights. Defendants’ policy is also “one by which  
5 rights or obligations have been determined, or from which legal consequences will flow.” *S.F.*  
6 *Herring*, 946 F.3d at 577. Plaintiffs were entitled to advance refunds, but did not receive them.  
7 Scholl Decl. ¶ 2 (Dkt. 13); Strawn Decl. ¶ 2 (Dkt. 14). Further, the IRS has made clear it will not  
8 issue payments to incarcerated people before the end of the year. Dkt. 44-1 ¶ 7. And, “[m]ore  
9 broadly, the impact of the IRS’s decision is evidenced by the fact that the IRS initially issued  
10 EIPs to incarcerated persons and then, because of its decision, intercepted payments or ordered  
11 recipients to return payments.” Dkt. 50 at 16 (citing Salahi Decl., Ex. 6 at 5).

12 These factors demonstrate that the IRS’s policy is not tentative or non-binding, but rather  
13 is final and ripe for review by the Court. *See also Ore. Natural Desert Ass’n v. U.S. Forest Serv.*,  
14 465 F.3d 977, 985-86 (9th Cir. 2006) (final agency action found where agency “arrived at a  
15 definitive position” and “put that decision into effect”).

## 16 2. The Policy Is Contrary to Law and Exceeds Statutory Authority

17 Under the APA, the Court “shall” “hold unlawful and set aside agency action . . . found to  
18 be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;  
19 [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”  
20 5 U.S.C. § 706(2)(A), (C).

21 As explained above, *see* Section IV.A, and as the Court has already held, the CARES Act  
22 “mandates distribution of the advance refund to eligible individuals,” and “[i]ncarcerated persons  
23 who otherwise qualify for an advance refund are not excluded as an ‘eligible individual.’” Dkt.  
24 50 at 25. This conclusion is also bolstered by the fact that Defendants initially took the position  
25 that incarcerated individuals *were* eligible for advance payments and actually issued nearly  
26 85,000 payments to them. *See* Salahi Decl., Ex. 6 at 5 (when the Treasury Inspector General for  
27 Tax Administration questioned IRS management about this decision, the IRS “noted that  
28 payments to these populations were allowed because the CARES Act does not prohibit them from

1 receiving a payment”). Subsequently, the IRS abruptly changed its mind without explanation.  
2 This “shifting interpretation demonstrates that the IRS ‘went well beyond the bounds of its  
3 statutory authority.’” Dkt. 50 at 25 (quoting *Utility Air Reg. Grp.*, 573 U.S. at 326).

4 The Secretary’s adoption of eligibility requirements beyond those provided by the CARES  
5 Act effectively re-writes the statutory definition of “eligible individual,” violating core separation  
6 of powers principles. *See Util. Air Regulatory Grp.*, 573 U.S. at 327-28 (“The power of  
7 executing the laws . . . does not include a power to revise clear statutory terms,” because of the  
8 “core administrative-law principle that an agency may not rewrite clear statutory terms to suit its  
9 own sense of how the statute should operate.”); *Safer Chemicals, Healthy Families*, 943 F.3d at  
10 425 (holding EPA’s re-definition of statutory term was unlawful because “[w]here Congress has  
11 explicitly provided a definition for a term, and that definition is clear, an agency must follow it”);  
12 *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 774 (9th Cir. 2018) (upholding injunction  
13 enjoining executive order and agency rule suspending entry of certain asylees because they “do[]  
14 indirectly what the Executive cannot do directly: amend the [Congressional statute]”). *See also*  
15 *La. Pub. Serv. Comm’n v. F.C.C.*, 476 U.S. 355, 374 (1986) (“an agency literally has no power to  
16 act . . . unless and until Congress confers power upon it”); *California v. Trump*, 963 F.3d 926,  
17 947-49 (9th Cir. 2020) (Department of Defense lacked statutory authority to transfer funds to  
18 other agencies for border wall construction); *City & Cnty. of S.F. v. Sessions*, 372 F. Supp. 3d  
19 928, 943 (N.D. Cal. 2019) (agency lacked statutory authority to impose additional conditions on  
20 federal grants).

21 Accordingly, Defendants’ policy is contrary to law.

### 22 **3. The Policy Is Also Arbitrary and Capricious**

23 Defendants’ policy is arbitrary and capricious for several other reasons.

24 First, Defendants violated the “basic procedural requirement” that “an agency must give  
25 adequate reasons for its decisions,” and when it “has failed to provide even that minimal level of  
26 analysis, its action is arbitrary and capricious and so cannot carry the force of law.” *Encino*  
27 *Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). When it announced its position, as  
28 this Court observed, the IRS “put forward virtually no public explanation concerning its decision

1 to withhold payments to incarcerated persons.” Dkt. 50 at 27. Indeed, its spokesman was unable  
2 to explain it either, telling reporters, “I can’t give you the legal basis. All I can tell you is this is  
3 the language the Treasury and ourselves have been using.” Salahi Decl., Ex. 7 at 3.

4 Second, Defendants’ policy is arbitrary and capricious because it “relie[s] on factors  
5 Congress did not intend it to consider . . . .” *League of Wilderness Defs. Blue Mountains*  
6 *Biodiversity Project v. Allen*, 615 F.3d 1122, 1130 (9th Cir. 2010) (quotation omitted).  
7 Specifically, in deciding who was an “eligible individual” for an advance refund payment,  
8 Defendants considered whether individuals were incarcerated, a criteria that Congress itself did  
9 not adopt or intend to be material. *See* Section IV.A, *supra*.

10 Third, to the extent that Defendants now claim the policy was adopted as an anti-fraud  
11 measure, that explanation is not persuasive for at least two reasons. One, it was stated for the first  
12 time in a post-hoc declaration filed in this lawsuit, and unaccompanied by contemporaneous  
13 evidence of the agency’s decision-making process at the time it adopted the policy in question.  
14 *Lands Council v. Powell*, 395 F.3d 1019, 1029 (9th Cir. 2005) (review of agency action “focuses  
15 on the administrative record in existence *at the time of the decision* and does not encompass any  
16 part of the record that is made initially in the reviewing court” (quotation omitted and emphasis  
17 added)); *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1124 (9th  
18 Cir. 2012) (reviewing court “cannot gloss over the absence of a cogent explanation by the agency  
19 by relying on . . . post hoc rationalizations” (quotation omitted)).

20 Further, as the Court previously observed, “defendants have not logically connected the  
21 identified burden (fraud) and their remedy (no payments to incarcerated persons).” Dkt. 50 at 35.  
22 Indeed, the IRS has confirmed less than 7,000 cases of fraud in 2018 associated with incarcerated  
23 individuals’ social security numbers, a miniscule percentage of the incarcerated population  
24 overall. Dkt. 44-1 ¶ 6. Rather than implement a mechanism that would isolate only individuals  
25 who had been specifically flagged by the IRS for potential fraud concerns or additional fraud  
26 screening, the IRS instead adopted a collective punishment approach, disqualifying hundreds of  
27 thousands of incarcerated people for whom the IRS had no specific reason to suspect fraud. This  
28 mis-match between the agency’s interest in preventing fraud and the action taken does not

1 demonstrate a “rational connection between the facts found and the choice made.” *Motor Vehicle*  
 2 *Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also*  
 3 *Genuine Parts Co. v. Env’t Prot. Agency*, 890 F.3d 304, 311-12 (D.C. Cir. 2018) (agency action is  
 4 arbitrary and capricious where the agency does not “articulate a rational explanation for its  
 5 actions” (quotation omitted)).

6 For the reasons above, Defendants’ policy is also arbitrary and capricious under the APA.

7 **D. The Court Should Enter Summary Judgment for Plaintiffs and Grant Their**  
 8 **Requests for Declaratory and Injunctive Relief**

9 The APA authorizes courts reviewing agency action to issue declaratory and injunctive  
 10 relief. *See* 5 U.S.C. § 703. *See also* 5 U.S.C. § 706(1) (providing that a reviewing court  
 11 “shall . . . compel agency action unlawfully withheld”); *Vietnam Veterans of Am.*, 811 F.3d at  
 12 1079-80 (affirming injunction under 5 U.S.C. § 706(1) compelling agency to perform actions  
 13 required by statute); 5 U.S.C. § 706(2) (court must “hold unlawful” and “set aside” agency action  
 14 that is arbitrary and capricious or contrary to law). Here, Plaintiffs request both forms of relief on  
 15 behalf of themselves and the Class.<sup>7</sup>

16 Specifically, Plaintiffs request a judicial declaration that (1) Section 6428 does not  
 17 authorize Defendants to withhold advance refunds or credits from Class Members solely because  
 18 they are or were incarcerated; (2) Defendants unlawfully withheld or unreasonably delayed  
 19 delivery of advance refunds to Class Members pursuant to 5 U.S.C. § 706(1); (3) Defendants’  
 20 policy of withholding advance refunds or credits from Class Members because they are or were  
 21 incarcerated is contrary to law and in excess of statutory authority under 5 U.S.C. § 706(2); and  
 22 (4) Defendants’ policy is also arbitrary and capricious under 5 U.S.C. § 706(2).

23 Plaintiffs also request that the Court convert its preliminary injunction into a permanent  
 24 injunction which: (1) enjoins Defendants from withholding advance refunds or credits under 26  
 25 U.S.C. § 6428 from any Class Member, including Plaintiffs, on the sole basis that they are or  
 26 were incarcerated, because the statute does not condition eligibility on incarcerated status, *see*,

27 <sup>7</sup> Although the Court noted that its certification of a class was “provisional,” no change in  
 28 circumstances material to the propriety of class certification has arisen. The Court should thus  
 confirm class certification for purposes of final judgment, too.

1 *e.g.*, *Bresgal v. Brock*, 843 F.2d 1163, 1171-72 (9th Cir. 1987) (affirming permanent injunction  
2 “enjoin[ing]” agency “to cease refusing to enforce” statute); (2) invalidates the IRS’s policy of  
3 withholding refunds or credits from people who are or were incarcerated, *see Cal. Wilderness*  
4 *Coal. v. U.S. Dep’t of Energy*, 631 F.3d 1072, 1095 (9th Cir. 2011) (“When a court determines  
5 that an agency’s action failed to follow Congress’s clear mandate, the appropriate remedy is to  
6 vacate that action.”); (2) orders Defendants to re-consider the eligibility of Class Members for  
7 advance refunds based on information available in the IRS’s records, specifically, 2018 or 2019  
8 tax returns or Forms SSA-1099 (Social Security Benefit Statements) and Form RRB-1099 (Social  
9 Security Equivalent Benefit Statement), but from whom benefits have thus far been withheld,  
10 intercepted, or returned on the sole basis of their incarcerated status within 30 days; and (3) orders  
11 Defendants to re-consider any claim filed through the “Non-Filer” portal or otherwise that was  
12 previously denied solely on the basis of the claimant’s incarcerated status.

13 **V. CONCLUSION**

14 For the reasons set forth above, Plaintiffs respectfully request that the Court grant  
15 summary judgment in favor of Plaintiffs and the Class.

16 Dated: September 29, 2020

Respectfully submitted,

17  
18 By: /s/ Kelly M. Dermody

Kelly M. Dermody

19  
20 Kelly M. Dermody (SBN 171716)  
Yaman Salahi (SBN 288752)  
Jallé Dafa (SBN 290637)  
LIEFF CABRASER HEIMANN  
& BERNSTEIN, LLP  
275 Battery Street, 29th Floor  
San Francisco, CA 94111-3339  
Telephone: 415.956.1000  
Facsimile: 415.956.1008  
kdermody@lchb.com  
ysalahi@lchb.com  
jdafa@lchb.com

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Eva Paterson (SBN 67081)  
Mona Tawatao (SBN 128779)  
Christina Alvernaz (SBN 329768)  
EQUAL JUSTICE SOCIETY  
1939 Harrison St., Suite 818  
Oakland, CA 94612  
Telephone: 415-288-8703  
Facsimile: 510-338-3030  
epaterson@equaljusticesociety.org  
mtawatao@equaljusticesociety.org  
calvernaz@equaljusticesociety.org

Lisa Holder (SBN 212628)  
EQUAL JUSTICE SOCIETY  
P.O. Box 65694  
Los Angeles, CA 90065  
Telephone: 323-683-6610  
lisaholder@yahoo.com

*Co-Lead Class Counsel*



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

I hereby certify that on September 29, 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.

I declare under penalty of perjury under the laws of the United States that the above is true and correct. Executed on September 29, 2020, at San Francisco, California.

/s/ Kelly M. Dermody  
Kelly M. Dermody