IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN GALVAN and PATRICK TAYLOR, Plaintiffs, v. STEVEN T. MNUCHIN, in his official capacity as United States Secretary of Treasury; the UNITED STATES DEPARTMENT OF TREASURY; CHARLES P. RETTIG, in his official capacity as United States Commissioner of Internal Revenue; the INTERNAL REVENUE SERVICE; the UNITED STATES OF AMERICA, and DOES 1-10, Defendants.	)	Case No. 1:20-cv-04511 Judge Joan B. Gottschall Mag. Judge Jeffrey T. Gilbert

OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants Secretary Steven T. Mnuchin, the U.S. Department of the Treasury, Commissioner Charles P. Rettig, the Internal Revenue Service, and the United States of America (hereinafter Defendants)[1] respond to Plaintiffs' motion for partial summary judgment and request that the Court deny Plaintiffs' motion and dismiss Counts I and II of Plaintiffs' Complaint for lack of jurisdiction. In the alternative, Defendants request that the Court deny Plaintiffs' motion

[1] Undersigned counsel does not represent Defendants Does 1-10.

for failure to establish the merits of their claims with competent evidence or defer consideration of Plaintiffs' motion, pursuant to Rule 56(d) of the Fed. R. Civ. P., to allow limited discovery.[2]

As set forth more fully below, the Court should deny Plaintiffs' motion for partial summary judgment and dismiss Counts I and II of the Complaint for lack of jurisdiction. Plaintiffs lack standing because they have not suffered a cognizable harm. Moreover, Plaintiff Patrick Taylor has already been issued an advance refund of the credit provided by section 6428 of the Internal Revenue Code and therefore has no standing to bring this suit. Further, the waiver of sovereign immunity and substantive cause of action under the Administrative Procedure Act (APA) are not available in this case because there has been no final agency action and there are other statutory remedies. Because the APA does not provide an avenue for relief, Plaintiffs have failed to identify a valid waiver of sovereign immunity to this suit. Finally, this suit is barred because, however styled, it seeks a refund of what is statutorily denied as an overpayment of income tax, 26 U.S.C. § 6401(b)(1), which must be brought as a tax refund action under 26 U.S.C. § 7422 for Plaintiffs' 2020 tax year, and Plaintiffs have not exhausted the administrative remedies required by that statute.

Plaintiffs also are not entitled to summary judgment because they have failed to support their allegation that they are entitled to the CARES Act credit with competent evidence and have failed to establish that the IRS's conduct was arbitrary, capricious, and contrary to law. Accordingly, they have not established that there are no material issues of fact. In the alternative, Defendants request that the Court defer consideration of the motion for partial

[2] Due to the expedited briefing schedule, Defendants have not separately moved for discovery pursuant to Rule 56(d).

summary judgment for the limited purpose of permitting Defendants to file a Rule 56(d) motion seeking take discovery on Plaintiff John Galvan's eligibility for the CARES Act credit.

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I. Background of the CARES Act

a. History and Purpose of the Statute

In order to deliver economic assistance and other support to individuals, families, businesses, and health-care providers during the COVID-19 pandemic emergency, Congress passed the bipartisan Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, 134 Stat. 281, which the President signed into law on March 27, 2020. The Act provides $2 trillion in economic relief for individuals, loans for small businesses, support for hospitals and other medical providers, and various types of aid for impacted businesses and industries.

b. 26 U.S.C. § 6428

At issue here, the CARES Act creates a refundable tax credit for the 2020 tax year through the addition of Section 6428 to the Internal Revenue Code (the "CARES Act credit"). 26 U.S.C. § 6428. The CARES Act credit delivers fiscal stimulus to the American economy. Section 6428(a) affords an eligible individual a refundable tax credit against the individual's federal income tax liability for his or her "first taxable year beginning in 2020." Eligible individuals are entitled to a credit of up to $1,200, or up to $2,400 in the case of married eligible individuals filing a joint return, plus up to $500 per qualifying child. *See id*.

To provide relief to eligible taxpayers, the CARES Act credit is implemented, in part, through advance refunds. Section 6428(f) provides that an eligible individual may receive an advance refund of the CARES Act credit during 2020 based on income tax information from previous years. Each eligible individual is treated as having made a payment against his or her 2018 or 2019 federal income tax liability, which enables the IRS to issue an advance refund of the CARES Act credit. Section 6428(f)(5) allows the Secretary of the Treasury to estimate and

make advance refunds of the CARES Act credit based on the individual's 2019 income tax information or, if that information is not available, his or her 2018 income tax information, or the individual's 2019 Form SSA-1099 (Social Security Benefits Statement) or 2019 Form RRB-1099 (Payments by the Railroad Retirement Board).

Section 6428(f)(3)(A) directs the Secretary of the Treasury to "refund or credit any overpayment attributable to this section as rapidly as possible," it does not, however, confer upon *any* individual the justiciable right to *receive* an advance refund rapidly or, indeed, at all, and does not provide a cause of action to direct payment of an advance refund or challenge the amount of refund the IRS issues. If the IRS does not issue an advance refund to an individual who will eventually qualify for a CARES Act credit, there is no mechanism in Section 6428 by which the individual can compel it to do so. Instead, any advance refund will be reconciled with the CARES Act credit reported on her 2020 tax return. *See* 26 U.S.C. § 6428(e) (reducing (but not below zero) the amount of any CARES Act credit by the aggregate amount of any advance refunds and credits made or allowed).

The statute therefore makes clear that the CARES Act credit is not a tax credit for 2019 or 2018 – information for those years is only used to estimate the amount of the 2020 tax credit that an individual would be entitled to on his or her 2020 income tax return so the IRS can issue that credit as an advance refund. An eligible individual who will qualify for a 2020 tax credit under Section 6428 thus will receive it in one of three ways: (1) as an advance refund on or before December 31, 2020; (2) as a CARES Act credit upon filing her 2020 tax return; or (3) partially as an advance refund and partially as a CARES Act credit. Some individuals who believe they will be eligible for a CARES Act credit have received a smaller advance refund than they had expected or no advance refund at all. These individuals will have to wait until the 2021

filing season to claim the remainder of the CARES Act credit on their 2020 tax return. *See Economic Impact Payment Information Center*, https://www.irs.gov/newsroom/economic-impact-payment-information-center-calculating-my-economic-impact, Q 7 ("If you did not receive the full amount to which you believe you are entitled, you will be able to claim the additional amount when you file your 2020 tax return.") (last accessed September 15, 2020).

c. Individuals Who Did Not File a Tax Return

Because an advance refund of the CARES Act credit is calculated based on 2019 or 2018 income tax information, if the Department of the Treasury and the IRS had not taken any other action, there are a number of otherwise eligible individuals – namely, persons not required to file income tax returns – who would not automatically receive the advance refunds. Those individuals, whose eligibility and contact information were not known to the IRS, would have to file their 2019 or 2018 tax returns or wait until they claim the refundable tax credit on their 2020 income tax returns.

Section 6428 itself identifies a subset of those individuals who are not necessarily required to file a tax return, permitting the IRS to automatically determine eligibility and calculate advance refunds based on information maintained by the Social Security Administration and reported on 2019 Forms SSA-1099 (Social Security Benefit Statement) or RRB-1099 (Payments by the Railroad Retirement Board). *See* 26 U.S.C. § 6428 (f)(5)(B). However, Section 6428 does not directly address how to determine eligibility for advance refund for other non-filers that are otherwise eligible for the credit. Nevertheless, the IRS took it upon itself, under the authority provided in 26 U.S.C. § 6428(h) among other statutory sources, to identify those other non-filers who may be eligible for the credit to provide them an advance refund. The IRS worked extensively with partner government agencies to ensure that up to

$1,200 payments would be automatically issued to those receiving Supplemental Security Income and to Veterans Affairs Compensation and Pension beneficiaries who did not file a tax return for the last two taxable years. *See* IR-2020-76 (Apr. 20, 2020); *see also* IR-2020-81 (Apr. 24, 2020).

To provide an advance refund of the CARES Act credit to these non-filers who do not receive federal benefits, the Department of the Treasury and IRS provided a simple method to for such individuals to identify themselves to the IRS. *See* Rev. Proc. 2020-28, 2020-19 I.R.B. 792. Through a third-party Free File online option, a non-filer web portal is offered on IRS.gov that allows individuals to provide limited information on their identities, their qualifying children, and their addresses and, if applicable, any direct deposit information to enable the IRS to determine the eligibility for and the amounts of advance refunds. *See* Non-Filers Printout, Attached as Exhibit 1.

Once the IRS has received and processed the information regarding eligibility for an advance refund of the CARES Act credit and either issues an advance refund or determines that an individual is not entitled to an advance refund, the taxpayer's account is "marked," and submission of supplemental information generally will not result in the reconsideration or recalculation of the credit. Accordingly, an individual who has been determined to be ineligible for the advance refund will not receive an advance refund by later utilizing the non-filer web portal or filing a return for tax year 2019. In such cases, the individuals who believe they are eligible for the CARES Act credit can claim the credit on their 2020 tax returns.

d. Implementation of the CARES Act Credit Related to Incarcerated Individuals

After initially sending out early payments that were not screened for incarcerated individuals, on May 6, 2020, the IRS issued a response to FAQ 14, ("Does someone who is

incarcerated qualify for the [advance refund] Payment?") (https://perma.cc/VDN6-6QY8) on its website stating that incarcerated individuals do not qualify for these advance refunds. On May 13, 2020, "programming was implemented to discontinue calculating and sending [advance payments of the CARES Act credit] to prisoners." Treasury Inspector General for Tax Administration (TIGTA), Interim Results of the 2020 Filing Season: Effect on COVID Shutdown, No. 2020-46-041 (June 30, 2020), pp. 4-6. FAQ 14 was addressed only to the question of whether incarcerated individuals may be issued an advance payment of the CARES Act credit, and did not address the separate question of whether such individuals are eligible to claim these credits on their 2020 tax returns. (Exhibit 2 - Declaration of Michael J. Desmond ¶ 8).

The IRS has justified the issuance of this FAQ by its concerns about possible fraud and the possibility that Congress intended to exclude prisoners. *Id.* ¶ 5. "The IRS regularly receives information about possible fraudulent tax refunds and/or what is considered "frivolous" tax activity involving prisoners, as well as information about incarcerated individuals using possible "stolen" identities to obtain false refunds. For example, the IRS receives information from an intelligence unit of the Federal Bureau of Prisons that directly monitors suspicious federal prisoner activity. The information is then shared with appropriate parts of the IRS for further analysis. Fraudulent activity involving tax refunds is prevalent among the prison population. For example, in calendar year 2018, the IRS found 6,799 returns filed under the Social Security numbers (SSNs) of prisoners under Federal, state or District of Columbia custody to be false and fraudulent returns. Those returns, all suspended or rejected, claimed tax refunds totaling $118.6 million. These 6,799 returns included returns filed by prisoners as well as returns filed by unknown individuals using prisoners' SSNs. The IRS findings for 2018 are not an isolated case

and, in fact, reflect progress from earlier years in reducing fraudulent tax activities involving prisoners. Because of the continued prevalence of fraudulent tax activities among the prisoner population, the IRS applies fraud filters to screen all tax returns filed under prisoners' SSNs that claim refunds and otherwise scrutinizes prisoners' tax filings and refund claims." *Id.* ¶ 6.

Additionally, various TIGTA reports indicate that "[t]ax refund fraud associated with prisoners remains a significant problem for tax administration." 2014 TIGTA Report: Prisoner Tax Refund Fraud (https://perma.cc/24RS-9PQ7); 2017 TIGTA Report: Actions Need to Be Taken to Ensure Compliance With Prisoner Reporting Requirements (https://perma.cc/FV5U-2G7D) (identifying "recent examples in which prisoners were the victims of identity theft or committed identity theft while incarcerated for another crime"). *See also, e.g.*, DOJ Press Release (https://perma.cc/RC5Y-E5H4) from the U.S. Attorney's Office for the Western District of Pennsylvania dated August 25, 2020 (discussing fraud from prisoners with respect to unemployment benefits during the pandemic); *see also* IRS Blue Bag Program (https://perma.cc/APN7-72DD) (describing a program where "the IRS and cooperating prisons monitor inmates' tax-related communications to deter inmate tax fraud").

Pursuant to 26 U.S.C. § 6116, "the head of the Federal Bureau of Prisons and the head of any State agency charged with the responsibility for administration of prisons" must provide the IRS with a variety of information regarding "all the inmates incarcerated within the prison system." The legislative history for this statute explains that its purpose was to "assist in detecting and deterring fraudulent tax return filings from inmates." H.R. REP. 112-239, 21. This information includes, among other items, the name, birthdate, date of incarceration, date of release or anticipated release, last known address, and taxpayer identification number of each prisoner. 26 U.S.C. § 6116(b).

The IRS used this and other information to determine which individuals were not eligible for the advance payments of the CARES Act credits. (Exhibit 2 ¶ 7). Specifically, the IRS determined that individuals who were reported to be incarcerated as of April 30, 2020, based on the dates of release or anticipated release reported to the IRS, did not qualify for the advance payments, and directed any such payments already made be returned to the IRS. *Id.*

II. Arguments

a. Counts I and II of the Complaint Should Be Dismissed for Lack of Jurisdiction

i. There Is No Case or Controversy [3]

Article III of the Constitution limits the jurisdiction of federal courts to "cases" and "controversies." U.S. Const., Art. III § 2. To bring a case or controversy before the Court, Plaintiffs must allege an "injury in fact" which has a "causal connection" with the injury it complains of and which is likely to be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations and quotes omitted). An "injury in fact" must rise to the level of an "invasion of a legally protected interest." *Id.* The injury must also be "concrete and particularized" and "actual or imminent," as opposed to "conjectural or hypothetical." *Id.* The injury-in-fact requirement is not met where a plaintiff "allege[s] a bare procedural violation, divorced from any concrete harm…." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016); *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right in vacuo—is insufficient to create Article III standing.").

[3] Even though this brief responds to Plaintiffs' motion for summary judgment as to Counts I and II, the lack of a live case or controversy requires that Count III should be dismissed as well.

Plaintiffs have not alleged any violation of their "legally protected interest" in this case. *Lujan*, 504 U.S. at 560. Section 6428 did not take anything from Plaintiffs. Nor did Section 6428 give Plaintiffs any type of legally protected interest in anything that is being wrongfully withheld, because the CARES Act does not mandate that Plaintiffs be issued an advance refund payment of a CARES Act credit. Instead, it creates a refundable credit against eligible individuals' 2020 income taxes. *See* 26 U.S.C. § 6428(a).

Although Congress authorized the IRS to make advance refunds of the 2020 tax credit, 26 U.S.C. § 6428(f), this does not create an entitlement to a refund for any other tax year or even for an advance credit. The text of Section 6428 provides for only one credit: "a credit against the tax imposed by subtitle A for the first taxable year beginning in 2020." 26 U.S.C. § 6428(a). Section 6428(f), pertaining to the advance refund, makes clear that it is an advance refund of the 2020 credit. Specifically, Section 6428(f)(2) states that "the advance refund amount is the amount that would have been allowed as a credit under this section for such taxable year [2019] if this section . . . had applied to such taxable year." Therefore, the amount of the advance refund is estimated based on the taxpayer's 2019 tax return information. To the extent that such an estimate is not correct, *i.e.*, the taxpayer's eligibility or credit amount for 2020 is different from the estimated eligibility or the estimated credit amount, the taxpayer can correct that on his or her 2020 income tax return. *See* 26 U.S.C. § 6428(e)(1) ("The amount of credit which would (but for this paragraph) be allowable under this section shall be reduced (but not below zero) by the aggregate refunds and credits made or allowed to the taxpayer under subsection (f).") But there is no provision permitting that same taxpayer to obtain relief in federal court for the funds that were not paid as an advance refund.

For individuals whose 2019 tax return information was not available, Congress provided that the Secretary of the Treasury "may" use the taxpayer's 2018 tax year information, 2019 Social Security Benefit Statement, or 2019 Payments by the Railroad Retirement Board statement to calculate the individual's advance refund. 26 U.S.C. § 6428(f)(5). While Congress allowed the IRS to issue the advance refund to all eligible individuals whose 2018 or 2019 information was unavailable, it did not require it. Nor did Congress mandate that the IRS use the non-filer web portal to collect information from such individuals.

The statute explicitly recognizes that there are individuals who, although eligible for the credit on their 2020 tax returns, will not be issued an advance refund by December 31, 2020, and will have to claim the credit on their 2020 tax returns. The requirement in section 6428(e) to reconcile the CARES Act credit for 2020 with any advance refund issued in 2020 reflects Congressional recognition that the identification of eligible individuals and determination of advance refund amounts under section 6428(f) will not be perfectly accurate, and allows both individuals and the IRS to cure any discrepancies in 2021 when income tax returns for 2020 are filed. The IRS's reliance on the non-filer web portal, in an effort to identify additional individuals to disburse the 2020 credit as an advance refund in 2020, simply does not create any substantive right to an advance refund.

Accordingly, Plaintiffs' alleged injuries are only cognizable once they attempt to claim the CARES Act credit on their 2020 tax returns, after the tax year is complete, and if the IRS then improperly denies it. But it is well-settled that such allegations of future possible injury do not satisfy the requirements of Article III. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).[4] In

[4] Notably, Plaintiffs argued in the reply in support of their Motion to Set an Expedited Briefing Schedule on their Motions for Class Certification and Partial Summary Judgment, that some

other circumstances, courts have consistently held that "the mere possibility of future tax liability, or any associated penalties imposed by the IRS, is insufficient to establish standing to sue in federal court." *Coon v. Wood*, 160 F. Supp. 3d 246, 251 (D.D.C. 2016) (collecting cases). Therefore, Plaintiffs claims must be dismissed.

ii. There Is No Case or Controversy Regarding Plaintiff Patrick Taylor Because He Was Issued an Advance Refund

Without regard to the general premature nature of this case, there also is no case or controversy regarding Plaintiff Patrick Taylor because he has already been issued an advance refund of the CARES Act credit in the amount of $1,200 on August 12, 2020. (Exhibit 3 - Declaration of Susan G. Fikes, ¶¶ 8.b. and 9) Because Plaintiff Taylor had unpaid child support obligations, the advance refund was applied to this debt. (Exhibit 3, ¶ 9). On August 12, 2020, Plaintiff Taylor was mailed a notice that his advance refund was applied in this manner. (Exhibit 3, ¶ 10).

Moreover, Plaintiff Taylor is not incarcerated on account of a conviction and, therefore, was not prevented from receiving an advance refund by the IRS policy he purports to challenge. The definition of incarcerated individual under 42 U.S.C. § 402(x)(1)(A) through (v) generally, which was referenced in FAQ 14, includes only individuals who are confined pursuant to a "conviction of a criminal offense." 42 U.S.C. § 402(x)(1)(A)(i). There are exceptions to this requirement, such as individuals confined in connection with "a verdict or finding that the

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potential class members may be harmed because calculation of advance refunds would be based on their 2019 income and income tax returns, but if they had to wait until 2021, they would not qualify for the credit based on their 2020 income. (ECF No. 52, PageID #: 1104). Plaintiffs did not raise that argument in their motion for partial summary judgment, so it may not be the basis of summary judgment here. In any case, those hypothetical class members cannot establish an injury-in-fact by alleging that they would otherwise receive an advance of a 2020 tax credit to which they are not entitled.

individual is not guilty of such an offense by reason of insanity." 42 U.S.C. § 402(x)(1)(A)(ii)(II). However, no part of the definition of incarcerated individual includes an individual, like Plaintiff Taylor, who is solely in pre-trial custody.

Plaintiff Taylor's conviction was vacated by the Illinois Appellate Court, and he is in pre-trial confinement. (Complaint ¶ 17). Individuals like Plaintiff Taylor, who are not "incarcerated individuals," as defined by 42 U.S.C. § 402(x)(1)(A)(i) through (v), are not prevented from receiving an advance refund. Accordingly, there is no case or controversy regarding Plaintiff Taylor's claim, and the Complaint should be dismissed as it pertains to Plaintiff Taylor.

iii. There Is No Jurisdiction Under the APA Because There Was No Final Agency Action

Where "the actions of the agency are not made reviewable by a specific statute, the APA allows judicial review of the actions by federal agencies only over 'final agency action for which there is no other adequate remedy in a court.'" *Home Builders Ass'n of Greater Chicago*, 335 F.3d 607, 614 (7th Cir. 2003) (quoting 5 U.S.C. § 704). There are "two conditions [that must] generally [] be satisfied for agency action to be 'final' under the APA. 'First, the action must mark the consummation of the agency's decision making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.'" *U.S. Army Corps of Engineers v. Hawkes Co*., 136 S. Ct. 1807, 1813 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997)).

Initially, Plaintiffs do not appear to contend a "specific statute" allows judicial review of the IRS's actions at issue in this lawsuit. Instead, Plaintiffs apparently seek APA review of an unidentified final agency action. In order to maintain this lawsuit, Plaintiffs must prove the contested factual allegations to support jurisdiction. *Meridian Sec. Ins. Co. v. Sadowski*, 441

F.3d 536, 540 (7th Cir. 2006). Defendants contend that the government engaged in a final agency action subject to review, but Plaintiffs have failed to establish that any final action has occurred. This is fatal to their claims.

Plaintiffs appear to erroneously contend that the IRS publication on their website in the Frequently Asked Question (FAQ) section that incarcerated individuals are not eligible for the advance refund is a final agency action. In support of this, Plaintiffs' contend that Defendants have "indicated" that the policy related to incarcerated individuals receiving advance refund of the CARES Act credit is "a final decision" that is reviewable by the Court. (ECF No. 19, PageID#: 357). Plaintiffs' claimed support for this inference is in paragraph 14 of their Statement of Facts. (ECF No. 19, PageID#: 357). Paragraph 14, in turn, quotes a news article that includes a single sentence from a webinar that IRS Chief Counsel Michael Desmond participated in on May 6, 2020. (ECF No. 20, PageID#: 367, ¶ 14). The news article discusses the lawsuit *McGruder v. Mnuchin*, No. 2:20-cv-03590 (E.D. Pa.), an unrelated APA challenge brought on behalf of individuals who allegedly received a smaller CARES Act credit advance refund than that to which they are entitled. (ECF No. 20-8, PageID#: 456). The article quoted Mr. Desmond stating that "I don't think we're going to take every FAQ and turn that into a full-blown notice or certainly a Treasury decision or proposed regulation." (*Id.*). Defendants do not dispute that is an accurate quote from Mr. Desmond during the webinar.

However, Plaintiffs do not explain how this quote – which is unrelated to incarcerated individuals receiving advance refunds – or the opinion of the journalist who wrote the article "indicates" that the IRS has made a final agency action that injured them. Only in Plaintiffs' statement of facts, rather than their memorandum of law, do they even make an argument that this statement means that Defendants have made a final decision on this issue. (ECF No 20,

PageID#: 367, ¶ 14). However, even this argument does not explain how their interpretation of this off-the-cuff remark, without any context, establishes that the IRS has made a final agency action that may be challenged under the APA.[5]

The Court should deem Plaintiffs' failure to develop this argument to be a waiver of their argument that the IRS has made a final agency action. *See Cornucopia Inst. v. U.S. Dep't of Agric.*, 560 F.3d 673, 677 (7th Cir. 2009); *Jester Commc'n, LLC v. Brunswick Corp.*, No. 18 CV 04847, 2018 WL 11191000, at *1 (N.D. Ill. Oct. 5, 2018).

In any event, Plaintiffs do not support their contention that a statement in the Frequently Asked Questions portion of the IRS webpage (ECF No. 19, PageID #: 359-360)[6] constituted final agency action. On its face, Mr. Desmond's statement does not mean that every FAQ, let alone the FAQ at issue, represents the IRS' final decision regarding the matter addressed in it. At best, Plaintiffs have proven nothing more than that the IRS Chief Counsel, in response to a question that Plaintiffs did not present to the Court, did not think that every FAQ on the IRS website will be followed up with formal guidance, such as, a Treasury decision or proposed regulation. (ECF No. 19, PageID #: 367, ¶ 14.) Moreover, as this is a motion for summary judgment, this fact, viewed in the light most favorable to the non-moving party, does not establish that Plaintiffs are entitled to summary judgment as a matter of law.

Most importantly, the FAQ does not represent the IRS's definitive statement on whether incarcerated individuals are entitled to the CARES Act credit, or even the advance refund.

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[5] Nor is the hearsay newspaper article liable to be presented in an admissible form. *See* Fed.R.Civ.P. 56(c)(2).

[6] The FAQ at issue states that a person that is incarcerated, as defined by one or more of clauses (i) through (v) of Section 202(x)(1)(A) of the Social Security Act (42 U.S.C. § 402(x)(1)(A)(i) through (v)), does not qualify for an advance refund of the CARES Act credit. (ECF No. 20, PageID#: 365, ¶ 10).

Plaintiffs themselves contend that the IRS has taken at least one other position with regard to this issue. (ECF No. 19, PageID#: 350.) Therefore, Plaintiffs have not established that the FAQ at issue represents the consummation of the IRS's decision making process.

FAQs allow the IRS to provide information as quickly as possible in a rapidly developing situation. In that regard the FAQs are similar to press releases; therefore, they were "merely tentative" and certainly not the consummation of its decision-making process. *See generally Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 189 (D.C. Cir. 2006) ("As the district court noted, we have never found a press release of the kind at issue here to constitute 'final agency action' under the APA."); *Barry v. S.E.C.*, 2012 WL 760456, at *6 (E.D.N.Y. Mar. 7, 2012) ("In any event, the press release fails for an independent reason: it is not 'final' agency action…"); *cf. Pub. Util. Dist. No. 1 of Snohomish Cnty., Washington v. Bonneville Power Admin.*, 250 F. App'x 821, 823 (9th Cir. 2007) ("We lack jurisdiction to entertain the petition because the issuance of the press release is neither a final action nor the implementation of a final action within the meaning of 16 U.S.C. § 839f(e)(5)."). Therefore, the FAQ at issue does not represent the consummation of the Department of the Treasury and the IRS's decision making process.

Only if the IRS denies the CARES Act credit to an individual who claims that credit on a properly filed 2020 tax return or amended return is there an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 177-178. Until an eligible individual submits a proper claim for refund, the IRS is not legally required issue to a refund. Since Section 6428 does not require that every eligible individual is entitled to receive the CARES Act credit in the manner and at the time of their choosing, the APA does not afford relief merely because the agency has not afforded Plaintiffs

their preferred relief. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004) ("the only agency action that can be compelled under the APA is action legally required.").

Beyond that, while the CARES Act created a refundable tax credit against 2020 tax liability that can be issued, in whole or in part, as an advance refund, there is no right to an advance refund, and certainly no right to the refund by any particular time. Section 6428 expressly contemplates that there will be individuals eligible for the credit who will not be issued all or any part of it as an advance refund, and provides for a mechanism to address that the credit when the eligible individual files a 2020 tax return. *See* 26 U.S.C. § 6428(e). If an eligible individual receives a credit claimed on the 2020 tax return, an advance refund issued in 2020, or a combination of an advance refund in 2020 and a credit on the 2020 tax return, the individual receives the benefit of the CARES Act.

Because the CARES Act provides a right to a refundable credit against 2020 income tax of eligible individuals *or an advance refund* of that credit, unless and until an individual files a proper claim for refund that is denied by the IRS, there is no final agency action that "marks the consummation of the agency's decision making process." *See U.S. Army Corps of Engineers*, 136 S. Ct. at 1813. Accordingly, there is no final agency action that is reviewable under the APA, and Plaintiffs' motion for partial summary judgment must fail.

iv. APA Review Is Not Available in This Case Because Plaintiffs Have Other Adequate Statutory Remedies

"The jurisdiction of the federal courts to review administrative action is codified in the Administrative Procedure Act." *Gen. Fin. Corp. v. F.T.C.*, 700 F.2d 366, 372 (7th Cir. 1983). The APA permits judicial review when an individual alleges that he or she has been injured by a final action of an agency of the United States. *See* 5 U.S.C. § 702. APA review is available only when "there is no other adequate remedy in a court." 5 U.S.C. § 704. Here, the CARES Act

credit is a tax credit, the eligibility for which, and the amount of which, is to be determined on a 2020 income tax return. By designing the credit in this manner, Congress assured that there is an adequate judicial remedy for aggrieved individuals: a tax refund claim. *See United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 4-5 (2008). Should they be denied the CARES Act credit for 2020, Plaintiffs have an adequate remedy through a suit for refund under 26 U.S.C. § 7422. Although styled as an APA claim, the Complaint prospectively seeks a tax refund. Specifically, Plaintiffs ask the Court for an order that the government issue advance payments of the CARES Act credit to them. (ECF No. 19, PageID #:354-355.) Accordingly, because a refund claim for the 2020 tax year under "26 U.S.C. § 7422(a) is the appropriate vehicle for [Plaintiff's] claim for relief, [Plaintiff] does not have a cause of action under the APA." *Starr Int'l Co., Inc. v. United States*, 910 F.3d 527, 536 (D.C. Cir. 2018).

While Congress undoubtedly intended to provide economic stimulus and relief with the passage of the CARES Act, Congress chose to provide this to certain eligible individuals by providing a tax credit through 26 U.S.C. § 6428. By structuring this relief as a tax credit, Congress subjected the administration of the CARES Act credit to the same rules and regulations applicable to all tax credits, including the refund procedures.

In considering the analogous context of the Earned Income Tax Credit, 26 U.S.C. § 32 (EITC), which is also a refundable tax credit, the Supreme Court held that an individual's entitlement to a refund of the EITC is because the "credit exceeds his tax liability" and that is only "because § 6401(b) of the Code defines that amount as an 'overpayment.'" *Sorenson v. Sec'y of Treasury of U.S.*, 475 U.S. 851, 860 (1986). The *Sorenson* plaintiff contended that, because she had no tax liability and had made no payment of taxes, her refund of the EITC was not a "refun[d] of Federal taxes paid." *Id.* at 863. The Supreme Court rejected that argument

and held that an individual "must characterize herself as a person who has 'made' an overpayment; otherwise, she cannot claim her excess earned-income credit." *Id*. at 864

In this case, Congress could have chosen to provide economic relief in any number of ways. However, Congress chose to do so as a refundable tax credit.[7] Congress further expressly stated that the credit be treated like any other refundable tax credit and defined eligible individuals as having made a payment against their taxes in the amount of the credit as part of the provision for providing an advance of that refund. 26 U.S.C. § 6428(b) and (f)(2).

As its name suggests, a refundable tax credit not only reduces a taxpayer's tax liability, but also the amount of the credit that exceeds the taxpayer's income tax liability is refunded to the taxpayer, since that amount is deemed an overpayment of taxes. *See* 26 U.S.C. § 6401(b)(1)("If the amount allowable as credits under subpart C of part IV of subchapter A of chapter 1 (relating to refundable credits) exceeds the tax imposed by subtitle A . . . the amount of such excess shall be considered an overpayment."). Accordingly, as with the EITC, the CARES Act credit is refundable to eligible individuals only because § 6401(b) provides that refundable credits are deemed to be overpayments of taxes – whether or not an individual actually made a payment to the IRS.

Further, Congress explicitly provided that "each individual who was an eligible individual 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." 26 U.S.C. § 6428(f)(1). Having specifically characterized the CARES Act credit as a refundable credit and provided that eligible individuals have made payments of taxes, the Court should

[7] The CARES Act provides that the credit "shall be treated as allowed by subpart C of part IV of subchapter A of chapter 1," 26 U.S.C. § 6428(b), the subpart of the Internal Revenue Code that contains refundable tax credits.

assume that Congress intended that those words have the same meaning they have for every other refundable tax credit. *Sorenson*, 475 U.S. at 860.

Thus, Plaintiffs' eligibility, if any, under 26 U.S.C. § 6428 is due to the statutory definition of overpayment of their taxes. *See* 26 U.S.C. § 6401(a)(1). This is true even if the Court agrees with Plaintiffs' contention that the advance refund of the credit is a separate entitlement to the 2020 tax credit; it is still a refund of an overpayment of tax. *See* 26 U.S.C. §§ 6428(b) (providing the CARES Act credit is treated as a refundable credit) and 6401(a)(1)(defining the amount of a refundable credit to be an overpayment of tax). Therefore, Plaintiffs' only remedy is to bring a proper claim for refund under 26 U.S.C. § 7422 for their 2020 tax year, and the availability of such a remedy precludes a cause of action under the APA. *See* 5 U.S.C. § 704; *see also Home Builders Ass'n of Greater Chicago*, 335 F.3d at 614.

v. There Is No Waiver of Sovereign Immunity

It is fundamental that the United States, its agencies, and its employees acting within the scope of their employment cannot be sued without an "unequivocally expressed" statutory waiver of sovereign immunity. *Lane v. Pena*, 518 U.S. 187, 192 (1996); *see also Edwards v. U.S. Dep't of Justice*, 43 F.3d 312, 317 (7th Cir. 1994). Waivers are to be 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). Plaintiff "not only must identify a statute that confers subject matter jurisdiction on the district court but also a federal law that waives the sovereign immunity of the United States to the cause of action." *Macklin v. United States*, 300 F.3d 814, 819 (7th Cir. 2002). Plaintiffs' failure to affirmatively satisfy either requirement requires dismissal of the complaint. *See id.; Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

Plaintiffs have pointed to no waiver of sovereign immunity other than the APA. (ECF No. 19, PageID#: 355). As discussed above, APA review is not available in this case, and therefore, Plaintiffs' claims cannot proceed.

vi. Plaintiffs May Not Proceed Under Section 7422

Despite styling their claim as review under the APA, Plaintiffs are seeking a refund of a deemed overpayment of taxes on account of the CARES Act credit. Thus, their sole remedy for this relief is a properly filed refund suit for their 2020 tax year. Section 7422(a) provides 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 . . . 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." Because a claim for refund on Plaintiffs' 2020 tax return is not possible until the end of the year, Plaintiffs cannot have satisfied this requirements of Section 7422(a).

The statutory and regulatory requirements for refund suits, including the refund of a tax credit, provide several jurisdictional prerequisites that must each be met. Among others, a taxpayer first must file a timely administrative claim with the IRS, *see* 26 U.S.C. §§ 6511(a), 7422(a), and the IRS must deny the claim or fail to act upon it within six months. *See* 26 U.S.C. § 6532(a)(1); 28 U.S.C. §§ 1346(a)(1), 1491; *United States v. Felt & Tarrant Mfg*., 283 U.S. 269, 272 (1931). If a plaintiff fails to exhaust administrative remedies in this manner, the lawsuit must be dismissed. *Nick's Cigarette City, Inc. v. United States*, 531 F.3d 516, 520 (7th Cir. 2008) (procedural requirements of § 7422(a) have "long been considered a jurisdictional prerequisite."); *Gillespie v. United States*, 670 F. App'x 393, 394 (7th Cir. 2016) (holding that whether the requirements of § 7422(a) are jurisdictional or not, a refund suit cannot be maintained if the taxpayer fails to comply with those requirements); *Brest v. Lewis*, 2009 WL

4679649, at *3 (N.D. Ill. Dec. 7, 2009) (barring challenge to withholding of 2008 stimulus act's advance refund because plaintiff failed to exhaust remedies).

Here, Plaintiffs' claims are barred by 26 U.S.C. § 7422 because Plaintiffs have not alleged or provided evidence that they have submitted claims for refund for the 2020 tax year.

vii. Cases Permitting Non-Refund Challenges to the CARES Act Were Wrongly Decided or Are Distinguishable

In three recent cases, federal courts have rejected the United States' argument that a refund action is the only proper venue for challenging the anticipated denial of the CARES Act credit. *See Amador v. Mnuchin*, No. 20-CV ELH-20-1102, 2020 WL 4547950 (D. Md. Aug. 5, 2020); *Doe v. Trump*, No. 820CV00858SVWJEM, 2020 WL 5076999 (C.D. Cal. July 8, 2020); *R.V. v. Mnuchin*, No. 20-CV-1148, 2020 WL 3402300 (D. Md. June 19, 2020). The government respectfully submits that these cases are distinguishable from Plaintiffs' APA challenge.

In *Amador*, the plaintiffs are U.S. citizens that are married to undocumented immigrants who do not have an SSN. *Amador*, 2020 WL 4547950, at *4. The *Amador* plaintiffs challenge the constitutionality of a provision of the CARES Act that requires each filer of joint tax returns to provide an SSN in order to receive the CARES Act credit. *Id.* The court held that a suit for refund under Section 7422 was not an adequate remedy that precluded APA review of the constitutionality of the provision, because filing a proper claim for refund would be an "arduous, expensive, and long process" that was "guaranteed to be an exercise in futility," and that could not provide the plaintiffs with relief based on the statute's plain language. *Id.* at *9. Unlike the present case, where Plaintiffs challenge the IRS's *policy* related to advance refunds, plaintiffs there contended they were *statutorily* barred from receiving a CARES Act credit at all. Further, the court held that the plaintiffs were not seeking the refund of a tax wrongfully collected because they were challenging the constitutionality of the CARES Act's eligibility criteria

(which is not at issue here) rather than seeking damages. *Id.* Here, on the other hand, Plaintiffs do not challenge the statute at all, and plainly seek money damages in Count III.

Doe v. Trump challenges the same provision of the CARES Act. The plaintiff there is a U.S. citizen married to an immigrant without an SSN who filed a joint income tax return, and she challenge her statutory exclusion from an advance refund of the CARES Act credit. *Doe*, 2020 WL 5076999, at *2. The court rejected the defendants' contention that 26 U.S.C. § 7422 provides the plaintiff's sole remedy, finding that plaintiff was simply alleging a constitutional violation – that the plain language of 26 U.S.C. § 7422(g) is an unconstitutional burden on her fundamental right to marriage. *Id.* at *5-*6. Although denying the plaintiff's motion for a temporary restraining order, the court there found that the plaintiff's lawsuit – which did not purport to raise a substantive APA claim – was not subject to dismissal for failure to comply with the exhaustion requirements of Section 7422. *Id.* Again, the *Doe* plaintiff sought declaratory and injunctive relief that a statutory provision was unconstitutional, quite unlike the Plaintiffs in the instant case.

In *R.V. v. Mnuchin*, the plaintiffs are U.S. citizen children whose parents are allegedly ineligible for the CARES Act credit, and their parents are therefore not eligible for the additional $500 credit for a dependent child. *R.V.*, 2020 WL 3402300, at *1. Plaintiffs in *R.V.*, as in this case, seek damages under the Little Tucker Act. *Id.* at *5. But unlike Plaintiffs, the *R.V.* plaintiffs do not purport to assert a claim under the APA at all. Accordingly, that court was not called upon to consider whether a tax refund claim was an adequate remedy that barred APA review. Instead, rejecting the defendants' argument that the government's only waiver of sovereign immunity for that lawsuit was contained in 26 U.S.C. § 7422, the court simply held that "[b]y its plain language, § 7422(a) does not apply here because it is not a suit for any tax,

penalty, or sum wrongfully collected." *Id.* at *7. Although the United States believes this was wrongly decided, it also has no bearing upon Plaintiffs' APA challenge. Whether or not those plaintiffs – who challenge the constitutionality of a statutory provision – must proceed under Section 7422 has no bearing on whether Plaintiffs have an adequate alternative remedy to APA review here.

b. Plaintiffs Have Failed to Satisfy Their Burden for Summary Judgment

In order to prevail on summary judgment, Plaintiffs must show "that that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To support the contention that "a fact cannot be genuinely disputed," Plaintiffs "must support the assertion" by "citing to particular parts of materials in the record, including . . . affidavits or declarations[.]" Fed. R. Civ. P. 56(c)(1)(A). Plaintiffs' motion should be denied because they have failed to establish their burden with competent evidence.

i. Plaintiffs Have Not Supported Their Contentions That They Are Entitled to the CARES Act Credit

Plaintiffs have failed to produce admissible evidence to support their contentions that they satisfy the eligibility requirements to receive an advance refund of the CARES Act credit. Specifically, Plaintiffs' only support for their contention that they satisfied these statutory requirements is in the form of their unsworn declarations, neither of which contains a valid signature. (ECF No. 20, PageID#: 480 and 482). In lieu of a signature, Plaintiffs' declarations have their typed names with a footnote that each "authorized use of his electronic signature." (ECF No. 20, PageID#: 480 and 482). Such declarations plainly do not comply with the requirements of Rule 56(e) or 28 U.S.C. § 1746, and therefore, they cannot be considered as evidence to justify summary judgment. This is fatal to Plaintiffs' motion.

It is well settled that "[a] court must not consider parts of an affidavit that fail to meet the standards of Rule 56(e) when considering summary judgment." *Cooper-Schut v. Visteon Auto. Sys.*, 361 F.3d 421, 429 (7th Cir. 2004). One of the requirements for an affidavit or a declaration is that it contains an original signature of the declarant. *See* 28 U.S.C. § 1746; *see also, e.g., Davis v. Wells Fargo Bank*, 685 F. Supp. 2d 838, 841 (N.D. Ill. 2010) (refusing to consider unsigned declarations submitted in support of summary judgment motion). This Court's General Order 2011-0024, dated April 20, 2017, does not excuse the failure of Plaintiffs to execute admissible declarations. To the contrary, General Order 2011-0024(VIII)(A) states that "[d]ocuments that are electronically filed and require original signatures other than of the E-Filer, *e.g.* affidavits, declarations, must be maintained in paper form by the E-Filer[.]" Because "compliance with 28 U.S.C. § 1746 is mandatory and fundamental, not a 'non-substantive' requirement," *id.* at 842, Plaintiffs have failed to support their contention that either of them satisfied the eligibility requirements for the CARES Act credit, and summary judgment must be denied for that reason alone.

Moreover, neither declaration indicates that either Plaintiff has even seen the declaration or knows the content of the declaration. Indeed, it appears from the declarations that their counsel could not obtain Plaintiffs' signatures because they could not get the declarations to them. (ECF No. 20-16, PageID#: 480). This is not an immaterial point. Defendants ascribe no bad faith to either Plaintiff Taylor or his counsel; however, at least part of his declaration is demonstrably and materially false.[8] As stated above, Plaintiff Taylor was, indeed, issued an advance refund of the CARES Act credit.

[8] It may be that the very mail delays that Plaintiffs' counsel contends prevented Plaintiffs from signing the declarations also delayed Plaintiff Taylor from learning of the fate of his advance refund.

Plaintiffs' attempt to excuse their deficiency with the nearly identical explanation on each declaration that the lack of an actual signature is due to "the limitations on in-person contact visits at the jail, and the slowdowns in mail handling and processing related to the COVID-19 Pandemic," (ECF No. 20 -17, PageID#: 482-483), is unavailing. While Defendants are sympathetic to Plaintiffs' difficulty in reviewing and signing the evidence submitted in support of their motion for partial summary judgment, it is undeniably true that the unsigned, unsworn declarations by which Plaintiffs seek to prove their case-in-chief cannot be considered by the Court. And Plaintiffs' inability to obtain signed declarations is due to an exigency of their own making. Plaintiffs chose to file this motion before Defendants even answered the complaint. Plaintiffs moved for an expedited briefing schedule for this motion (ECF No. 33), and Plaintiffs opposed Defendant's request to stay the briefing of these motions. (ECF No. 52, PageID#: 1108). That this compressed schedule also has prevented Plaintiffs from properly supporting their own motion does not justify reliance on incompetent evidence.

ii. Plaintiffs Have Failed to Establish That the IRS's Conduct Was Arbitrary, Capricious, And Contrary to Law

Plaintiffs also fail to establish as a matter of law that the IRS's conduct violated the APA and make no allegations as to how the IRS's conduct was arbitrary, capricious or contrary to the law. They therefore fail to establish that the IRS's conduct was unlawful under the APA as a matter of law.

An agency action is arbitrary, capricious, or contrary to law only where "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm*

Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). "The APA requires that an agency's decision be set aside only if it is arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence in the case, or not in accordance with the law." *Little Co. of Mary Hosp. v. Sebelius*, 587 F.3d 849, 853 (7th Cir. 2009). In construing the statute, "a reviewing court should accord deference to the interpretation of the agency charged with the administration of the statute. *Edgewater Hosp., Inc. v. Bowen*, 857 F.2d 1123, 1129 (7th Cir. 1988), *amended*, 866 F.2d 228 (7th Cir. 1989).

Preliminarily, Plaintiffs conflate statutory eligibility for the CARES Act credit with the supposed individual right to receive an advance refund "as rapidly as possible." 26 U.S.C. § 6428(f)(3). However, the CARES Act does not provide that every individual eligible for the CARES Act credit is also eligible for an advance refund. As stated above, Section 6428 explicitly recognizes that there are individuals who are eligible for the credit, but who will nevertheless not be issued an advance refund. *See* 26 U.S.C. § 6428(e).

For individuals whose 2019 tax return information is not available, Congress provided that the Secretary of the Treasury "may" use the taxpayer's 2018 tax year or, for individuals for whom the IRS has no 2019 or 2018 tax return information, 2019 Social Security Benefit Statement or 2019 Payments by the Railroad Retirement Board statement to calculate the individual's advance refund. Congress's grant of discretionary authority to implement the purpose of Section 6428, in Section 6428(h) among other authorities, permitted, but did not require the IRS to use the non-filer web portal to identify other individuals that may be entitled to the advance refund. Moreover, Congress expressly contemplated and instructed that, in implementing the purpose of Section 6428, Defendants should take "any such measures as are

deemed appropriate to avoid allowing multiple credits or rebates to a taxpayer." 26 U.S.C. § 6428(h).

Accordingly, Plaintiffs contention, that the statute "leaves no room for dispute" that they are eligible for the advance refund of the CARES Act credit, fails. Plaintiffs do not allege or establish that they filed either a 2018 or 2019 federal income tax return or the IRS otherwise had their return information, nor do they allege or establish that they received a Form SSA-1099 or Form RRB-1099 in 2019. (ECF No. 20-16 PageID#: 479, ¶ 4 and ECF No. 20-17, PageID#: 481, ¶ 4). Plaintiffs fall squarely in the category of individuals that Congress understood would not automatically receive an advance refund of the CARES Act credit.

Accordingly, the only injury that Plaintiffs can arguably assert is that Defendants abused their discretion in exercising their authority to implement the purpose of the statute. Plaintiffs do not contend that the IRS's decision to use the web portal to identify potentially eligible individuals who did not have a 2018 or 2019 income tax filing requirement or receive a 2019 Form SSA-1099 or 2019 Form RRB-1099 was outside the discretionary authority provided by Congress. Indeed, Plaintiffs could not object to this decision because, but for that decision, Plaintiffs would have no basis for complaining that they did not receive an advance refund.

Plaintiffs make no argument, however, as to how Defendants' decisions on implementing the purpose of Section 6428 was arbitrary, capricious, or contrary to the law. They therefore fail to establish that the IRS's conduct was unlawful under the APA as a matter of law.

In any event, on its face, Defendants' decision to limit or discontinue the issuance of the advance refund to incarcerated individuals does not itself indicate that the IRS "relied on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 43. To the contrary, Congress expressly instructed the Secretary to take "any such

measures as are deemed appropriate to avoid allowing multiple credits or rebates to a taxpayer." 26 U.S.C.A. § 6428(h). In exercising its discretionary authority to carry out the purpose of the CARES Act, Defendants made the decision to limit the availability of the advance refund to incarcerated individuals justified by, among other things, concerns about the possibility of fraud. *See* Exhibit 2, ¶ 5. A measure that prevents individuals from fraudulently obtaining multiple credits is on its face squarely within the discretionary authority provided by Congress.

c. In the Alternative, Summary Judgment Is Premature

If the Court finds that there is jurisdiction for this case and that the Plaintiffs have made a prima facie case for summary judgment, then Defendants request that the Court defer considering the motion in order to permit them to file a motion seeking discovery into Plaintiff Galvan's allegations. Pursuant to Rule 56(d) of the Fed. R. Civ. P., the court may defer consideration of a motion for summary judgment if the nonmovant "specifies reasons it cannot present facts essential to justify its opposition."

Defendants agree that Plaintiff Galvan used the IRS non-filers web portal and that the IRS denied Plaintiff Galvan an advance refund because he is incarcerated. However, as set forth in the attached declaration, Defendants cannot currently determine whether Plaintiff Galvan is otherwise eligible for the CARES Act credit. (Exhibit 4 – Declaration of James Strandjord). Without regard to Plaintiff Galvan's status as an incarcerated individual, if he does not satisfy each of the statutory requirements for the CARES Act credit, he is not entitled to an advance refund. Until Defendants have an opportunity to conduct discovery on this issue, they cannot fully respond to Plaintiffs' summary judgment motion.

As stated above, the only evidence Plaintiffs have presented to show that they are entitled to the CARES Act credit are two unsigned declarations that Plaintiffs themselves may not even

have seen or know the content of, and one of which contains at least one materially false statement. Accordingly, should the Court decline to immediately deny this motion, Defendants request the Court defer consideration of this motion for the limited purpose of allowing Defendants to take discovery on this issue.

III. Conclusion

For the reasons set forth above, Defendants respectfully request that the Court deny Plaintiffs' Motion for Partial Summary Judgment, and dismiss Counts I and II of the Complaint or grant summary judgment pursuant to Rule 56(f) of the Fed. R. Civ. P., against Plaintiffs as to Counts I and II. In the alternative, Defendants request that the Court defer consideration of the Motion for Partial Summary Judgment for the limited purpose of permitting Defendants to request and take discovery on Plaintiff Galvan's eligibility for the CARES Act credit.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on this 18th day of September 2020, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all parties that have appeared in this action and are registered to receive service through that system.

/s/ James M. Strandjord
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