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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

JANE DOE, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 8:20-cv-00858-SVW-JEM

Reply to Opposition to Motion to Dismiss (ECF 32); Memorandum of Points and Authorities

Hearing Date: July 13, 2020
Time: 1:30 p.m.
Courtroom: 10A
Location: 350 W. 1st Street
Los Angeles, CA 90012

Hon. Stephen V. Wilson

The United States of America (United States) hereby replies to the June 22, 2020, opposition to motion to dismiss (opposition, ECF 32) filed by plaintiffs Jane Doe and John Doe.

Dated: June 29, 2020

Respectfully submitted,

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## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

The United States demonstrated in its motion to dismiss (ECF 30) that this Court lacks jurisdiction over plaintiffs' claims and that the first amended complaint (ECF 28) fails to state a claim upon which relief can be granted. Plaintiffs' opposition does not address, much less refute, binding authority requiring plaintiffs to seek relief via the tax refund provisions in 26 U.S.C. § 7422. Nor does it distinguish precedent demonstrating that plaintiffs' constitutional claims fail to state a claim upon which relief can be granted. The United States addresses each of plaintiffs' arguments in turn.[1]

## II. ARGUMENT

### A. Plaintiffs ignore binding Supreme Court and Ninth Circuit precedent requiring them to avail themselves of the specific remedy in 26 U.S.C. § 7422

Plaintiffs' opposition (ECF 32 at 10-13) attempts to recast plaintiffs' claims as stand-alone constitutional claims under section 702 of the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq*.[2] Although the Ninth Circuit has allowed constitutional challenges to agency action to proceed under section 702 where neither section 704 of the APA nor any other statute provides for the review of a plaintiff's constitutional claims, this is not such a situation. *See Juliana v. United States*, 947 F.3d 1159, 1167-68 (9th Cir. 2020) (citing *Sierra Club v. Trump*, 929 F.3d 670, 698-99 (9th Cir. 2019) and

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[1] Plaintiffs spend over three pages of their opposition arguing that the Anti-Injunction Act, 26 U.S.C. § 7421, and Declaratory Judgment Act, 28 U.S.C. § 2201(a), do not bar their action. The United States has never contended that either provision applies. Moreover, the conclusion that plaintiffs eventually reach--that the CARES Act credit is a refundable tax credit--is a fundamental premise of the United States' argument.

[2] Plaintiffs' argument on this point is unclear and relies primarily on out-of-circuit cases. Plaintiffs discuss *Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir. 1989) but not the more recent Ninth Circuit cases on this issue.

*Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1170 (9th Cir. 2017)).[3] As explained in the United States' motion (ECF 30 at 14-16) and reiterated below, 26 U.S.C. § 7422 provides plaintiffs their exclusive remedy to obtain the refund of the tax credit they seek.

Plaintiffs' opposition fails to address the Ninth Circuit and Supreme Court precedent cited in the United States' motion which requires plaintiffs to avail themselves of the specific remedy set forth in section 7422. *See City of Oakland v. Lynch*, 798 F.3d 1159, 1165 (9th Cir. 2015) ("It is a 'well-established principle that, in most contexts, a precisely drawn, detailed statute pre-empts more general remedies.'") (quoting *Hinck v. United States*, 550 U.S. 501, 506 (2007)). As the Supreme Court has repeatedly stated, Congress has designated section 7422 (and its predecessor provisions) as the exclusive vehicle to recover tax credits. *See United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 5-8 (2008) (affirming section 7422 as the exclusive vehicle for tax refund claims); *Quarty v. United States*, 170 F.3d 961, 973 (9th Cir. 1999) (dismissing constitutional claim for lack of jurisdiction because plaintiff was required to comply with requirements of section 7422 to raise constitutional claim).

Plaintiffs' contention (ECF 32 at 17) that the CARES Act credit is excepted from the requirements set forth in section 7422 because it is a refundable tax credit, rather than a tax, ignores applicable and binding precedent. As explained in the United States' motion (ECF 30 at 15), refundable credits create a legal fiction that the recipient has overpaid her taxes, thereby entitling her to a refund in an amount corresponding to the constructive overpayment. *See* 26 U.S.C. § 6401(b)(1); *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 864 (1986) (discussing the earned income tax credit). The mechanism to

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[3] The United States does not concede that such a cause of action exists. Indeed, the Supreme Court, in staying the order granting a permanent injunction in *Sierra Club*, held that "the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review . . ." *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (mem.); *but see Sierra Club v. Trump*, -- F.3d --, 2020 WL 3478900, at *9 (9th Cir. June 26, 2020) (noting the Supreme Court's conclusion yet determining that the Sierra Club had a constitutional and *ultra vires* cause of action).

obtain such credits is the refund scheme in section 7422 that Congress crafted. *See Sorenson v. Sec'y of Treasury*, 752 F.2d 1433, 1439 (9th Cir. 1985) (section 7422 requires a claim for a refund or credit to be filed with the IRS); *Oatman v. Dep't of Treasury*, 34 F.3d 787, 789 (9th Cir. 1994) (same); *see also Sarmiento v. United States*, 678 F.3d 147, 151 (2d Cir. 2012) (taxpayers satisfied section 7422's requirements before bringing claim for tax credits under former section 6428).

Although plaintiffs' first amended complaint purports to seek declaratory and injunctive relief, plaintiffs' alleged injury is the denial of a tax credit, and the relief they seek is the issuance of the credit (specifically, as an advance refund). Plaintiffs may not short-circuit the refund scheme crafted by Congress in section 7422 through creative pleading. *See City of Oakland*, 798 F.3d at 1165 ("Permitting parties to file under the APA and circumvent the short deadlines Congress established . . . would make mush of the law."); *see also Hinck* 550 U.S. at 506 (holding a "precisely drawn, detailed statute" in the Internal Revenue Code provided the taxpayer's "exclusive" and "specific" remedy); *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) ("Congress did not intend . . . to duplicate existing procedures for review of agency actions.").

Plaintiffs' opposition does not cite, much less distinguish, the binding precedent in *Clintwood*, *City of Oakland*, *Hinck*, *Quarty*, *Sorenson*,[4] or *Oatman* requiring them to bring their claim to obtain the CARES Act tax credit using section 7422. Instead, it cites only *U.S. Army Corps of Engineers v. Hawkes Co., Inc. (Army Corps)*, 136 S. Ct. 1807 (2016), for the proposition that "the Supreme Court expressly rejected the notion that long, arduous, and expensive litigation is an adequate alternative to an injunction prohibiting agency action." (ECF 32 at 20.) But *Army Corps* is inapposite on that point. There, the Supreme Court reviewed a jurisdictional determination under the Clean Water

[4] Although plaintiffs cite *Sorenson* in the context of the Anti-Injunction and Declaratory Judgment Acts (*see* ECF 32 at 15-16), they fail to mention or address the Ninth Circuit's conclusion that the district court's jurisdiction was premised on section 7422. *See Sorenson*, 752 F.2d at 1439.

Act via a suit brought under section 704 of the APA. It rejected the position that applying for a permit and seeking judicial review if the application was denied constituted an alternative remedy. The permitting procedure itself would have required expenditures of over $100,000 "[a]nd whatever pertinence all this might have to the issuance of a permit, none of it w[ould] alter the finality of the approved [jurisdictional determination], or affect its suitability for judicial review." 136 S. Ct. at 1816. In contrast, the Supreme Court and the Ninth Circuit have long upheld section 7422's jurisdictional requirements and held that taxpayers may not challenge a denial of a tax benefit without first seeking the benefit of the provision, following the refund provisions, and then filing suit, even if the taxpayer is bringing constitutional claims, and even if such an exercise seems futile. *See Clintwood*, 553 U.S. at 11-12 (explaining "Congress has indeed established a detailed refund scheme that subjects complaining taxpayers to various requirements before they can bring suit" which applies even when taxpayers seek to bring a constitutional claim); *Quarty*, 170 F.3d at 973 (requiring section 7422 administrative claim for refund in order to bring constitutional claim even if futile); *see also Sorenson*, 752 F.2d at 1439 (jurisdiction requires a section 7422 claim); *Oatman*, 34 F.3d at 789 (same).

**B. The non-issuance of an advance refund is not final agency action under the APA**

Plaintiffs contend (ECF 32 at 18-19) that the IRS's failure to issue them an advance refund is "final agency action" under the APA. As explained in the United States' motion to dismiss (ECF 30 at 21), "two conditions [must] generally be satisfied for agency action to be 'final' under the APA. First, the action must mark the consummation of the agency's decisionmaking 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." *Army Corps*, 136 S. Ct. at 1813 (quotation and citation omitted).

Plaintiffs' opposition implies that advance refunds are somehow distinct from the CARES Act credit to which they relate. The supposed difference cannot be reconciled with the way that Congress drafted section 6428. The language added to the Internal Revenue Code by Congress in section 6428 creates a credit based on an individual's 2020 adjusted gross income, filing status, and the number of qualifying children claimed on her return. That credit can be issued to an eligible individual in one of three ways: (1) as an advance refund in 2020, (2) as a refundable tax credit claimed on a 2020 tax return, or (3) in part as an advance refund and in part as a refundable tax credit. *See* 26 U.S.C. §§ 6428(a), (e), and (f). If the IRS does not issue an advance refund to an individual who eventually qualifies for a CARES Act credit or issues her an advance refund that is less than the credit for which she eventually qualifies, the individual may claim the remaining credit on her 2020 tax return. *See* 26 U.S.C. § 6428(e)(1). An individual's eligibility for and the amount of the CARES Act credit cannot be determined until the tax year ends and the IRS receives and reviews the individual's 2020 tax return, and there are many instances in which an individual will receive an advance refund that is less than the CARES Act credit for which she eventually qualifies. But because the amount of any advance refund must be reconciled with the amount of any CARES Act credit for which an individual eventually qualifies, *see* 26 U.S.C. § 6428(e), the IRS's issuance or non-issuance of an advance refund is most appropriately characterized as an approximation (based on 2018 or 2019 tax information) of the CARES Act credit an individual will receive. The issuance or non-issuance of an advance refund, then, is not final agency action in any sense.

**C. Plaintiffs do not refute that section 7422 provides an adequate alternative**

In their opposition, plaintiffs contend that claiming the CARES Act credit on their respective 2020 tax returns or an amended 2020 tax return is not an "adequate alternative for challenging" the IRS's alleged denial of an advance refund. (ECF 32 at 19-20).

Plaintiffs contend that they cannot raise their constitutional arguments administratively because doing so would subject them to civil liability under 26 U.S.C. § 6662 or criminal liability under 26 U.S.C. § 7201 or 18 U.S.C. § 287. Plaintiffs are mistaken. None of these provisions apply if, as the United States has suggested, the plaintiffs submit their respective 2020 federal income tax returns using the married filing jointly filing status, timely pay any taxes due for the year, then submit administrative claims for refund requesting a CARES Act credit on the grounds that section 6428(g) is unconstitutional. *See* 26 U.S.C. § 6662(a) (providing that the penalty applies to "underpayments of tax required to be shown on a return"); *Sansone v. United States*, 380 U. S. 343, 351 (1965) ("the elements of § 7201 are will-fulness[,] the existence of a tax deficiency[,] and an affirmative act constituting an evasion or attempted evasion of the tax" ) (citations omitted); 18 U.S.C. § 287 (applying to claims known to be "false, fictitious, or fraudulent").

**D. Plaintiffs lack standing and their claims are not yet ripe for review**

Plaintiffs contend that they have standing and their claims are ripe for review "right now" because they have not received an advance refund (ECF 32 at 20-23) (emphasis removed). As the United States has explained, however, there is no justiciable right to an advance refund in section 6428. And even if there were such a right, the IRS is authorized to issue advance refunds through December 31, 2020. 26 U.S.C. § 6428(f)(3)(A). As such, any injury plaintiffs have suffered from their alleged exclusion from the scheme set forth in section 6428 will be hypothetical, rather than concrete and particularized, until the year ends.

Additionally, as the United States previously explained (ECF 30 at 16), a plaintiff must actually seek a tax benefit in order to have standing to challenge the denial of that benefit as unconstitutional. *See, e.g.*, *Droz v. Commissioner*, 48 F.3d 1120, 1122 & n.1 (9th Cir. 1995). These requirements apply even if plaintiffs believe that performing them would be an exercise in futility. *Quarty*, 170 F.3d at 973. Until plaintiffs file an

administrative claim for refund and are denied a refund of a credit as required by section 7422 they lack standing.

Plaintiffs do not address the binding authority on standing cited in the United States' motion. Instead, they direct the Court's attention to an out-of-circuit district court case, *Freedom from Religion Foundation, Inc. v. Shulman*, 961 F.Supp.2d 947 (W.D. Wisc. 2013), for the proposition that they have suffered an injury in fact. That case is distinguishable.[5] It concerned an equal protection challenge to an ongoing IRS policy prohibiting religious organizations from participating in political campaigns. *Id*. at 951. Assuming that such a religious organization had a right to participate in political campaigns, the alleged prohibition was in effect, and therefore causing harm, when the case was filed.

Here, however, any injury plaintiffs have suffered is hypothetical, rather than concrete and particularized, because section 6428 did not confer a right to an advance refund upon any individual. Instead, a CARES Act credit may be issued in one of three ways: (1) as an advance refund, (2) as a refundable tax credit, or (3) as a combination of the two. The ultimate amount of any credit cannot be determined until the tax year ends and the claimant has selected a filing status on a 2020 tax return. Indeed, as the United States has repeatedly noted, if the facts in the first amended complaint are true, plaintiffs can each qualify for a CARES Act credit by electing to file their respective 2020 tax returns using the married filing separately filing status. Until they have filed their 2020 tax returns and have been denied a tax benefit under section 6428, plaintiffs lack standing.

Plaintiffs argue (ECF 32 at 21) that Congress intended to expedite advance refunds of the CARES Act credit but ignore that the statute itself does not confer on any

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[5] The parties voluntarily dismissed that case before the United States could appeal the district court's flawed standing analysis. In addition, the case is in substantial tension with the Seventh Circuit's later-decided opinion in *Freedom from Religion Found., Inc. v. Lew*, 773 F.3d 815 (7th Cir. 2014). Although cited by the United States (ECF 30 at 14), the Seventh Circuit's opinion goes unmentioned by plaintiffs.

individual the right to an immediate credit. The statute provides that the CARES Act credit can be issued as an advance refund, as a tax credit claimed on a 2020 tax return, or as some combination of the two. And even assuming *arguendo* that the statute confers a right to an advance refund--which it does not--the IRS has until December 31, 2020, to issue such advance refunds.

**E. Plaintiffs fail to state a claim upon which relief can be granted**

1. Plaintiffs fail to state a cognizable constitutional claim based on the right to marry

Plaintiffs' opposition (ECF 32 at 25-28) alleges that the CARES Act infringes upon their fundamental right to marry in violation of both the First and Fifth Amendments but fails to address the binding precedent cited in the United States' motion. And to be sure, plaintiffs do not identify any cases that extend the fundamental right to marry beyond the right to enter into a legally recognized union. As the United States explained (ECF 30 at 24-25), section 6428(g) does not "interfere directly and substantially with the right to marry" because plaintiffs have not been prevented from marrying individuals of their choosing. *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978). Nor does it, as plaintiffs contend, "disproportionately and negatively impact a taxpayer who chooses to marry someone who does not have an SSN" (ECF 32 at 27) because such a taxpayer who otherwise qualifies may claim and receive a CARES Act credit by filing her 2020 tax return using the married filing separately filing status.

Plaintiffs rely on *United States v. Windsor*, 570 U.S. 744 (2013), for the proposition that section 6428(g) is unconstitutional. It is inapposite. *Windsor* concerned the Defense of Marriage Act's exclusion of same-sex spouses from receiving federal estate tax benefits that were afforded to individuals in opposite-sex marriages. No such exclusion is at issue here. Indeed, plaintiffs are not excluded from CARES Act tax credits at all because they can, assuming the allegations in the first amended complaint are true, receive a CARES Act credit by electing to file their respective 2020 federal

income tax returns using the married filing separately filing status. Moreover, the Court in *Windsor* confirmed "that Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges." *Id*. at 764.

In sum, section 6428(g) distinguishes between individuals who file using the married filing jointly filing status and those who file using the married filing separately filing status if they are married to individuals without social security numbers. Similar distinctions in the Tax Code have been consistently upheld as constitutional.

2. Plaintiffs fail to state a cognizable constitutional claim regarding discrimination based on their spouses' alienage

Plaintiffs' opposition (ECF 32 at 28-30) frames their alienage claim as an allegation that section 6428 violates the Fourteenth Amendment's equal protection provisions by discriminating against citizens based on their marriage to non-citizens. Plaintiffs invoke *Graham v. Richardson*, 403 U.S. 365, 372 (1971), for the proposition that section 6428 is subject to strict scrutiny, but as the United States explained in its motion (ECF 30 at 28), that case dealt with a state classification based on alienage, not a federal one. Federal distinctions based on alienage are subject only to rational basis review. *See id*. at 376-77; *Mathews v. Diaz*, 426 U.S. 67, 81-85 (1976).

Plaintiffs cite no apposite authority for the proposition that section 6428(g) should be subjected to strict scrutiny. That is not surprising because, as the United States explained in its motion (ECF 30 at 27-28), the Tax Code contains a number of provisions which treat U.S. citizens married to non-citizens differently than U.S. citizens married to U.S. citizens. These provisions have consistently passed constitutional muster. *See Hofstetter v. Commissioner*, 98 T.C. 695, 701–02 (1992) (rejecting constitutional challenge to Code provision that prevented taxpayer from filing a joint return, thus denying him exemptions to which he would have otherwise been entitled because of his spouse's alienage); *Schinasi v. Commissioner*, 53 T.C. 382, 384 (1969) (holding that 26 U.S.C. § 6013(a)(1) was reasonable and did not violate the Constitution in precluding

individuals married to individuals who were nonresident aliens for any part of the taxable year from filing joint federal tax returns). To be sure, the distinctions in section 6248 that require plaintiffs to choose the married filing separately filing status in order to obtain a CARES Act credit also pass rational basis review.

## III. CONCLUSION

For the reasons stated in the United States' motion and this reply, plaintiffs' action should be dismissed because this Court lacks jurisdiction over plaintiffs' claims and because the first amended complaint fails to state a claim upon which relief can be granted.

Dated: June 29, 2020

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