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

JOHN DOE, Plaintiff, v. DONALD J. TRUMP, ET AL., Defendants.	)	Case No. 1:20-CV-2531

UNITED STATES' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION AND/OR DECLARATORY JUDGMENT

Defendant United States of America, named and sued as Donald J. Trump, in his individual and official capacity as President of the United States; Mitch McConnell, in his individual and official capacity as a Senator and Sponsor of S. 3548 CARES Act; Steven Mnuchin, in his individual and official capacity as the Secretary of the U.S. Department of Treasury; Charles Rettig, in his individual and official capacity as U.S. Commissioner of Internal Revenue; U.S. Department of the Treasury; the U.S. Internal Revenue Service, and the United States of America (collectively "Defendant" or "Government"), submits this memorandum in opposition to Plaintiff's motion for a temporary restraining order (Dkt. 13).

Respectfully submitted,

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Table of Contents

Table of Authorities

Cases

Statutes

Rules

Regulations and Other Authorities

John Doe attempts to invalidate certain eligibility requirements for the refundable tax credit provision within the recently enacted Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"). He seeks an extraordinary temporary restraining order ("TRO") that would judicially rewrite the Act, prevent Congress from passing certain amendments to it or approving similar legislation, and require Congress to appropriate or escrow funds for individuals who were excluded from the Act's refundable tax credit. *See* Dkt. 13.

Doe's motion should be denied. *First*, he cannot establish a likelihood of success on the merits. The Court has no jurisdiction to consider his underlying claims. He also fails to state a claim that the CARES Act violates the right to marriage or the First Amendment, or that it creates an impermissible classification based on alienage. Significantly, since 1996, Congress has included nearly-identical eligibility requirements in other tax statutes. *Second*, Doe will not suffer irreparable injury before his claims are considered, because monetary relief would remedy his alleged harm if he prevails. *Finally*, he has non-equitable remedies because he can claim a credit under the CARES ACT by filing his tax return separately from his wife, or file a tax refund suit under 26 U.S.C. § 7422.

BACKGROUND

1. 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 coronavirus pandemic, Congress passed the bipartisan 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 by the addition of 26 U.S.C. § 6428 (the "CARES Act credit") to the Internal Revenue Code. 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 $1,200, or $2,400 in the case of eligible individuals filing a joint return, and $500 per qualifying child. *See id*. The CARES Act credit is treated as an overpayment of a taxpayer's income tax liability. *See id.* §§ 6428(a), (e), (f).

To expedite the economic stimulus and provide relief to eligible taxpayers, the CARES Act credit is implemented, in part, through advance refunds, also referred to as economic impact payments. Section 6428(f) provides that an eligible individual may receive an advance refund of the CARES Act credit during 2020. Each eligible individual is treated as having made a payment against his or her 2019 federal income tax liability. This treatment enables the IRS to issue an advance refund of the CARES Act credit.

Section 6428(f)(5) allows the Secretary of the Treasury to compute and make advance payment of the CARES Act credit based on the 2018 tax return for individuals who have not filed their 2019 income tax returns. Section 6428(f)(3)(A) provides that advance payments are to be made "as rapidly as possible,"[1] but does not confer upon eligible individuals any justiciable right to payment of an advance refund. Nor does the Act confer any right to receive an advance

[1] The IRS processed CARES Act credits worth more than $200 billion to approximately 130 million individuals in the program's first four weeks. *See https://www.irs.gov/newsroom /treasury-irs-release-latest-state-by-state-economic-impact-payment-figures.*

refund at a particular time or in a particular manner. Many eligible individuals have not yet received an advance refund or have received a different amount than they expected. *See https://www.irs.gov/newsroom/why-the-economic-impact-payment-amount-could-be-different-than-anticipated.* Some taxpayers will have to wait until they file their 2020 tax return in 2021 to claim and receive the credit or an additional amount. *See https://www.irs.gov/newsroom/va-ssi-recipients-with-eligible-children-need-to-act-by-may-5-to-quickly-add-money-to-their-automatic-economic-impact-payment-plus-500-push-continues*. If the IRS does not issue an advance refund to an individual who is eligible for the CARES Act credit, there is no statutory mechanism to compel advance payment. The statute provides that any advance refund will be reconciled with the CARES Act credit reported on the taxpayer's 2020 tax return next year. *See* 26 U.S.C. §§ 6428(e).

c. Eligibility for the CARES Act credit

Not every taxpayer is entitled to a CARES Act credit. The credit is limited based upon a taxpayer's adjusted gross income, phasing out for joint tax return filers with an adjusted gross income over $150,000, head of household filers with an adjusted gross income over $112,500, and all other filers with an adjusted gross income over $75,000. *See* 26 U.S.C. § 6428(c).

The CARES Act credit is available only to a statutorily-defined "eligible individual." Section 6428(d) defines an eligible individual as any individual other than (1) a nonresident alien individual, (2) an individual for whom a dependent deduction is allowable to another taxpayer, or (3) an estate or trust. Plaintiff does not challenge this provision. Rather, he challenges section 6428(g) which, in relevant part, disallows a credit to an eligible individual who does not include on his or her tax return valid identification numbers for the taxpayer, his or her spouse (if filing a joint return), and any qualifying child claimed on the return. *See* 26 U.S.C. § 6428(g)(1).

A "valid identification number" is defined as a social security number ("SSN") or, in the case of a qualifying child who was adopted or lawfully placed for legal adoption, his or her adoption taxpayer identification number. *See* 26 U.S.C. § 6428(g)(2). The SSN limitation of section 6428(g)(1)(B) does not apply if at least one spouse was a member of the Armed Forces of the United States during the taxable year and at least one spouse provides a valid identification number. *See* 26 U.S.C. § 6428(g)(3). Section 6428(g) allows an otherwise eligible U.S. Citizen married to a spouse without a valid SSN to file a separate return and obtain the credit.

2. Other Eligibility Limitations Based on Social Security Number

The CARES Act's eligibility and SSN restrictions are not unique. Changes to the Internal Revenue Code included in the Economic Stimulus Act of 2008, Pub. L. No. 110-185, 122 Stat. 613 (Feb. 13, 2008) (the "ESA"), and 1996 amendments to the Earned Income Tax Credit, 26 U.S.C. § 32 (the "EITC"), used similar language to limit tax credits to those who provide SSNs on their income tax return. Moreover, provisions of the Code have long distinguished between taxpayers on the basis of marital status and alienage.

a. Economic Stimulus Act of 2008 ("ESA")

Facing a worldwide recession, another Congress passed, and President signed, the ESA, which included a substantially-similar provision, entitled "2008 recovery rebates for individuals," that created tax credits paid as an advance rebate to eligible individuals.

Like the CARES Act, the ESA amended 26 U.S.C. § 6428 to create a refundable tax credit intended to deliver fiscal stimulus to the economy and provide prompt relief to taxpayers in challenging times. There, as here, the value of the credit was reduced by any advance refund, which was treated as a constructive overpayment of tax. *See Sarmiento v. United States,* 678 F.3d 147, 155-56 (2d Cir. 2012) (explaining mechanism of advance refund of the ESA's recovery rebate credit). The statute directed that "any refund or credit should be made 'as

rapidly as possible[.]'" *Id.* at 151 (quoting prior version of 26 U.S.C. § 6428(g)(3)). Most, but not all, eligible taxpayers received the credit in the form of an advance rebate through a paper check from the IRS. The credit then was reported on the taxpayer's 2008 Form 1040 during the 2009 tax filing season. Eligible individuals who did not receive the advance rebate could claim the credit on their 2008 income tax returns.

The ESA's recovery rebate credit provision included the same eligibility limitation challenged in this lawsuit. It defined an eligible individual as anyone other than (1) a nonresident alien, (2) an estate or trust, or (3) a dependent. 26 U.S.C. § 6428(e)(3) (2008). Like the CARES Act, the ESA provided that no credit was allowed for an individual who did not include a valid identification number on his or her tax return. *Id.* § 6428(h) (2008). In the case of a joint return that did not include valid identification numbers for both spouses, no credit was allowed.[2] *Id.* § 6428(h)(1)(B) (2008). A qualifying child was taken into account in determining the amount of the ESA's tax credit only if a valid identification number for the child was included on the return. *Id.* § 6428(h)(1)(C) (2008). Valid identification number was defined as a social security number. *Id.* § 6428(h)(2) (2008). As here, a U.S. Citizen filing a joint return with a non-SSN holder was not eligible for the ESA's recovery rebate credit.

b. Earned Income Tax Credit

Since at least 1996, the Internal Revenue Code has limited certain federal tax credits to taxpayers filing joint returns who each provide SSNs. Like the CARES Act credit, the EITC[3] is

[2] Congress later amended section 6428(h) to provide that the identification number requirement in the ESA did not apply to joint returns where at least one spouse is a member of the U.S. Armed Forces at any time during the taxable year. The CARES Act has a similar exception.

[3] The EITC is one of the federal government's largest benefit programs for workers, greatly reducing poverty for low- to moderate-income individuals and couples, particularly those with children.

a refundable tax credit that is not available to "nonresident aliens." 26 U.S.C. § 32(c)(1)(D). In 1996, Congress disallowed the EITC for any eligible individual who does not include on his or her income tax return an SSN for the taxpayer, and, if the taxpayer is married, the SSN of the taxpayer's spouse. *Id.* §§ 32(c)(1)(E), (m). Taxpayers also must provide SSNs for any qualifying children to claim the EITC. *Id.* §§ 32(c)(3)(D), (m).

c. Other Limitations Based on Marital Status, Alienage, and SSN

Various Internal Revenue Code provisions make similar distinctions based on filing status, marital status, citizenship or alienage, and whether an individual includes SSNs on her tax return. For example, due to the different tax rates set forth in 26 U.S.C. § 1, the amount of tax owed by a dual-income married couple can be greater than the combined tax owed by each member of the couple if they had not married. This differential treatment, sometimes referred to as the "marriage penalty," has survived constitutional challenge. *See infra* at 21-23.

In addition, since 2017, the Child Tax Credit ("CTC") has required a taxpayer to include a child's SSN on a tax return. From 2018 through 2025, the Code permits the full CTC only to a taxpayer who includes his or her child's SSN. *See* 26 U.S.C. § 24(h)(7). The CTC also implicates marital status, as it phases out past certain income thresholds which are different for unmarried individuals, married couples filing jointly, and married couples filing separately. 26 U.S.C. § 24(b)(2).

3. The Complaint[4] and Motion for Preliminary Injunction

Doe challenges 26 U.S.C. § 6428(g)(1)(B),[5] which denies a CARES Act credit to an

[4] Doe has not established proper service under Fed. R. Civ. P. 4(i). *See* Dkt. 12.

[5] The Second Amended Complaint and motion for a temporary restraining order both inadvertently purport to challenge § 6428(h).

eligible individual who does not include each spouse's SSN on a jointly-filed tax return. Doe[6] alleges he is statutorily-ineligible for a CARES Act credit. Dkt. 20, ¶¶26-27. He contends that: (1) he is a U.S. citizen who has an adjusted gross income of less than $75,000; (2) his children are U.S. citizens; (3) he files joint tax returns with his wife; (4) his wife does not have an SSN; and (5) neither spouse is a member of the military. *Id*. On behalf of himself and a purported class of similarly situated individuals, Doe claims 26 U.S.C. § 6428(g)(1) violates his First, Fifth, and Fourteenth Amendment rights; specifically, section 6428(g)(1) allegedly violates his "procedural and substantive due process rights," Dkt. 20, ¶39; deprives him of his "rights, privileges and immunities secured by the Constitution of the United States," *id.*; violates his "constitutional property interest rights individually and as a taxpayer," *id.*, ¶40; and burdens "the right of association, the right to due process of law, the right to equal protection under the law, and the penumbra of privacy rights created by the First, Third, Fourth, and Fifth Amendments that creates a fundamental right to marriage," *id.*, ¶41. He contends he has been denied equal protection "based solely on whom he chose to marry." *Id.*

Doe seeks virtually identical relief in his complaint and motion for temporary restraining order. *Compare* Dkt. 20, ¶¶16-18 *with* Dkt. 13 at 27-29. In both, he requests an order certifying a class; an injunction prohibiting the United States from enforcing the CARES Act as it was drafted and requiring the Court to re-write the law; and an order compelling the government to escrow or otherwise appropriate funds sufficient to issue advance refunds of the CARES Act credit to Doe and the putative class. *Id.* He also seeks various declaratory relief, including a declaratory judgment that section 6428(g)(1) is unconstitutional. *Id.* Doe does not request

[6] Doe has not requested leave, or established the exceptional circumstances required, to proceed anonymously. *Doe v. Village of Deerfield*, 819 F.3d 372, 376-77 (7th Cir. 2016) (citing cases).

money damages or otherwise demand immediate payment of an advance refund of the CARES Act credit in either his complaint or preliminary injunction motion.

ARGUMENT

I. Legal Standard for a Preliminary Injunction

The purpose of a preliminary injunction is to preserve the relative positions of the parties until the merits of a case are decided. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). A preliminary injunction is an equitable, interlocutory form of relief; it is "'an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it.'" *Roland Mach. Co. v. Dresser Indus., Inc.,* 749 F.2d 380, 389 (7th Cir. 1984) (quotation omitted). It should not be issued "'unless the movant, *by a clear showing*, carries the burden of persuasion.'" *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original) (quotation omitted).

The standard for issuing a temporary restraining order is identical to that for a preliminary injunction. *See, e.g., Long v. Bd. of Educ., Dist. 128*, 167 F. Supp. 2d 988, 990 (N.D. Ill. 2001). A plaintiff must clearly establish a likelihood of succeed on the merits, irreparable harm absent a TRO, the balance of equities tips in his favor, and that an injunction is in the public interest. *Winter v. Nat. Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008). A trial court's analysis proceeds in two distinct phases: threshold and balancing. *Valencia v. City of Springfield, Ill.*, 883 F.3d 959, 965 (7th Cir. 2018) (quoting *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1085-86 (7th Cir. 2008)).

To survive the threshold phase, a movant must show that (1) absent a TRO, she will suffer irreparable harm prior to final resolution of her claim; (2) traditional legal remedies would be inadequate; and (3) her claim has some likelihood of succeeding on the merits. *Id.* If the court determines the moving party has failed to demonstrate any of these thresholds, it must deny

the motion. *Girl Scouts*, 549 F.3d at 1086. If the movant satisfies her initial burden, the court attempts to minimize the cost of potential error by balancing the nature and degree of her alleged injury with the possible harm to the defendant if the TRO is granted, taking into account the public interest. *Id.*

II. Plaintiff Cannot Establish a Likelihood of Success on the Merits.

Plaintiff's motion should be denied because he has no likelihood of success on the merits. Because he has a statutory refund remedy, the Court lacks jurisdiction. In addition, he has no standing to challenge the statute here. The complaint also fails to state a claim for relief.

A. This Court does not have subject matter jurisdiction over Plaintiff's claims.

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 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). Plaintiff's 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).

The CARES Act itself does not contain any jurisdictional grant or waiver of sovereign immunity. *See* Pub. L. No. 116-136. In his complaint, Plaintiff alleges jurisdiction pursuant to 28 U.S.C. § 1331 ("Federal Question Statute") and 28 U.S.C. § 1367 ("Supplemental Jurisdiction

Statute"). *See* Dkt. 20, ¶¶12, 14. He also appears to contend that the named defendants, in their individual capacities, violated his constitutional rights under color of federal law, pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics*, 403 U.S. 388 (1971). *See* Dkt. 20, ¶¶ 41, 46 (citing 42 U.S.C. § 1983). He raises constitutional challenges to the CARES Act, which might be considered an attempt to invoke the sovereign immunity waiver contained in the Administrative Procedure Act, codified at 5 U.S.C. § 702 (the "APA"). None of these statutes, however, waive sovereign immunity for this lawsuit, because Plaintiff must bring his challenge to the CARES Act through a properly-filed tax refund suit pursuant to 26 U.S.C. § 7422. Accordingly, the Court has no jurisdiction over this lawsuit.

1. 28 U.S.C. §§ 1331, 1367, and 2201 do not confer jurisdiction.

The jurisdictional statutes cited by Plaintiff do not provide the unequivocally expressed waiver of sovereign immunity necessary to proceed against the Government. "No citation is needed to reject [the] suggestion that 28 U.S.C. § 1331 waives sovereign immunity. It merely gives the district court jurisdiction to hear federal claims not otherwise barred." *Arvanis v. Noslo Eng'g Consultants, Inc.,* 739 F.2d 1287, 1290 (7th Cir. 1984).

The Supplemental Jurisdiction Statute does not confer jurisdiction or act as a waiver of sovereign immunity. *First*, Plaintiff fails to establish how the Court has *original* jurisdiction over any of his claims such that supplemental jurisdiction is appropriate to consider. *Goldberg v. United States*, 2019 WL 1317741, at *2 (N.D. Ill. Mar. 22, 2019). *Second*, "'§ 1367(a) cannot be used to waive sovereign immunity unless specifically allowed by Congress.'" *Goldberg*, 2019 WL 1317741, at *2 (quoting *Palmer v. Comm'r*, 62 F. App'x 682, 685 (7th Cir. 2003)). Section 1367(a) does not act as a waiver of sovereign immunity sufficient to permit this – or any – lawsuit against the United States.

Any attempt to assert claims under the Declaratory Judgment Act, 28 U.S.C. § 2201

("DJA"), also fails to establish jurisdiction or overcome sovereign immunity. The DJA "does not enlarge the jurisdiction of the federal courts; it is procedural only." *Vaden v. Discover Bank*, 556 U.S. 49, 70 n.19 (2009); *see also Villars v. Kubiatowski,* 2017 WL 4269008, at *12 (N.D. Ill. Sept. 26, 2017) (citing *Balistrieri v. United States,* 303 F.2d 617, 619 (7th Cir. 1962)). District courts in this circuit have consistently held that the DJA does not include a waiver of the federal government's sovereign immunity. *Hoelscher v. United States*, 2018 WL 3466936, at *2 n.1 (W.D. Wis. July 18, 2018) (citing cases).

2. Plaintiff may only proceed through a 26 U.S.C. § 7422 refund suit.

Under section 7422(a), a taxpayer may sue the United States for a refund of any tax unlawfully assessed or collected. Section 7422(a) contains the *only* specific waiver of sovereign immunity permitting an individual to challenge the denial of a refundable tax credit, like the CARES Act credit. *See United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 5-8 (2008); *see also Sarmiento*, 678 F.3d at 151 (taxpayer's suit for refund of the ESA's tax credit considered after plaintiff "filed an administrative claim with the IRS under section 7422 seeking to recover the withheld" funds). It is also the proper vehicle to raise a constitutional challenge to the denial of a refund or credit. *See id.* at 9-10.

Congress expressly limited the circumstances under which jurisdiction lies for tax refund suits. Congress has created a carefully articulated, comprehensive administrative scheme to challenge the denial of a refund or credit. As the Supreme Court has emphasized, a tax refund suit can be brought only if certain jurisdictional prerequisites have been fully met. *See Clintwood,* 553 U.S. at 5-8; *United States v. Dalm,* 494 U.S. 596 (1990); *Goldberg v. United States,* 881 F.3d 529, 533 (7th Cir.), *cert. denied,* 138 S. Ct. 1564 (2018); *see also John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008) (explaining that statutes designed "to

achieve a broader-system related goal," such as "limiting the scope" of the waiver of "sovereign immunity," are "jurisdictional") (citing *Dalm*). The administrative exhaustion requirement applies to all refund suits, including claims that provisions of the Internal Revenue Code violate the Constitution. *See Clintwood*, 553 U.S. at 9.

In order to bring a federal lawsuit under section 7422, 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). *See* 28 U.S.C. §§ 1346(a)(1), 1491; *United States v. Felt & Tarrant Mfg.,* 283 U.S. 269, 272 (1931); *Greene-Thapedi v. United States,* 549 F.3d 530, 532 (7th Cir. 2008). If a plaintiff fails to exhaust administrative remedies in this manner, her lawsuit must be dismissed for lack of jurisdiction. *Greene-Thapedi*, 549 F.3d at 532; *see also Hefti v. I.R.S.*, 8 F.3d 1169, 1174 (7th Cir. 1993).

When considering a challenge to advance refund criteria under the 2008 ESA, this Court required administrative exhaustion to establish a waiver of sovereign immunity sufficient for subject matter jurisdiction. *See Brest v. Lewis*, 2009 WL 4679649, at *3 (N.D. Ill. Dec. 7, 2009) (court lacked jurisdiction to consider challenge to withholding of ESA advance refund payment because plaintiff failed to exhaust administrative remedies); *see also Fatani v. I.R.S.,* 2009 WL 763059, at *1 (D. Utah Mar. 23, 2009) (same).

Plaintiff's constitutional challenge to the CARES Act credit is subject to these jurisdictional requirements. *See Clintwood*, 553 U.S. at 4. Thus, Plaintiff may challenge his alleged ineligibility for the CARES Act credit *only* by a section 7422 refund action, filed after he exhausts administrative remedies, which he has not done. Plaintiff may submit a joint 2020 tax return after December 31, 2020 and file an administrative claim with the IRS alleging that he is entitled to the credit because section 6428(g) is unconstitutional. Until he does so, the Court is

without jurisdiction to consider his suit, and it must be dismissed.

3. The Court does not have jurisdiction under the APA.

The APA supplies a right to seek judicial review of federal agency action and waives sovereign immunity for lawsuits seeking declaratory and injunctive relief.[7] *See* 5 U.S.C. § 702; *see also Michigan v. U.S. Army Corps of Eng'rs,* 667 F.3d 765, 774 (7th Cir. 2011). However, review of agency action under the APA is permitted only where "there is no other adequate remedy in a court." 5 U.S.C. § 704. Thus, determining whether jurisdiction exists under the APA requires an inquiry into whether other provisions allow a cause of action to remedy the plaintiff's alleged injury. *See U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) ("agency action is reviewable under the APA only if there are no adequate alternatives to APA review in court").

Here, the existence of judicial review under section 7422 precludes jurisdiction under the APA. Congress specifically waived sovereign immunity and authorized a cause of action for a taxpayer to challenge the denial of a tax credit under section 7422. This Court thus has long recognized "a clear congressional intent to preclude judicial review of taxpayer challenges under the APA." *Hall v. United States*, 1983 WL 1583, at *3 (N.D. Ill. Feb. 24, 1983); *see also Petit v. I.R.S.,* 1983 WL 1612, at *1 (N.D. Ill. May 12, 1983). Because Plaintiff has a refund remedy, his claims do not fall within the APA's immunity waiver. *See Clintwood*, 553 U.S. at 8-12; *Bowen v. Massachusetts,* 487 U.S. 879, 903 (1988) ("Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action.").

[7] To the extent that Plaintiff's claim is construed as an attempt to restrain the assessment and collection of tax, it would be barred by the Anti-Injunction Act and Declaratory Judgment Act. *See Wiemerslage v. United States*, 838 F.2d 899, 901 n.4 (7th Cir. 1988).

4. A damages remedy under *Bivens* is not available.

The Court also lacks jurisdiction to consider a *Bivens*-type civil rights claim against the United States or the named defendants. The United States has not waived sovereign immunity with regard to alleged civil rights or constitutional violations, such as the right to due process. *See F.D.I.C. v. Meyer,* 510 U.S. 471, 485 (1994); *Carlson v. Green,* 446 U.S. 14, 21 (1980). A *Bivens* action, alleging the violation of constitutional rights under color of federal law, can be maintained against a federal officer in his or her individual capacity only; it cannot be brought against the United States, federal agencies, or an officer in his or her official capacity. *Meyer,* 510 U.S. at 485; *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (a suit against a federal official in an official capacity is a suit against the United States). Naming individual government officials as defendants does not allow a plaintiff to avoid the bar of sovereign immunity. *See*, *e.g.*, *Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682, 688 (1949).

To the extent Plaintiff seeks to hold the individual named defendants personally liable for carrying out their legislative or executive duties in enacting or administering the CARES Act, they are absolutely immune from suit. *See Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

Moreover, a *Bivens* remedy is not available. Doe's claims are unlike prior *Bivens* claims approved by the Supreme Court, so they require a special factors analysis. *See Ziglar v. Abbasi*, — U.S. —, 137 S. Ct. 1843, 1860 (2017). The exclusive, comprehensive administrative scheme created to resolve tax-related disputes, which culminates in a section 7422 lawsuit, precludes a *Bivens* action for damages. *See Haas v. Schalow*, 172 F.3d 53 (table), 1998 WL 904727, at *3 (7th Cir. 1998); *see also Cameron v. IRS*, 773 F.2d 126, 129 (7th Cir. 1985).

B. Plaintiff does not have standing to bring this lawsuit.

Federal courts may decide only actual cases or controversies. *Daimler-Chrysler Corp. v.*

Cuno, 547 U.S. 332, 341 (2006). "One element of the case-or-controversy requirement" is that plaintiffs "must establish that they have standing to sue." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). The "'standing inquiry has been especially rigorous when reaching the merits of the dispute would force [a court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (quoting *Raines*, 521 U.S. at 819-20).

Standing has three elements: (1) plaintiffs must have suffered an injury in fact which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of such that the injury is fairly traceable to the challenged action of the defendant; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations and quotation marks omitted). A "threatened injury must be *certainly impending* to constitute injury in fact," and "'[a]llegations of *possible* future injury' are not sufficient." *Clapper,* 568 U.S. at 410 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)) (emphasis added).

1. Plaintiff has not been denied the CARES Act credit.

The ripeness doctrine, like the requirement that an injury-in-fact is "certainly impending," is intended to avoid "premature adjudication" and to postpone judicial review until "an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967) *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Where agency action offers a benefit or establishes criteria for dispensing benefits, courts generally have concluded that a plaintiff's application for benefits must be denied before a claim is ripe for review. *See Nat'l*

Park Hosp. Ass'n v. Dep't of Interior, 538 U.S. 803, 809 (2003); *Reno v. Catholic Soc. Servs., Inc*., 509 U.S. 43, 57-59 (1993). And courts have been particularly reluctant to find jurisdiction for a specific pre-enforcement challenge where (as in the tax refund context) a statutory scheme creates a separate process for review. *See, e.g., Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207-09 (1994). As shown above, Plaintiff has not pursued the statutory review process by filing an administrative claim, as required to permit jurisdiction over a section 7422 refund suit.

Although his economic circumstances are serious, Plaintiff has not established that his claim is ripe and that any injury by the Government is "certainly impending," "actual or imminent," or "concrete and particularized." He alleges that the denial of a tax credit violates his constitutional rights. However, the CARES Act credit is a refundable tax credit toward eligible individuals' 2020 income taxes. The CARES Act does not provide the right to immediate payment of an advance refund – even if it is re-written as Plaintiff requests. Since tax year 2020 is not complete, he cannot yet claim the CARES Act credit on his income tax return. Plaintiff also has not otherwise requested a CARES Act credit and had his administrative claim denied. Thus, any alleged injury has yet to occur.

Nor can plaintiff claim that seeking administrative review is futile because he is allegedly statutorily ineligible for the tax credit. The Seventh Circuit rejected a similar argument in *Freedom from Religion Foundation*. There, plaintiffs challenged the constitutionality of 26 U.S.C. § 107, the "Parsonage Exemption." *Freedom from Religion Found., Inc. v. Lew*, 773 F.3d 815, 818 (7th Cir. 2014). Although seeking and being denied the exemption was a formality – since plaintiffs were not "ministers of the gospel" eligible for the exemption – the Seventh Circuit held that, "[o]nly a person that has been denied such a benefit can be deemed to have suffered a cognizable injury." *Id.* at 825. Thus, the Court found that the plaintiffs suffered no

injury and lacked standing to challenge the constitutionality of the Parsonage Exemption. *Id.*

Here, as in *Freedom from Religion Foundation*, Plaintiff must request, and be denied, the CARES Act credit in order to challenge the constitutionality of section 6428. *Id.*; *see also Gaylor v. Mnuchin*, 919 F.3d 420, 425 (7th Cir. 2019) (plaintiffs had standing to challenge the constitutionality of a Code provision since they had "personally claimed and been denied the exemption" after complying with section 7422); *Black Bear Sports Group, Inc. v. Amateur Hockey Ass'n of Ill., Inc.*, 2019 WL 2060934, at *6 (N.D. Ill. May 9, 2019) (dismissing lawsuit for lack of standing partially because "Black Bear has alleged neither that it applied for approval of its additional ice arrangement nor that such an application was rejected.").

Plaintiff needs to assert a proper claim for a CARES Act credit. Since he has not done so, he lacks standing and his suit is not ripe.

2. Plaintiff may be, or may become, eligible for a CARES Act credit.

Plaintiff's alleged injury-in-fact also is conjectural at this time and may not occur, requiring the Court to speculate on a future injury. *See Whitmore*, 495 U.S. at 158-59. Plaintiff may still qualify for the CARES Act credit. For example, he can elect to file a 2019 tax return by July 15, 2020, or a 2020 tax return after December 31, 2020, under the status "married filing separately." *See* Dkt. 13-1, ¶4 (Doe affirms that his wife used her ITIN "in 2018"). If his last-filed return includes the status "married filing separately," he might be entitled to the CARES Act credit. He also may be eligible if he or his wife join the Armed Forces on or before December 31, 2020, or his wife obtains a social security number before they timely file a 2020 joint return. *See id.*, ¶3 (Doe affirms that his wife is in the process of obtaining permanent residency); 26 U.S.C. § 6428(g)(2)(A) (citing 26 U.S.C. § 24(h)(7)).

C. Plaintiff has not raised a valid constitutional claim.

Plaintiff also cannot establish that he is likely to succeed on the merits of his underlying claim that the CARES Act is unconstitutional.

1. Reasonable basis review applies to tax statutes.

The CARES Act, like all other federal statutes, is presumed to be valid. *INS v. Chadha*, 462 U.S. 919, 944 (1983). "Its wisdom is not the concern of the courts; if a challenged action does not violate the Constitution, it must be sustained[.]" *Id.* "'[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 567 U.S. 519, 563 (2012) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

"The equal protection obligation imposed by the Due Process Clause of the Fifth Amendment is not an obligation to provide the best governance possible;" it only requires that legislation "classify the persons it affects in a manner rationally related to legitimate governmental objectives." *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *City of Chicago v. Shalala*, 189 F.3d 598, 605-09 (7th Cir. 1999) (upholding federal statute that denied food stamps, supplemental security income, and other public benefits to certain aliens); *Griffin v. Richardson*, 346 F. Supp. 1226, 1234 (D. Md. 1972) (applying rational basis analysis to void statutory distinction based on "illegitimate" status). "If the classification has some 'reasonable basis' it does not offend the Constitution simply because [it] 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (quoting *Lindsley v. Natural Carbonic Gas Co*., 220 U.S. 61, 78 (1911)).

The Supreme Court has acknowledged that federal courts lack of expertise in the "complex arena" of fiscal policy. *See San Antonio Ind. Sch. District v. Rodriguez*, 411 U.S. 1,

40-42 (1973)). Thus, "'[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes,'" even in constitutional cases, and courts must give "substantial deference" to a legislative "judgment" regarding a "tax" provision that is challenged under the constitution. *Mueller v. Allen*, 463 U.S. 388, 396 (1983) (quotation omitted); *see Regan v. Taxation With Representation*, 461 U.S. 540, 547 (1983) (rejecting an equal protection challenge to a federal tax classification).

"No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact." *Rodriguez*, 411 U.S. at 41. "In such a complex arena in which no perfect alternatives exist," courts cannot "impose too rigorous a standard of scrutiny lest all . . . fiscal schemes become subjects of criticism under the Equal Protection Clause." *Id.* Rather, "within the limits of rationality, the legislature's efforts to tackle problems should be entitled to respect." *Id.* at 42; *see United States v. Md. Savings-Share Ins. Corp.*, 400 U.S. 4, 6-7 (1970) (tax classifications generally presumed to be reasonable and constitutional when a rational basis is shown or perceived by a court).

Courts, therefore, "cannot require the Government to demonstrate more convincingly than it has that no less burdensome means exist," because "[t]o do so would be effectively to abrogate the constitutional taxing power of Congress." *Johnson v. United States*, 422 F. Supp. 958, 974 (N.D. Ind. 1976), *aff'd sub nom., Barter v. United States*, 550 F.2d 1239, 1240 (7th Cir. 1977) (citing *Brushaber v. Union P.R. Co.*, 240 U.S. 1 (1916)); *see also Mapes v. United States*, 576 F.2d 896, 904 (Ct. Cl. 1978) ("We in the judiciary, are neither equipped nor inclined to second guess the legislature in its determination of appropriate tax policies."). Ultimately, "the power of Congress in levying taxes is very wide, and where a classification is made of taxpayers

that is reasonable, and not merely arbitrary and capricious, the Fifth Amendment cannot apply." *Barclay & Co. v. Edwards*, 267 U.S. 442, 450 (1924).

2. Section 6428(g)(1) does not infringe upon plaintiff's right to marry.

Plaintiff alleges that section 6428(g)(1) fails to treat him equally with fellow citizens "based solely on whom he chose to marry," and that it discriminates "on the basis of his fundamental right to marriage." Dkt. 20, ¶¶ 41, 53. Section 6428(g)(1) does not implicate, let alone violate, the right to marriage. Because it is a reasonable limitation based on tax filing status and does not affect the decision to enter marriage, Doe fails to state a claim.

a. Distinctions based on marital status are subject to lower scrutiny than statutes affecting the right to marriage.

Zablocki v. Redhail, 434 U.S. 374, 386-87 (1978), articulates the crucial distinction between statutory restrictions that interfere with the decision to marry and those that classify based on marital status. The Supreme Court reviewed a Wisconsin law prohibiting non-custodial parents from marrying if they had child support obligations or children who were, or may become, "public charges." *See id.* at 375. Because "the right to marry is of fundamental importance, and since the classification at issue . . . significantly interferes with the exercise of that right[,]" the Court undertook a "critical examination" of the state interests advanced in support of the classification. *Id.* at 383. Finding an impermissible burden on the right to enter marriage, the Court affirmed the lower court's decision striking down the law for violating the equal protection requirements of the Fifth and Fourteenth amendments. *See id.* at 390-91.

Zablocki does not require the same analysis of all limitations involving marriage. The Supreme Court explained, "by reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents or prerequisites for marriage must be subject to rigorous scrutiny." *Id.* at 386. To the contrary,

"reasonable regulations that do not significantly interfere with decisions to enter in the marital relationship may be legitimately imposed." *Id.* at 387.

Thus, there is a difference between a provision impacting an individual's ability to marry, *see, e.g., Lee v. Orr*, 2014 WL 683680, at *1 (N.D. Ill. Feb. 21, 2014), and one making a distinction related to marital status. *See Druker v. Comm'r*, 697 F.2d 46, 49 (2d Cir. 1982) (denying equal protection challenge to differential tax rates in 26 U.S.C. § 1) (citing *Zablocki*, 434 U.S. at 386; *Califano v. Jobst*, 434 U.S. 47, 53 (1978)). At most, section 6428(g) distinguishes based on marital status and is subjected to a lower level of scrutiny than provisions that significantly interfere with the ability to enter marriage. *See, e.g., Mapes*, 576 F.2d at 900, 901-03 (applying rational basis review and holding that differential tax effect between different married couples was constitutionally permissible); *Barter*, 550 F.2d at 1240 ("the inequities asserted to inhere in the 'marriage penalty,' whatever may be their persuasiveness as arguments for legislative change, do not rise to the level of constitutional violations of appellants' rights").

b. The Code permissibly distinguishes on marital status.

Numerous tax benefits and obligations – including allowable tax credits – distinguish based on marital status. For example, the Code permits several filing statuses, each subject to different tax rates and other provisions, based on marital status. *See* 26 U.S.C. §§ 1(a) (married individuals filing joint returns & surviving spouses); 1(b) (heads of household); 1(c) (unmarried individuals); 1(d) (married individuals filing separate returns). Federal courts have consistently rejected constitutional claims where, for federal tax purposes, married couples are treated differently from unmarried couples, or certain married couples are treated differently from other married couples. *See Druker,* 697 F.2d at 50; *Mapes,* 576 F.2d at 904 (holding that section 1's tax rates are constitutional); *Johnson*, 422 F. Supp. at 966 (same); *Schinasi v. Comm'r*, 53 T.C.

382, 384 (1969) (holding that 26 U.S.C. § 6013(a)(1) did not violate the Constitution by precluding individuals married to nonresident aliens from filing joint federal tax returns).

The constitutionality of marital distinctions within the Code is illustrated by the so-called "marriage penalty," which refers to the additional tax owed by a couple filing jointly, compared with the amount of tax that would have been owed by each member of the couple if they filed individual returns under the "single" status.[8] *See Johnson*, 422 F. Supp. at 966. A "marriage penalty" typically occurs "when both spouses generate somewhat comparable incomes." *Mapes*, 576 F.2d at 899. Such couples would pay less if they never married. But married couples cannot use the tax rates available to unmarried individuals; they must file jointly or separately. *See* 26 U.S.C. § 1(a), (d). They face a higher tax bill based on how much income their spouses received.

The Seventh Circuit and Second Circuit both have rejected constitutional challenges to the "marriage penalty." In *Barter*, the Seventh Circuit succinctly affirmed the Northern District of Indiana's "thoughtful" opinion in *Johnson.* 550 F.2d at 1240. The Second Circuit's more extensive *Druker* opinion also rejected an equal protection challenge to the "marriage penalty." 697 F.2d at 47-48. Considering the evolution of tax rates over time, the Court noted the "marriage penalty" is an inherent policy choice in any system with progressive tax rates that tries to impose the same tax liability on every couple with the same taxable income. *Id.* at 50. The mere fact that tax rates differently affect particular groups of individual and married taxpayers is not unconstitutional. *Id.* ("In the area of family taxation every legislative disposition is 'virtually fated to be both overinclusive and underinclusive when judged from one perspective or another.'" (citation omitted)).

[8] Not all married couples face a "marriage penalty" – "many if not most, married couples achieve considerable tax savings through income splitting on a joint return." *Mapes*, 576 F.2d at 898-99.

The court explained, "[w]hereas differences in race, religion, and political affiliation are almost always irrelevant for legislative purposes, 'a distinction between married persons and unmarried persons is of a different character.'" *Druker*, 697 F.2d at 49 (quoting *Jobst*, 434 U.S. at 53). It acknowledged that the "marriage penalty" has "some adverse effect on marriage." *Druker*, 697 F.2d at 50. Nevertheless, the "adverse effect of the 'marriage penalty,' . . . is merely 'indirect'; while it may to some extent weight the choice whether to marry, it leaves the ultimate decision to the individual." *Id.* (citation omitted).

Because the tax rate structure places "'no direct legal obstacle in the path of persons desiring to get married,'" and "the 'marriage penalty' is most certainly not 'an attempt to interfere with the individual's freedom [to marry],'" the Second Circuit held Congress could enact a policy that penalizes some dual-income couples. *Id.* (citing *Zablocki*, 434 U.S. at 387 n.12; *Jobst*, 434 U.S. at 54); *see Mapes*, 576 F.2d at 901 (The additional tax liability suffered by some two-income couples "is an indirect burden on the exercise of the right to marry . . . suffered not for marrying but for marrying one in a particular income group."); *Johnson*, 422 F. Supp. at 974. Given the "wide latitude" accorded to Congress in the area of taxation, "[t]here is nothing in the equal protection clause that required a different choice." *Drucker*, 697 F.2d at 50-51.

c. Section 6428(g)(1) is a reasonable restriction based on tax filing status and does not interfere with the right to marry.

Like the "marriage penalty," section 6428(g)(1) does not interfere with the right to marry. Rather, it precludes certain joint tax filers from claiming the CARES Act credit or receiving advance refund of that credit. Section 6428(g)(1) is a reasonable restriction, rationally related to Congress's intent to benefit United States citizens and those nationals and resident aliens eligible for lawful employment. SSN-holders married to non-SSN holders can claim the CARES Act credit by filing a separate return from their spouse. *See https://www.irs.gov/coronavirus/*

economic-impact-payment-information-center at Q23 ("If spouses file separately, the spouse who has an SSN may qualify for a Payment; the other spouse without a valid SSN will not qualify"). Plaintiff admits that he can change filing status and obtain the credit. *See* Dkt. 13 at 26. His claim is merely that the Constitution obligates the IRS to permit the CARES Act credit on a joint return with his spouse. The Constitution does not require that result.

In *Schinasi*, the U.S. Tax Court denied a Fifth Amendment challenge to 26 U.S.C. § 6013(a)(1), which precluded individuals who are nonresident aliens for any part of a taxable year from filing a joint return.[9] *See* 53 T.C. at 383. Schinasi argued section 6013(a)(1) "discriminates against married couples of which one member was a nonresident alien for part of the taxable year," and constitutes "'unequal taxation' for the 'new immigrants.'" *Schinasi*, 53 T.C. at 383 (quoting petition). The Tax Court upheld the statute, finding a reasonable basis for differential treatment. *See id.* at 384. It explained, "Congress thought that because the income of a citizen or resident is taxed differently from the income of a nonresident alien (*see* § 1.1-1(b), Income Tax Regs.), a citizen or resident should not be allowed to file a joint return with one who has been a nonresident alien for part of the taxable year." *Schinasi*, 53 T.C. at 384. That rationale for denying the privilege of filing joint returns passed constitutional muster. *See id.*

Section 6428(g)(1) does not implicate the right to marry. Rather it contains restrictions that may impact a married taxpayer's choice whether to file jointly or separately for any given year. *See Johnson*, 422 F. Supp. at 968 (because "each married taxpayer may make the individual choice to file a separate return and thus avoid 'attribution' of his income . . . to the income of his spouse," "[a]ny aggregation of the two spouses' income in a joint return is entirely

[9] In 1976, Congress added section 6013(g), which permits an election to treat nonresident aliens as residents for tax purposes and thus allows the filing of joint tax returns by such individuals.

a voluntary matter"). There are other reasons a married couple would choose to file separately, rather than jointly. In particular, filing a joint return with a nonresident alien requires that all worldwide income earned by the nonresident is taxed here. *See* 26 C.F.R. § 1.1-1(b).

Faced with these considerations, including section 6428(g), some married couples may choose to file separately and others will not. The fact that the Code presents these choices does not violate due process. As the Supreme Court held, "[a]rguments of equity have little force in construing the boundaries of exclusions and deductions from income many of which, to be administrable, must be arbitrary." *Comm'r v. Kowalski*, 434 U.S. 77, 95-96 (1977).

3. Section 6428(g) is not an improper classification based on alienage.

Plaintiff alleges that section 6428(g)(1) discriminates due to his wife's alienage. But eligibility for the CARES Act credit is based on whether an individual has an SSN, not alienage. To the extent the section 6428(g) implicates alienage, it does not violate the Equal Protection Clause, because it has a rational basis – it is a reasonable restriction that assists with the efficient and accurate implementation of the CARES Act. *See Lewis v. Thompson*, 252 F.3d 567, 583 (2d Cir. 2001) (finding rational basis for distinction based on undocumented status). Plaintiff thus fails to state an equal protection claim based on alienage.

a. The CARES Act does not contain any alienage classification.

Many non-U.S. citizens are entitled to receive, and have, an SSN. Those individuals are entitled to receive a CARES Act credit if they otherwise meet the requirements of section 6428. The Constitution does not prevent Congress from imposing this policy-based requirement. *See McElrath v. Califano*, 615 F.2d 434, 441 (7th Cir. 1980) (rejecting equal protection challenge to requirement that all members of family provide SSNs as a condition of public aid eligibility).

Section 6428 includes two threshold requirements for the CARES Act credit. *First*,

"eligible individual" excludes "any nonresident alien individual." 26 U.S.C. § 6428(d)(1). "Nonresident alien" (in contrast to "resident alien" or "U.S Citizen") is a *taxation* classification, used for purposes of the Internal Revenue Code. *See* 26 U.S.C. § 7701(b)(1)(A); *see also* Congressional Research Service (CRS) Report RS 21732, "Federal Taxation of Aliens Working in the United States," at 1-3.[10] *Second*, an individual must include her SSN on her tax return to receive a CARES Act credit. *See* 26 U.S.C. § 6428(g). In the case of a couple filing a joint return, each spouse must include an SSN. *Id*.

While those requirements may overlap – as many nonresidents are ineligible for SSNs[11] – the SSN requirement most closely tracks *work authorization*. *See* 20 C.F.R. § 422.104 ("Who can be assigned a social security number"); CRS Report R46339, "Unauthorized Immigrants' Eligibility for COVID-19 Relief Benefits: In Brief" at 5-6 (SSNs are "typically issued to U.S. citizens, lawful permanent residents, and noncitizens with work authorization"); CRS Report R43840, "Federal Income Taxes and Non-Citizens," at 4 (the Social Security Administration largely stopped providing "nonwork SSNs" once the ITIN was established); 61 Fed. Reg. 26788, 27689 ("an ITIN creates no inference regarding the . . . right of that individual to be legally employed in the United States"). In other words, those ineligible to receive SSNs are, mostly, unauthorized to work in the United States, regardless of their sustained presence.

By contrast, "nonresident alien" status, for taxation purposes, generally involves duration of presence in the United States, rather than work authorization. *See* IRS Pub. 519 at 1

[10] This Tax Code classification is not identical to immigration status, which instead is defined under the Immigration and Naturalization Act. *See id*. For instance, an undocumented immigrant may be deemed a "resident alien" for taxation purposes.

[11] Those who are ineligible to receive SSNs, but must file tax returns, include many classes of nonresident aliens. Such individuals can be issued an Individual Taxpayer Identification Number ("ITIN"). *See https://www.irs.gov/individuals/individual-taxpayer-identification-number*.

("Nonresident Alien or Resident Alien?"). "Nonresident aliens" are individuals who are not permanent residents and who do not have a "substantial presence" in the United States regardless of whether they may work here. *Compare* IRS Pub. 519 *with* 20 C.F.R. § 422.104. The distinction between residency and nonresidency is critical for tax enforcement because residents must pay tax on their worldwide income, but nonresidents do not. *See* IRS Pub. 519; *see generally* 26 U.S.C. § 7701(b)(3); 26 CFR §§ 301.7701(b)-1 through 301.7701(b)-4.

Plaintiff is unlikely to prevail on his alienage claim. He challenges the SSN requirement of section 6428(g)(1), not the exclusion provisions of section 6428(d)(1). But section 6428(g)(1) focuses solely on work authorization, which bears only an indirect link to alienage.[12] Further, the Code contains multiple provisions excluding non-SSN holders from credits and deductions available to SSN holders. *See supra* at 6. These provisions show that distinctions based on SSNs, like section 6428(g)(1), are permissible. *See McElrath*, 615 F.2d at 441.

b. Section 6428(g)'s classifications do not violate the Constitution.

Even if this Court construes section 6428(g) as a classification based on alienage, it is permissible. Statutes that implicate alienage are not unconstitutional as long as Congress has a "rational basis" for the challenged classification. Section 6428(g) easily clears that test.

The Supreme Court recognizes that the federal government has "broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States,* 567 U.S. 387, 394 (2012) (citing *Toll v. Moreno*, 458 U.S. 1, 10 (1982)). When federal law classifies individuals based on alienage, rational basis review applies. *See Matthews v. Diaz*, 426, U.S. 67, 81-85 (1976); *City of Chicago*, 189 F.3d at 603-04. Under rational basis review, a law "is

[12] Undocumented immigrants can be "resident aliens" for taxation purposes, with sufficient time spent in the United States. IRS Pub. 519. In that instance, their "alienage" would not disqualify them under section 6428(d), but their lack of an SSN would disqualify them under 6428(g).

presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate . . . interest." *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 440 (1985). Further, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). "The administrative difficulties of individual eligibility determinations are without doubt matters which Congress may consider when determining whether to rely on rules which sweep more broadly than the evils with which they seek to deal." *Weinberger v. Salfi*, 422 U.S. 749, 784 (1975).

In *Hofstetter v. Commissioner*, the Tax Court rejected a challenge to a provision requiring a taxpayer whose spouse is a nonresident to file a separate return. *See* 98 T.C. 695, 701-02 (1992). There, a Swiss taxpayer challenged the computation of alternative minimum tax made applicable to certain nonresident aliens. Because his spouse did not have U.S. source income and was not required to file a U.S. tax return, he could not file a joint return. He alleged the Internal Revenue Code treated him unequally based on his alienage because he could not claim the higher exemption amount available for joint filers. *See id.* at 701. The court rejected taxpayer's claim because the restriction at issue, stemming from 26 U.S.C. § 6013, applied "equally to all taxpayers whose spouses are nonresident aliens, regardless of their nationality." *Id.* at 702 (citing *Schinasi*, 53 T.C. at 384). Thus, the court held that "petitioner is not discriminated against based upon his national origin." *Hofstetter*, 98 T.C. at 702 (citing *Black v. Comm'r*, 69 T.C. 505 (1977); *Bhargava v. Comm'r*, T.C. Memo. 1978-197 (1978)).

In *Barr v. Commissioner*, the Tax Court found a rational basis for 26 U.S.C. § 152(b)(3), which allows a taxpayer to claim a child as a dependent, only if the child "is a citizen of the United States, a resident of the United States or certain other countries, or makes his principal

place of abode in the home of the taxpayer." 51 T.C. 693, 694 (1969). Although taxpayers supported their noncitizen son during the taxable year, he resided in South Korea. The court rejected taxpayers' argument that the statute violated the Fifth Amendment. *See id.* at 695. The court noted that, in 1944, Congress added the restriction in section 152(b)(3) "because [it] became convinced that dependency deductions were being claimed in questionable situations," and "[i]t was impracticable for the Internal Revenue Service to investigate all these claims." *Id.* The court concluded that "the statutory restrictions may be the only practicable answer to the problem—surely, we cannot say that they are without reason." *Id.*

Likewise, the SSN requirement in section 6428(g)(1) permissibly distinguishes between individuals with and without SSNs. *See, e.g., Bowen v. Roy*, 476 U.S. 693 (1986) (rejecting First Amendment challenge to SSN requirement for children's food stamp benefits); *see also Lewis*, 252 F.3d at 583. Nonresident aliens are not eligible for a CARES Act credit. *See* 26 U.S.C. § 6428(d)(1). To effectuate section 6428(d)(1) and further its policy goal of providing the CARES Act credit only to citizens, nationals, and noncitizens authorized to work in the United States, Congress precluded claims for credit submitted on joint returns by couples with only one SSN. This decision was reasonable given Congress' desire to disburse aid efficiently and accurately (*i.e.*, avoid payments to those who were statutorily ineligible) and to reduce fraud and abuse. Without this rule, if a citizen or resident alien and a non-resident alien file a joint return under section 6013(g), any amount of credit would be jointly claimed, in violation of section 6428(d)(1). *See id.*, § 6428(e).

It is irrelevant whether Congress could have selected a different method to achieve the same result. *See Brushaber*, 240 U.S. at 26. And the wisdom of this policy choice is not at issue in this lawsuit. *See Sebelius,* 567 U.S. at 563. Plaintiff's alienage claim therefore fails.

4. Section 6428(g) does not violate the First Amendment.

To the extent the complaint includes a First Amendment claim, plaintiff is not likely to prevail. He contends section 6428(g) violates the right of privacy and the right of association, which, "contained in the penumbra of the First Amendment[,] is one of those fundamentally protected zones of privacy." Dkt. 20, ¶50 (citing *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965)). Section 6428(g) does not infringe on these rights.

The right of association stems from the First Amendment and is "an indispensable means of preserving other individual liberties." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984); *see Griswold*, 381 U.S. at 483. The Constitution therefore protects both a freedom of expressive association and a freedom of intimate association. *Roberts*, 468 U.S. at 617-18; *Griswold*, 381 U.S. at 483 (holding that the "'freedom to associate and privacy in one's associations'" was constitutionally-protected) (quoting *NAACP v. State of Alabama*, 357 U.S. 449, 462 (1958)).

The freedom of intimate association concerns the right "to enter into and maintain certain intimate human relationships." *Roberts*, 468 U.S. at 617-18. Expressive association, on the other hand, is "a right to associate for the purpose of engaging in those activities protected by the First Amendment[.]" *Id.* at 618. These freedoms are "not absolute," but rather can "be overridden 'by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (quoting *Roberts*, 468 U.S. at 623).

Section 6428(g) does not infringe upon or proscribe these rights. Requiring both spouses to provide an SSN on a joint tax return does not impact intimate or expressive association. The requirements set forth in section 6428 do not "significantly interfere with decisions to enter into

the marriage relationship." *Zablocki,* 434 U.S. at 386. The requirement also does not distinguish between married and unmarried individuals, but rather distinguishes between joint returns and separate or individual returns. Married spouses have a voluntary choice to file their tax returns jointly or separately, and the different impact if Plaintiff files jointly is not of a constitutional nature. *See Rodriguez*, 411 U.S. at 41.

III. Plaintiff Will Not Suffer Irreparable Harm Absent a Preliminary Injunction.

Plaintiff claims that he and the purported class will suffer irreparable harm in the absence of a preliminary injunction in two ways. *First*, he identifies "the loss of a minimum of $1,200," based on "exclusion from the CARES Act." Dkt. 13 at 10, 18. *Second*, he argues the CARES Act has a harmful "effect on the lawful immigration process." *Id.* at 18. Doe alleges "requiring US Citizens to file their 2019 and/or amend their 2018 tax returns to file separately in order to receive the Stimulus Check" is contrary to immigration policies that provide citizens "a path to obtaining lawful citizenship for their spouses." *Id.* at 19.

Without minimizing the hardship faced by Plaintiff and those he seeks to represent, courts have held that neither of these alleged injuries constitute irreparable harm justifying a TRO. A potential injury is irreparable only when "the threatened harm would impair the court's ability to grant an effective remedy." *EnVerve, Inc. v. Unger Meat Co.*, 779 F. Supp. 2d 840, 844 (N.D. Ill. 2011). Potential harm is not "irreparable" unless the harm cannot be repaired and money compensation is inadequate. *Graham v. Med. Mut. of Ohio*, 130 F.3d 293, 296 (7th Cir. 1997). It is well settled that the loss of money is ordinarily not an irreparable harm, as it usually can be remedied through damages. *See Sampson v. Murray,* 415 U.S. 61, 90 (1974) (rejecting the claim that loss of income pending the outcome of an appeal was irreparable harm). Even substantial money injuries are not irreparable, as long as there is a possibility that "'adequate

compensatory or other corrective relief will be available at a later date.'" *Id.* (citation omitted). That is particularly true where a litigant has not lost existing benefits.

Here, the potential loss of advance payments of the CARES Act credit, like the loss of income pending appeal, is an economic injury that can be adequately compensated if Doe ultimately prevails in this case. *See Ciechon v. City of Chicago*, 634 F.2d 1055, 1058 (7th Cir. 1980) (the loss of income and benefits during a thirty-day suspension is not irreparable); *Frerck v. John Wiley & Sons, Inc.*, 850 F. Supp. 2d 889, 894 (N.D. Ill. 2012) (plaintiff did not suffer irreparable harm from unauthorized use of his copyright because he could recover damages if he prevailed). As the Seventh Circuit has explained, "the difference between money now and money later, though real, 'is not the sort of irreparable harm that is effectively unreviewable on appeal.'" *Moretrench Am. Corp. v. S.J. Groves and Sons Co.*, 839 F.2d 1284, 1289 (7th Cir. 1988) (quoting *Uehlein v. Jackson Nat'l Life Ins. Co.,* 794 F.2d 300, 302 (7th Cir. 1986)).

Acknowledging that a remedy to his primary injury exists, Doe argues he would be harmed by filing a separate tax return. However, filing separate returns does not necessarily impact the immigration process, let alone cause irreparable harm. He concedes "income tax forms" are but one consideration in evaluating whether a marriage is valid for immigration purposes. *See* Dkt. 13 at 19 (citing *In Matter of Laureano*, 19 I & N. Dec. 1, 1 (B.I.A. Dec. 12, 1983)). He notes that other evidence of legitimate intent to marry includes, but is not limited to, insurance policies, property leases, bank accounts, and testimony. *See* Dkt. 13 at 19. Thus, it is far from certain that filing separate returns would have any effect on immigration decisions. This speculative, future harm is insufficient for purposes of a preliminary injunction. *See Winter*, 555 U.S. at 22 (plaintiffs seeking preliminary relief must show that irreparable injury is likely in the absence of an injunction, not merely speculative). In sum,

"[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Sampson*, 415 U.S. at 90.

IV. Plaintiff is Not Entitled to a TRO Because He Has Adequate Remedies.

Plaintiff seeks an order re-writing a federal statute, enjoining Congress, and requiring the United States to permit him and the purported class members to claim the CARES Act credit for themselves and their children with valid identification numbers. To obtain this extraordinary preliminary relief, he bears the heavy burden of establishing he has no adequate remedy at law. *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1260 (2018) (citing *Protamek Indus. Ltd. v. Equitrac Corp.*, 300 F.3d 808, 813 (7th Cir. 2012)). Doe does not explain how he meets this burden. Dkt. 13 at 24.

Plaintiff has two independent avenues to claim the CARES Act credit, each of which is a sufficient, non-equitable remedy. Doe can file a separate return for 2020 claiming a $1,200 credit for himself and $500 for each of his children. *See supra* at 3-4. Alternatively, he can proceed by refund action seeking those amounts. *See supra* at 11-13. He may submit a joint 2020 tax return after December 31, 2020, and file an administrative claim with the IRS alleging that section 6428(g) is unconstitutional. If that claim is denied, he can file a refund action under 26 U.S.C. § 7422. If Doe prevails in either situation, his alleged harm would be remedied. This Court therefore should not grant the extraordinary relief of a TRO.

Furthermore, even if the Court issues a TRO, Plaintiff still would not immediately receive an advance refund. Rather, if they were otherwise eligible, Plaintiff and all others similarly situated would receive an advance refund of the CARES Act credit when the Secretary of the Treasury is able to issue it. Although section 6428(f)(3)(A) provides that the Secretary

"shall, subject to the provisions of this title, refund or credit any overpayment attributable to this section as rapidly as possible," the CARES Act confers no justiciable right to an immediate payment of an advanced refund of the CARES Act credit. In addition, because of complications related to providing advance refunds in certain instances, some individuals will not receive the CARES Act credit until it is claimed on their 2020 tax return filed next year. *See supra* at 3. Accordingly, a TRO is unlikely to give plaintiff the immediate relief he seeks.

V. The Equities and Public Interest Favor Denying a TRO.

Doe fails to establish threshold eligibility for an injunction, so the Court need only conduct a "cursory" review of the other *Winter* factors. *Girl Scouts*, 549 F.3d at 1087. Because he only seeks declaratory and injunctive relief in his motion, Doe's financial situation will not be improved by a preliminary injunction. However, Plaintiff requests an extraordinary order that would invalidate and re-write a unanimously-passed federal statute and enjoin the conduct of two branches of government. A TRO would not preserve the relative positions of the parties, but instead would undermine the public interest of implementing a duly-enacted law.

VI. Class Certification Is Premature and Unnecessary at This Stage of the Case.

Plaintiff requests an order certifying his proposed class or, alternatively, certifying a provisional class for purposes of the motion. *See* Dkt. 13 at 27. It is premature to grant class certification. The United States has not yet responded to the Complaint, let alone taken discovery from Doe on any issue, including whether he is an adequate class representative. Because he brought this case as "John Doe," the United States has no ability to determine whether he actually is a member of the proposed class. This Court should postpone any decision on class certification to permit the detailed factual inquiry that is required to determine whether certification is appropriate.

Further, conditional class certification is not required to preserve the relative positions of the parties. Class certification, pending a merits determination, would not alleviate any of the harm that Doe alleges. In addition, none of the extraordinary injunctive and declaratory relief that he requests necessitates class certification at this time. *See* Dkt. 13 at 28-29.

Moreover, Doe has not established entitlement to his requested preliminary remedy on a class-wide basis at this stage of the proceedings. For example, no evidence has yet been presented capable of identifying class members. As discussed above, Doe has not identified himself. In order to "hold in escrow or otherwise earmark sufficient funds," *id.* at 29, the United States would need to know how many people were in the class and how many qualifying children each of them had. Without discovery to determine whether the class can be identified, certification is premature and should not be considered in connection with the TRO motion.

CONCLUSION

Plaintiff has not established entitlement to the extraordinary remedy of a preliminary injunction or TRO. He has not established a likelihood of success on the merits, will not suffer irreparable injury, and has alternative, non-equitable remedies. His motion should be denied.

Respectfully submitted,

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Certificate of Service

I certify that on May 18, 2020, a copy of the foregoing *United States' Memorandum in Opposition to Plaintiff's Emergency Motion for Temporary Restraining Order, Preliminary Injunction and/or Declaratory Judgment* was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

/s/ Jordan A. Konig
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