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

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

**MOTION TO DISMISS CLAIMS AGAINST ALL DEFENDANTS OTHER THAN THE UNITED STATES**

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"), hereby moves to dismiss the claims against all defendants other than the United States.[1]

Doe's lawsuit is simply a challenge to the constitutionality of 26 U.S.C. § 6428(g)(1)(B), so it must be brought against the United States alone. *First*, Doe's "official capacity" allegations against individual defendants actually are claims against the United States because they would

[1] The United States intends to separately seek dismissal of this lawsuit pursuant to Fed. R. Civ. P. 12(b)(1) & (6) once it is properly served under Fed. R. Civ. P. 4(i). Doe has not established a valid waiver of sovereign immunity, he lacks an actual or imminent injury-in-fact, his claims are not ripe, and he fails to state a claim for relief.

restrain the Government from acting or compel it to act. And, Doe has sued the United States for the same relief, so his "official capacity" claims are duplicative. *Second*, all claims against defendants Trump and McConnell should be dismissed. A president enjoys absolute immunity from suit for acts within the "outer perimeter" of his or her official responsibility, which includes signing federal legislation. Also, the Speech or Debate Clause bars civil suits against federal legislators that arise from the sphere of their legitimate legislative activity, such as the introduction and passage of bills. *Third*, no defendants may be sued in their individual capacities, since the equitable relief that Doe seeks – a finding that 26 U.S.C. § 6428(g)(1) is unconstitutional and an injunction against its enforcement – cannot be obtained from a private individual. *Fourth*, the IRS and the Department of the Treasury may not be sued in their own names since Congress has not specifically allowed lawsuits of this type against them. Because Doe seeks a declaration that a federal statute is unconstitutional, an injunction compelling the United States to act, and, ultimately, payment of funds from the public treasury, the United States alone is the proper defendant.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 7, 2020, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all registered parties.

*/s/ Jordan A. Konig*
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United States Department of Justice

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

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

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS CLAIMS AGAINST ALL DEFENDANTS OTHER THAN THE UNITED STATES**

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 the 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 support of its motion to dismiss the claims against all defendants other than the United States.

Respectfully submitted,

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John Doe[1] asks this Court to overturn certain identification number requirements for the refundable tax credit provision contained in the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"). *See* 26 U.S.C. § 6428. He seeks extraordinary declaratory and injunctive relief that would judicially rewrite the Act, prevent Congress from passing certain amendments to it or approving similar legislation, and compel Congress to appropriate or escrow funds for individuals who were statutorily excluded from the Act's refundable tax credit. *See* Dkt. 20.

Doe purports to sue (1) Donald J. Trump, in his individual and official capacity as President of the United States; (2) Mitch McConnell, in his individual and official capacity as a Senator and sponsor of S. 3548 CARES Act; (3) Steven Mnuchin, in his individual and official capacity as the Secretary of the Department of the Treasury; (4) Charles Rettig, in his individual and official capacity as Commissioner of Internal Revenue; (5) the Department of the Treasury; (6) the Internal Revenue Service; and (7) the United States. *See id.*, ¶¶ 3-11. Doe has filed proofs of service as to all defendants but the United States. *See* Dkt. 12; 23-34.

This Court should dismiss Doe's claims against all defendants other than the United States.[2] Regardless of how it is pleaded, Doe's lawsuit is simply a challenge to the constitutionality of 26 U.S.C. § 6428(g)(1)(B), so it must be brought against the United States alone. *First*, Doe's "official capacity" allegations against individual defendants actually are claims against the United States because they would restrain the Government from acting or compel it to act. And, Doe has sued the United States for the same relief, so his "official

[1] On July 1, 2020, the Court denied Doe's motion to proceed under a pseudonym. *See* Dkt. 42. The United States reserves the right to supplement this motion after Doe discloses his identity.

[2] The United States intends to separately seek dismissal of this lawsuit pursuant to Fed. R. Civ. P. 12(b)(1) & (6) once it is properly served under Fed. R. Civ. P. 4(i). Doe has not established a valid waiver of sovereign immunity, he lacks an actual or imminent injury-in-fact, his claims are not ripe, and he fails to state a claim for relief.

capacity" claims are duplicative. *Second,* all claims against defendants Trump and McConnell should be dismissed. A president enjoys absolute immunity from suit for acts within the "outer perimeter" of his or her official responsibility, which includes signing federal legislation. Also, the Speech or Debate Clause bars civil suits against federal legislators that arise from the sphere of their legitimate legislative activity, such as the introduction and passage of bills. *Third*, no defendants may be sued in their individual capacities, since the equitable relief that Doe seeks – a finding that 26 U.S.C. § 6428(g)(1)(B) is unconstitutional and an injunction against its enforcement – cannot be obtained from a private individual. *Fourth*, the IRS and the Department of the Treasury may not be sued in their own names since Congress has not specifically allowed lawsuits of this type against them. Because Doe seeks a declaration that a federal statute is unconstitutional, an injunction compelling the United States to act, and, ultimately, payment of funds from the public treasury, the United States alone is the proper defendant.

**BACKGROUND**

Doe challenges 26 U.S.C. § 6428(g)(1)(B),[3] which denies a CARES Act credit under 26 U.S.C. § 6428(a) to an eligible individual who does not include each spouse's social security number ("SSN") on a joint tax return. Doe alleges he is disqualified from receiving 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[4]; and (5) neither spouse is a member of the

[3] The Second Amended Complaint inadvertently purports to challenge § 6428(h). Dkt. 20 at 16.

[4] During oral argument regarding Doe's motion to proceed under a pseudonym, his counsel stated that Doe's wife is becoming a United States citizen through the naturalization process. *See* Dkt. 43. Because Doe may qualify for a CARES Act credit if his wife obtains an SSN before they timely file a joint 2020 return, any injury to him is speculative, his suit is not ripe,

(continued...)

military. *Id*. On behalf of himself and a purported class of similarly situated individuals, Doe claims 26 U.S.C. § 6428(g)(1)(B) violates his First, Fifth, and Fourteenth Amendment rights; specifically, section 6428(g)(1)(B) 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.*

As a remedy for these alleged injuries, Doe requests an order certifying a class; an injunction prohibiting the United States from enforcing the CARES Act as it was enacted 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.* at 15-17. He also seeks various declaratory relief, including a declaratory judgment that section 6428(g)(1)(B) is unconstitutional. *Id.* Although Doe's underlying objective seems to be payment of an advance refund of the CARES Act credit, he does not expressly request money damages or an advance refund in his demand for relief.

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and he is not a proper representative for the purported class. Doe is qualified for the CARES Act credit if he chooses the status "married filing separately" for his 2020 income tax return, and would qualify even filing jointly if his wife becomes a citizen by the end of 2020.

## ARGUMENT

### I. Doe's "Official Capacity" Claims Should be Dismissed as Duplicative of his Claims Against the United States.

Doe purports to sue Donald J. Trump, Mitch McConnell, Steven Mnuchin, and Charles Rettig in their official capacities in this action to invalidate a provision of a federal tax statute. Such a suit against a federal official in his or her official capacity is properly construed as a lawsuit against the United States itself. *See Walker v. Sheahan*, 526 F.3d 973, 977 (7th Cir. 2008) (citing *Hafer v. Melo*, 502 U.S. 21, 25 (1991)); *see also Kentucky v. Graham*, 473 U.S. 159, 165-67 (1985) (official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent").

The Supreme Court has explained that "a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (internal quotation marks omitted) (quoting *Land v. Dollar*, 330 U.S. 731, 738 (1947) & *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949)); *see also Schlafly v. Volpe*, 495 F.2d 273, 278-79 (7th Cir. 1974). Here, Doe seeks to restrain the United States from acting or to compel its action – he asks the Court to enjoin the enactment of 26 U.S.C. § 6428(g)(1)(B) and demands the escrow or appropriation of funds from the public treasury for those who are statutorily-barred from receiving the CARES Act credit. Any "official capacity" claims therefore are properly brought against the United States.

Even if an official capacity suit was permitted, the individual defendants may still be dismissed because Doe already named the United States as a defendant. "Because adding the official-capacity claim in the present situation makes no practical difference, there is no reason to

retain the Individual Defendants as parties to this action." *Davis v. Village of Hazel Crest*, 2018 WL 835224, at *3 (N.D. Ill. Feb. 13, 2018) (citations and internal alterations omitted); *see, e.g.*, *Myers v. City of Chicago*, 2011 WL 43063, at *5 (N.D. Ill. Jan. 6, 2011) (dismissing official capacity claims against officers as duplicative of claims against city); *Weathers v. Illinois State Police*, 2006 WL 1594044, at *5 (N.D. Ill. June 6, 2006) (observing that official capacity claims against officers would be duplicative of claims against police). Accordingly, Doe's official capacity claims should be dismissed as duplicative of his claims against the United States.

## II. The President and Senate Majority Leader Are Immune From This Suit.

Defendants Donald J. Trump and Mitch McConnell are absolutely immune from this lawsuit, and all claims against them must be dismissed. All of the allegations against these defendants stem from their constitutional duties as federal officeholders. *See* Dkt. 20, ¶3 (defendant Trump "signed into law the S. 3548-Coronavirus Aid, Relief, and Economic Security Act"); ¶4 (defendant McConnell "is the Sponsor of the S. 3548-CARES Act, introduced in the Senate on March 19, 2020").

The Supreme Court has explained that the special nature of a president's constitutional office and functions requires that he or she be absolutely immune from suits alleging liability for acts within the "outer perimeter" of official responsibility. *Nixon v. Fitzgerald*, 457 U.S. 731, 755-56 (1982). Here, all of Doe's allegations against the President stem from acts conducted in performance of specific functions of his office – namely, signing the CARES Act after it passed both houses of Congress.[5] Doe alleges that a discrete provision of the CARES Act is

[5] Doe also seems to fault the President for including his signature on "Stimulus Checks." Dkt. 20, ¶21. That conduct is at least within the "outer perimeter" of duties of the executive branch, and thus sufficient for immunity to apply. In any case, it is not clear how an allegedly improper signature on a check that Doe did not receive caused him any actionable harm.

unconstitutional – not that the signing of the bill was *ultra vires* or that the President here engaged in any conduct under color of federal law that was outside his constitutional duties. Therefore, the claims against defendant Trump should be dismissed.

All claims against defendant McConnell also must be dismissed. The Supreme Court has made clear that United States senators are absolutely immune from suit when performing acts that are legislative in nature. *Harlow v. Fitzgerald*, 457 U.S. 800, 811 (1982); *Gravel v. United States*, 408 U.S. 606, 625 (1972). The Speech or Debate Clause of the Constitution, art. I, sec. 6, cl. 1, broadly bars civil suits against federal legislators that arise from "the sphere of legitimate legislative activity." *Rose v. Hastert*, 2004 WL 783065, at *1-*2 (N.D. Ill. Jan. 22, 2004) (quoting *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503, 506 (1975)). Here, all of Doe's allegations against defendant McConnell arise from his role as a United States senator and his conduct in the passage of a federal statute. Accordingly, defendant McConnell is completely immune from suit, and all claims against him must be dismissed.[6]

**III. No Defendants May Be Sued in Their Individual Capacities.**

Doe also purports to sue defendants Trump, McConnell, Mnuchin, and Rettig in their individual capacities. Dkt. 20, ¶¶3-6, 10-11. Initially, Doe does not set forth any cause of action

[6] Even if Senator McConnell was not immune from suit, all claims against him still must be dismissed. Doe cannot establish standing, since any alleged injury is not "fairly traceable" to McConnell's conduct and could not be redressed by an injunction issued against McConnell. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Rangel v. Boehner*, 2013 WL 6487502, at *5 (D.D.C. Dec. 11, 2013). Moreover, personal jurisdiction is lacking since Senator McConnell represents Kentucky and does not have the requisite minimum contacts with Illinois. *See Liberation News Serv. v. Eastland*, 426 F.2d 1379, 1384-85 (2d Cir. 1970). McConnell is entitled to qualified immunity, and a *Bivens* remedy is not available. *See infra.* Finally, there is no recognized theory under which a Member of Congress may be held liable simply because a litigant objects to his or her legislative conduct. *See, e.g.*, *Phillips v. U.S. Equal Employment Opportunity Comm'n*, 2016 WL 8719050, at *10 (N.D. Ind. Sept. 9, 2016); *Newell v. Brown*, 981 F.2d 880, 887 (6th Cir. 1992); *Richards v. Harper*, 864 F.3d 85, 88 (9th Cir. 1988).

under which he may sue any defendants in their personal capacities. At most, he recites boilerplate language that seems to allege that the individual defendants violated his constitutional rights under color of federal law or are vicariously liable for the unconstitutional conduct of others, pursuant to *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). *See* Dkt. 20, ¶¶11, 41, 46 (citing 42 U.S.C. § 1983). However, the equitable relief that Doe seeks cannot be obtained from federal officeholders in their individual capacities. Accordingly, all "individual capacity" claims should be dismissed.

While a *Bivens* action, alleging the violation of constitutional rights under color of federal law, may be maintained against a federal officer in his or her individual capacity, *see F.D.I.C. v. Meyer*, 510 U.S. 471, 484-85 (1994), the allegations in Doe's complaint relate solely to the conduct of the individual defendants in their roles as federal officeholders. Dkt. 20, ¶¶3-6, 10-11, 16-17. Indeed, Doe contends that the CARES Act – not these officials as private citizens – unlawfully "denies tax-paying U.S. citizens their rights, privileges, benefits and/or protections[.]" *Id.*, ¶15. Such allegations plainly challenge the individual defendants' actions only in their official capacities. None of the allegations are sufficient to allege personal liability on the part of defendants Trump, McConnell, Mnuchin, or Rettig. *See, e.g.*, *Hill v. Shelander*, 924 F.2d 1370, 1374 (7th Cir. 1991); *Feit v. Ward*, 886 F.2d 848, 858 (7th Cir. 1989). Moreover, the equitable relief requested in this lawsuit cannot be obtained through an action against federal officeholders in their individual capacities. *See Hill*, 924 F.2d at 1373-74; *Feit*, 886 F.2d at 857-58. Since Doe seeks an injunction compelling the Government to act, his only cause of action would be against the sovereign, not an individual. *Feit*, 886 F.2d at 857-58; *Dertz v. City of Chicago*, 912 F. Supp. 319, 327-28 (N.D. Ill. 1995).

In any case, a *Bivens* remedy is not available. A *Bivens* claim is a limited, implied cause of action for money damages against a federal employee only in his or her personal capacity. *Bivens*, 403 U.S. at 497. The basis of the implied cause of action recognized in *Bivens* was that other forms of relief, such as an injunction, were unavailable – for Bivens, it was "damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring). Here, however, Doe purports to sue the individual defendants in both personal and official capacities and seeks only injunctive relief. *See* Dkt. 20, ¶¶3-6, 70-77.

Permitting *Bivens* claims against the individual defendants also would require an unwarranted extension of *Bivens.* The Supreme Court disfavors implying causes of action for alleged violations of the Constitution and has consistently refused to extend *Bivens* to new contexts and categories of defendants. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017). In particular, the Supreme Court will not recognize a *Bivens* remedy where Congress created an alternative process for protecting the interest asserted by a litigant. *Id.* at 1858. Here, the exclusive, comprehensive scheme created to resolve tax-related disputes, which includes a cause of action under 26 U.S.C. § 7422, precludes a *Bivens* claim. *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). Doe's constitutional challenge may be raised in an administrative claim to the IRS and, if unsuccessful, a tax refund suit. *See United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 5-8 (2008). Accordingly, the Court lacks jurisdiction to consider a claim under *Bivens*, and no defendants may be named in their individual capacities.

## IV. There is No Waiver of Sovereign Immunity Permitting Suit Against the Department of the Treasury or Internal Revenue Service in This Action.

Doe's claims against the Department of the Treasury and the Internal Revenue Service also must be dismissed. It is well-settled that the United States and its departments and agencies

may not be sued without its consent. *See Larson*, 337 U.S. at 688-89; *Blackmar v. Guerre*, 342 U.S. 512, 514 (1952); *Exch. Nat'l Bank v. Daniel Hale Williams Univ.*, 473 F. Supp. 656, 657 (N.D. Ill. 1979). That is, a federal agency may not be sued in its own name without an explicit statutory waiver. *See Blackmar*, 342 U.S. at 515.

Courts routinely have found that neither the IRS nor the Department of the Treasury is an authorized suable entity. *See id.*; *see also, e.g., Castleberry v. Alcohol, Tobacco & Firearms Div. of Treas. Dep't of U.S.*, 530 F.2d 672, 673 n.3 (5th Cir. 1976); *Howell v. Dep't of the Treas.*, 2020 WL 2065843, at *1 n.2 (D. Utah Mar. 6, 2020) (Report and Recommendation). Where taxpayers are authorized to sue on matters arising out of IRS actions, the United States alone is the proper party defendant. *See* 26 U.S.C. § 7422(f) (suit arising out of dispute over tax liabilities may only be maintained against the United States); 26 U.S.C. §§ 7430(a), 7431(a)(1), 7432(a), 7433(a) (suits for damages arising out of specified IRS actions may be maintained against the United States).

Of course, the Administrative Procedure Act ("APA") permits certain regulatory challenges to be filed against the IRS and Department of the Treasury. Through the APA, Congress has waived sovereign immunity to permit judicial review for an individual allegedly suffering an injury because of final agency action, or adversely affected or aggrieved by final agency action. *See* 5 U.S.C. § 702. The APA explicitly permits suits against "the United States, the agency by its official title, or the appropriate officer." 5 U.S.C. § 703; *see also W. Radio Servs. Co. v. Qwest Corp.*, 530 F.3d 1186, 1195 (9th Cir. 2008).

Doe disclaims any attempt to raise a cause of action under the APA.[7] *See* Dkt. 25 at 9-

[7] Doe's attempt to rely on the sovereign immunity waiver of the APA without asserting a cause of action under the APA or any other federal statute authorizing review of agency action is

(continued...)

11. Even if Doe's lawsuit was construed as an APA challenge, it still must be dismissed. 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 Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) ("an agency action is reviewable under the APA only if there are no adequate alternatives to APA review in court").

Here, the existence of a carefully articulated scheme for judicial review under 26 U.S.C. § 7422 precludes jurisdiction under the APA. Congress specifically waived sovereign immunity under 28 U.S.C. § 1346(a)(1) and authorized a cause of action for a taxpayer to challenge the denial of a tax credit under section 7422. And Doe here plainly seeks to challenge the denial of the CARES Act credit, which is a refundable tax credit. 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 Doe has an adequate remedy to challenge the constitutionality of the CARES Act credit, 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."). Accordingly, the IRS and Department of the Treasury are not proper defendants, and all claims against them should be dismissed.

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meritless. Doe's failure to identify a valid sovereign immunity waiver justifies dismissal of his lawsuit against the United States. *See Blagojevich v. Gates*, 519 F.3d 370, 372 (7th Cir. 2008).

## CONCLUSION

Doe's challenge to the constitutionality of 26 U.S.C. § 6428(g)(1)(B) requests equitable relief for which the United States alone is the proper defendant. All claims against defendants Trump, McConnell, Mnuchin, Rettig, Department of the Treasury, and IRS therefore should be dismissed.

Respectfully submitted,

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Certificate of Service

I certify that on July 7, 2020, a copy of the foregoing *United States' Memorandum in Support of Motion to Dismiss* 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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U.S. Department of Justice, Tax Division