IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

CHRISTOPHER JENNER, LAUREL JENNER, THOMAS KLINGNER, ADAM LIEBMANN, KELLY LIEBMANN, MICHELLE MATHIA, KRISTINA RASMUSSEN, JEFFREY TUCEK, MARK WEYERMULLER, and JUDI WILLARD, Plaintiffs, vs. ILLINOIS DEPARTMENT OF COMMERCE AND ECONOMIC OPPORTUNITY, Defendant.	No. 15-MR-16

<u>MOTION TO DISMISS</u>

NOW COMES the Defendant, the ILLINOIS DEPARTMENT OF COMMERCE AND ECONOMIC OPPORTUNITY, by and through its attorney, Lisa Madigan, Attorney General of the State of Illinois, and pursuant to 635 ILCS 5/2-619 hereby moves to dismiss the complaint, stating as follows:

1. Plaintiff taxpayers challenge the issuance of future tax credits by Defendant Illinois Department of Commerce and Economic Opportunity (the “Department”) to third party taxpayers under the Economic Development for a Growing Economy Tax Credit Act (“EDGE Act) (35 ILCS 10/5-1 et seq.).

2. Plaintiffs have no standing to challenge the issuance of tax credits to third parties under the traditional test or under the doctrine of taxpayer standing.

3. Plaintiffs also lack standing to bring their claims because the real party in interest is the State of Illinois.

4. Accordingly, the complaint should be dismissed for lack of standing under 735 ILCS 5/2-619.

5. A memorandum of law is submitted herewith and incorporated herein.

WHEREFORE, Defendant, the ILLINOIS DEPARTMENT OF COMMERCE AND ECONOMIC OPPORTUNITY, requests this honorable Court dismiss this case with prejudice.

Respectfully submitted,

ILLINOIS DEPARTMENT OF
COMMERCE AND ECONOMIC
OPPORTUNITY,

Defendant,

LISA MADIGAN, Attorney General of the
State of Illinois,

Attorney for Defendant.

By:____________________________
Joshua D. Ratz
Assistant Attorney General

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Of Counsel.

CERTIFICATE OF SERVICE

Joshua D. Ratz, Assistant Attorney General, herein certifies that he has served a copy of the foregoing Motion to Dismiss upon:

Jacob H. Huebert
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Liberty Justice Center
190 S. LaSalle Street, Suite 1500
Chicago, Illinois 60603

by mailing a true copy thereof to the address listed above in an envelope duly addressed, bearing proper first class postage, and deposited in the United States mail at Springfield, Illinois, on March 16, 2015.

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Plaintiff taxpayers challenge the issuance of future tax credits by Defendant Illinois Department of Commerce and Economic Opportunity (the "Department") to third party taxpayers under the Economic Development for a Growing Economy Tax Credit Act ("EDGE Act) (35 ILCS 10/5-1 *et seq.*). Under the EDGE Act, the Department is empowered to foster job creation and retention in Illinois by entering into agreements with third party taxpayers awarding them eligibility to claim tax credits that may be used to offset taxes. *See* 35 ILCS 10/5-15, 5-45, 5-50, 5-60; 35 ILCS 5/211.

Plaintiff taxpayers have no standing to raise their claims, and therefore the complaint should be dismissed. Plaintiffs plead no facts demonstrating an injury in fact. The doctrine of taxpayer standing does not permit a party to challenge tax credits granted to third parties because tax credits do not require an expenditure of funds, but rather lowers tax liability of certain entities or individuals. Accordingly, the only real party in interest is the State, not individual taxpayers.

STANDARD

A § 2-619 motion to dismiss admits the legal sufficiency of the complaint but raises defects, defenses, or other affirmative matter to defeat the claim. *Wilson v. City of Decatur*, 389 Ill. App. 3d 555, 558 (2009). Lack of standing is an affirmative matter that may be raised in a § 2-619 motion. *McCready v. Illinois Secretary of State White*, 382 Ill. App. 3d 789, 794 (2008).

ISSUES AND ARGUMENTS

I. PLAINTIFFS LACK STANDING UNDER THE TRADITIONAL TEST.

A plaintiff's mere concern or curiosity about the outcome of a controversy is insufficient to support standing. *AIDA v. Time Warner Entertainment Co., L.P.*, 332 Ill. App. 3d 154, 160 (2002). Speculative, generalized harms are similarly insufficient to confer standing. *In re Marriage of Harnack & Fanady*, 2014 IL App (1st) 121424, ¶ 54 n.9. Rather, "[t]he party requesting the [relief] must possess a personal claim, status, or right that is capable of being affected by the grant of such relief." *Id.* One has standing to challenge the validity of a rule if he or she "has sustained or if he [or she] is in immediate danger of sustaining some direct injury as a result of enforcement" of the rule. *People v. Douglas*, 2014 IL App (5th) 120155, ¶ 37 (quoting *People v. Mayberry*, 63 Ill. 2d 1, 8 (1976)). "[S]tanding requires some injury in fact to a legally cognizable interest." *Bank of America, N.A. v. Adeyiga*, 2014 IL App (1st) 131252, ¶ 61 (alteration in original). "The actual or threatened injury claimed by a plaintiff must be distinct and palpable, fairly traceable to the defendant's actions, and substantially likely to be prevented or redressed by the grant of the requested relief." *P & S Grain, LLC v. County of Williamson*, 399 Ill. App. 3d 836, 842–43 (2010).

"The purpose of the doctrine of standing is to ensure that courts are deciding actual, specific controversies, and not abstract questions or moot issues." *In re M.I.*, 2013 IL 113776, ¶ 33. The doctrine is "designed to preclude persons who have no interest in a controversy from bringing

suit" and "assures that issues are raised only by those parties with a real interest in the outcome of the controversy." *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999). Whether a Plaintiff has standing is determined from the allegations in the complaint. *Illinois Ass'n of Realtors v. Stermer*, 2014 IL App (4th) 130079, ¶ 26.

Plaintiffs do not set forth any personal claim, status, or right capable of being affected by the requested relief. Plaintiffs do not seek to enjoin the State from assessing any particular tax against them, depriving them of property, or otherwise affecting their interest. Whether the Court grants the requested relief or not will not change the taxes Plaintiffs must pay, restore their wrongfully withheld or seized property or moneys, or otherwise change any status of any Plaintiff. Instead, Plaintiffs seek a declaration that may, in the future, result in other taxpayers receiving smaller amounts of tax credits. Plaintiffs fail to meet the requirements for standing under the traditional test.

II. PLAINTIFFS LACK STANDING UNDER THE NARROW DOCTRINE OF TAXPAYER STANDING BECAUSE THERE IS NO EXPENDITURE FROM GENERAL REVENUE FUNDS.

Plaintiffs assert that they have standing as taxpayers, alleging that they pay taxes, have an equitable ownership interest in public funds, and therefore may be liable in the future to replenish the treasury for depletion of those funds. (Compl. ¶¶ 47–48.) Plaintiffs' assertion of taxpayer status fails, however, because Plaintiffs fail to allege any unlawful misappropriation of public funds.

"Taxpayer standing is a *narrow doctrine* permitting a taxpayer the ability to challenge the *misappropriation* of public funds." *Stermer*, 2014 IL App (4th) 130079, ¶ 29 (emphasis added). Illinois law permits taxpayers "to enjoin the misuse of public funds . . . based upon the taxpayers' *ownership of such funds* and their liability to replenish the public treasury for the deficiency cause by such misappropriation. The *misuse of these funds* for illegal or unconstitutional purposes is a

damage which entitles them to sue." *Barco Mfg. Co. v. Wright*, 10 Ill. 2d 157, 160 (1957) (emphasis added); *Price v. City of Mattoon*, 364 Ill. 512, 514–15 (1936). "The illegal *expenditure* of general public funds may always be said to involve a special injury to the taxpayer not suffered by the public at large." *Barco Mfg. Co.*, 10 Ill. 2d at 161 (emphasis added).

Critical to the inquiry of whether a taxpayer has standing to sue is whether there is an *expenditure* of public funds in which the taxpayer has an ownership interest. *Id.* at 160–62 (characterizing taxpayer standing cases as dealing with "disbursement of . . . general revenue", holding where there was no "expenditure of the general revenue," petitioners lacked general taxpayer standing and, instead, were required to demonstrate a "special right or special injury different in degree and kind from that suffered by the public at large"); *Stermer*, 2014 IL App (4th) 130079, ¶ 29 ("[A] plaintiff whose claims rest on his or her standing as a taxpayer must allege [an] equitable ownership of funds *depleted by misappropriation* and his or her liability to replenish them in the complaint; otherwise, the complaint is 'fatally defective.'") (second alteration in original) (emphasis added); *Barber v. City of Springfield*, 406 Ill. App. 3d 1099, 1111 (2011) (relevant inquiry for taxpayer standing is "the impact of *expenditures* on general revenue and citizens' tax liability" (emphasis added)); *Crusius ex rel. Taxpayers of State of Ill. v. Ill. Gaming Bd.*, 348 Ill. App. 3d 44, 49 (2004) (taxpayer standing premised on "equitable interest in public property which [the taxpayer] claims is *being illegally disposed of*." (emphasis added)); *Martini v. Netsch*, 272 Ill. App. 3d 693, 695 (1995) (same). It is the equitable interest in public funds actually collected by the government from the taxpayer that satisfies the special injury requirement of general standing and permits the taxpayer to challenge the misuse of those public funds. *Barco Mfg. Co.*, 10 Ill. 2d at 161.

Illinois law has not extended the "narrow doctrine" of taxpayer standing, *Stermer*, 2014 IL

App (4th) 130079, ¶ 29, to suits seeking to enjoin tax credits, as opposed to expenditures of public funds. Here, Plaintiffs do not challenge any disbursement of funds from the public treasury and there are no funds allegedly subject to misappropriation. Under Plaintiffs' allegations, not one dollar collected from Plaintiffs or any other taxpayer that has been (or will be) disbursed or used for any illegal purpose. Rather, Plaintiffs complain that the State is not taxing third parties enough because the State has granted tax credits, because the Department's regulations allegedly permit tax credits in excess of the amounts allowed by the EDGE Act. Yet, Illinois law is clear that the taxpayer standing doctrine is premised on the taxpayer's ownership interest in disbursed funds. Plaintiffs can demonstrate no equitable interest in taxes not collected from third parties. Because Plaintiffs allege no expenditures of general revenue funds and allege no equitable interest in any public funds unlawfully disbursed, Plaintiffs must, in line with the traditional test, demonstrate a "special right or special injury different in degree and kind from that suffered by the public at large." *Barco Mfg. Co.*, 10 Ill. 2d at 161–62. Plaintiffs set forth no allegations demonstrating such special right or injury distinct from the public at large, however. Accordingly, Plaintiffs lack taxpayer standing under Illinois law.

III. THIS COURT SHOULD NOT EXTEND THE DOCTRINE OF TAXPAYER STANDING BEYOND THE NARROW CIRCUMSTANCES ARTICULATED BY THE APPELLATE COURTS.

Although Illinois Courts have not directly addressed the issue of taxpayer standing for suits challenging tax credits instead of disbursements, the Circuit Court should not expand the "narrow doctrine" articulated by the Illinois Supreme Court and the Illinois Appellate Court. *See Rickey v. CTA*, 98 Ill. 2d 546, 551 (1983) (lower courts lack authority to "overrule the supreme court or to modify its decisions."); *People v. Matthews*, 2012 IL App (1st) 102540, ¶ 21 (abuse of discretion for trial courts to expand narrow exceptions articulated by the appellate courts); *Vonholdt v. Barba*

& Barba Constr., Inc., 276 Ill. App. 3d 325, 329 (1995) (declining to extend a cause of action created by the Illinois Supreme Court, acknowledging lack of authority to modify its decisions). Indeed, Illinois courts have refused to expand the doctrine of taxpayer standing beyond cases involving disbursements from the general revenue fund. Thus, Illinois does not recognize general taxpayer standing in cases involving disbursements from special funds held by the State, *Barco Mfg. Co.*, 10 Ill. 2d at 165, even where the fund is comprised of fees paid by the plaintiffs. *Stermer*, 2014 IL App (4th) 130079, ¶ 30. (2014).

In *Stermer*, the plaintiff sought to prevent the General Assembly from "sweeping" money out of the Real Estate License Administration Fund and into the General Revenue fund, arguing that the plaintiff's realtor members had an equitable interest in the funds, which were comprised of realtor licensing fees. *Id.* at ¶¶ 6–7, 30–33. Because the case did not involve an expenditure from the general revenue fund, but rather a special fund, the plaintiff did not have general taxpayer standing. *Id.* at ¶ 30. The plaintiff argued, however, that by sweeping moneys out of the Fund, the General Assembly caused the fund to be depleted, which indirectly resulted in higher fees to replenish the fund. *Id.* at ¶ 33. The court rejected this reasoning, noting that the fund sweep did not require an increase in fees and any link between the two was too attenuated to confer standing. *Id.* at ¶¶ 33–37.

Here, Plaintiffs merely speculate that the granting of tax credits to third parties will result in higher taxes. The mere possibility that the State "may be required to make up a deficiency in public funds" is insufficient to confer taxpayer standing where, as here, "neither a *debt nor a public fund* of the city is directly or contingently involved." *Price*, 364 Ill. at 515 (emphasis added).

Other jurisdictions are in accord. In *Manzara v. State*, the Missouri Supreme Court held

that taxpayer standing did not extend to suits to enjoin tax credits because tax credits are not public expenditures. *Manzara v. State,* 343 S.W.3d 656, 657, 660 (Mo. banc 2011). There, the petitioners challenged a tax credit statute permitting credits to be awarded to property redevelopers as an unconstitutional "grant of public money or property" to a "private person, association or corporation" or an invalid "lending of credit" or "pledge [of] credit" *Id.* (alteration in original). Missouri law, similar to Illinois law, grants taxpayer standing where "a public interest is involved and public monies are being expended for an illegal purpose." *Id.* at 659.

In rejecting taxpayer standing to challenge the tax credits, the court reasoned that "[e]xpenditures typically occur in government when checks are written by the state treasurer based on appropriations or warrants. No such withdrawal of public funds or such "expenditure" occurs with the granting of a tax credit. While 'expenditures' and 'tax credits' might be compared in that their end result is 'less' money in the state treasury, the similarity is superficial." *Id.* "A tax credit is not a drain on the state's coffers; it closes the faucet that money flows through into the state treasury rather than opening the drain." *Id.* "Insofar as the purpose of taxpayer standing is to give taxpayers a way to conform government spending to the law, that purpose is not served if the State is spending nothing." *Id.* The court cited with approval cases holding that a taxpayer lacks standing to challenge tax exemptions because the taxpayer cannot demonstrate he or she has been adversely affected by a statute that merely excuses the tax obligations of others. *Id.*

In *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011), the United States Supreme Court also distinguished tax credits and tax expenditures, holding that tax credits are not expenditures and do not confer standing. Although not generally recognized under federal law, taxpayer standing may exist where government expenditures implicate the Establishment Clause of the First Amendment. *Winn*, 131 S. Ct. at 1445–46; *Flast v. Cohen*, 392

U.S. 83 (1968). At issue in *Winn* was whether tax credits given for contributions to school tuition organizations, or "STOs" (that would then provide scholarships to private, often religious schools), constituted expenditures triggering taxpayer standing under the *Flast* exception.

The Court held that tax credits are not expenditures for purposes of taxpayer standing. The Court reasoned:

> It is easy to see that tax credits and governmental expenditures can have similar economic consequences, at least for beneficiaries whose tax liability is sufficiently large to take full advantage of the credit. Yet tax credits and governmental expenditures do not both implicate individual taxpayers in sectarian activities. A dissenter whose tax dollars are "extracted and spent" knows that he has in some small measure been made to contribute to an establishment in violation of conscience. In that instance the taxpayer's direct and particular connection with the establishment does not depend on economic speculation or political conjecture. . . . When the government declines to impose a tax, by contrast, there is no such connection between dissenting taxpayer and alleged establishment. Any financial injury remains speculative. . . .
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> * * *
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> *Respondents' contrary position assumes that income should be treated as if it were government property even if it has not come into the tax collector's hands. That premise finds no basis in standing jurisprudence.* Private bank accounts cannot be equated with the Arizona State Treasury.

Id. at 1447–48 (citations omitted) (emphasis added); *see also DaimlerChrysler Corp. v. Cuno*, 457 U.S. 332, 344 (noting that alleged harm from tax credits granted to third parties is "conjectural or hypothetical" and that it is unclear that tax credits do in fact deplete the treasury because the very point of the tax break is to spur economic activity, thereby *increasing* revenues).

Here, as in *Winn*, Plaintiffs do not have standing because there is no link between monies extracted through taxation from Plaintiffs and illegal disbursement of those monies. This is because Illinois standing jurisprudence is premised on equitable ownership of public funds and the right to prevent misuse of those funds. In this case, tax credits granted to third parties do not constitute transfers of any public moneys held by Illinois. To argue otherwise is, as the Supreme

Court stated, to "assume[] that income should be treated as if it were government property even if it has not come into the tax collector's hands." *Id.* at 1448; *Manzara,* 343 S.W.3d at 659 (a tax credit does not drain the state's coffers, it simply constitutes the government's discretionary decision to close the flow of money *into* the treasury and declare taxable assets off-limits)..

IV. PLAINTIFFS LACK STANDING TO BRING THIS CLAIM BECAUSE THE STATE OF ILLINOIS IS THE REAL PARTY IN INTEREST TO ANY CLAIM REGARDING THE VALIDITY OF TAX CREDITS

The State of Illinois is the real party in interest in a matter regarding the validity of tax credits. Plaintiffs, therefore, lack standing to bring this claim. The Illinois Supreme Court has held that plaintiffs lack standing to bring a taxpayer action where the State is the "real party in interest." *Lyons v. Ryan*, 201 Ill. 2d 529, 534 (2002). A real party in interest is the individual who benefits from the outcome of a successful claim. *Id.* The State is the real party in interest where it has an "actual and substantial interest in the subject matter of the action, as distinguished from one who has a nominal, formal or technical interest." *Id*.

In *Lyons*, the plaintiff sought to bring a taxpayer derivative claim, alleging that various political actors had accepted illegal campaign contributions in exchange for commercial driver's licenses. *Id.* at 532. The plaintiff sought a constructive trust over the funds and benefits wrongfully received by the political actors. *Id.* at 532. The court held that because the campaign contributions and salaries involved did not affect the public treasury, *id.* at 538, the plaintiff did not bring a claim of personal injury. *Id* at 535. Rather, the plaintiff sought to bring a claim belonging to the State. *Id*. The court held that the State, and not the taxpayers, would be the beneficiary of such an action, because the plaintiff had failed to demonstrate that funds distributed by the State would be affected by the claim. *Id*. Thus, the State was the real party in interest. *Id*. The court noted that the Attorney General was the only party constitutionally authorized to represent the State, where the State is the

real party in interest. *Id* at 537. The court further held that disagreement with the Attorney General's decision to prosecute a given case was insufficient to confer standing on the plaintiff. *Id* at 539.

The Corporate Accountability and Expenditure Act (20 ILCS 715/1 *et seq.*) ("Expenditure Act") establishes provisions that must be included in any agreement made under the EDGE Act. 20 ILCS 715/25(a)(5). Section 25(a)(5) of the Expenditure Act requires, in part, that all agreements include language establishing that "in the event of a revocation or suspension of the credit, the Department shall contact the Director of Revenue to initiate proceedings against the recipient to recover wrongfully exempted Illinois State income taxes and the recipient shall promptly repay to the Department of Revenue any wrongfully exempted Illinois State income taxes." 20 ILCS 715/25(a)(5).

The Illinois Income Tax Act authorizes an individual who enters an agreement under the EDGE Act to apply the tax credit to its income tax liability or that of partners and shareholders, depending upon the legal structure of the entity. 35 ILCS 5/211; *see also* 26 U.S.C. §§ 702, 703; 35 ILCS 5/201. The Illinois Department of Revenue has the authority to collect taxes and generally enforce the Illinois Income Tax Act. 35 ILCS 5/901(a). In the event that a deficiency in a taxpayer's payment of its income tax liability exists, the Department of Revenue may issue a notice of deficiency describing the assessment of such deficiency. 35 ILCS 5/903(a)(2); 35 ILCS 5/904(c). Additionally, the Department of Revenue is generally authorized to conduct broad investigations and hearings to enforce the Illinois Income Tax Act. 35 ILCS 5/914; 89 Ill. Admin. Code 200.101(b). In such cases, the Department of Revenue is represented by a Special Assistant Attorney General authorized to present the Department's case and heard before an Administrative Law Judge. 89 Ill. Admin. Code 200.105; 89 Ill. Admin. Code 200.165. Judicial review of the

Department's decision is governed by the Administrative Review Law and heard before the Illinois Independent Tax Tribunal. 35 ILCS 5/1201; 35 ILCS 1010/1-5.

The enforcement mechanisms set forth above demonstrate that the State of Illinois is the real party in interest to any claim, including this one, seeking to enforce caps on tax credits and therefore, ensure that taxpayers' tax liability is properly paid. Indeed, Section 211 of the Income Tax Act expressly provides that EDGE credits "shall not exceed the Incremental Income Tax (as defined in Section 5-5 of the [EDGE] Act) . . . ." Thus, the Income Tax Act, independent of the agreements issued by the Department of Commerce and Economic Opportunity, defines the lawful amount of credits that may be claimed and authorize the Department of Revenue to exercise its enforcement authority over claimed credits. If Plaintiffs are correct that the Department of Commerce and Economic Opportunity's regulations authorize tax credits that exceed statutory authority, the proper mechanism for recoupment of any tax deficiency that may result from claiming the excess credit is an action by the Department of Revenue pursuant to Section 211 of the Income Tax Act and the statutory and regulatory regime that has been established under the authority of the Department of Revenue. The beneficiary of any such action would be the State, not Plaintiffs.

Plaintiffs, as in *Lyons*, have not brought a claim for personal injury, but rather a claim belonging to the State, in which the State is the ultimate beneficiary. Plaintiffs have not alleged any facts suggesting that disbursements of State funds would in any way be affected by the claim Plaintiffs bring. As discussed above, private dollars do not become state property until such time as they are acquired by tax collectors. As such, the State of Illinois, through its enforcement regime granted to the Department of Revenue and Special Assistant Attorney General, is the real party in interest to this claim. Illinois law does not authorize private citizens to bring claims where the State

is the real party in interest. *Lyons*, 201 Ill. 2d at 534. Therefore, Plaintiff lacks standing to bring this claim.

CONCLUSION

Plaintiffs lack standing to challenge the grant of tax credits under the EDGE Act because they cannot demonstrate an injury in fact to a legally cognizable interest, cannot demonstrate an equitable interest in the challenged credits because the credits do not result in expenditures or disbursement from the general revenue fund or any specialized fund, and lack authority to assert claims belonging to the State. Accordingly, the Court should dismiss the complaint with prejudice for lack of standing.

WHEREFORE, Defendant, the ILLINOIS DEPARTMENT OF COMMERCE AND ECONOMIC OPPORTUNITY, requests this honorable Court dismiss this case with prejudice.

Respectfully submitted,

ILLINOIS DEPARTMENT OF
COMMERCE AND ECONOMIC
OPPORTUNITY,

Defendant,

LISA MADIGAN, Attorney General of the
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By:____________________________
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Of Counsel.

CERTIFICATE OF SERVICE

Joshua D. Ratz, Assistant Attorney General, herein certifies that he has served a copy of the foregoing Memorandum of Law in Support of Motion to Dismiss upon:

Jacob H. Huebert
Jeffrey M. Schwab
Liberty Justice Center
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Chicago, Illinois 60603

by mailing a true copy thereof to the address listed above in an envelope duly addressed, bearing proper first class postage, and deposited in the United States mail at Springfield, Illinois, on March 16, 2015.

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