IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

R.V., a minor by and through his next friend and mother, N.R., et al.,

Plaintiffs,

v.

STEVEN T. MNUCHIN, et al.,

Defendants.

Civil Action No. 8:20-cv-1148-PWG

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
AND SUPPORTING MEMORANDUM

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules & Regulations

Other Authorities

INTRODUCTION

The coronavirus pandemic has brought unprecedented suffering to the United States. Hundreds of thousands have died and many more have gotten sick. Businesses have closed by the thousands. Millions have lost their jobs. And food banks and other community providers are straining to meet the demand for help.

This case is about whether the federal government can deny critical emergency aid designed to provide relief from this hardship to millions of U.S. citizen children solely because of their parents' disfavored immigration status. The Coronavirus Aid, Relief, and Economic Security (CARES) Act directs Defendant Treasury Secretary Steven Mnuchin to distribute up to $1,200 per tax filer and up to $500 per child in means-tested financial assistance. This assistance is restricted to individuals who provide a "valid identification number," in essence, a type of social security number that only citizens and certain immigrants can obtain—and that undocumented immigrants cannot. But even if a citizen child has provided a valid identification number, the government still will not distribute the up-to-$500 payment for that child if her parent lacks the requisite number.

In this way, the CARES Act discriminates against citizen children of undocumented immigrants in violation of the Fifth Amendment's equal protection component. These children do not qualify for the distribution of assistance, while other citizen children—who are the same in every respect except that their parents are citizens or possess a different immigration status—do. Children with undocumented parents are thus relegated to second-class citizenship and denied much-needed aid that similarly situated citizen children enjoy.

Citizen Children Plaintiffs—five children who range from four to eight years old—are among the millions of citizen children who have suffered from this discriminatory denial of aid. Their mothers, Plaintiffs N.R. and H.G.T. ("Parent Plaintiffs"), filed tax returns

using individual taxpayer identification numbers assigned to them by the Internal Revenue Service (IRS) so that they may fulfill their obligation to pay federal taxes. Together with Citizen Children Plaintiffs, they satisfied every statutory requirement needed to obtain a $500 payment for each child except that, because of their immigration status, Parent Plaintiffs have no valid identification number. As a result, no aid was distributed to either family.

But while that emergency assistance never came, the hardship wrought by the COVID-19 pandemic arrived in full force. The restaurant where N.R. worked closed, and she lost her job. In order to sustain her family on her depleted income, N.R. has stopped buying meat (among the highest priced grocery items) for her son, Plaintiff R.V., and has been unable to buy him new clothes as he outgrows his old ones. H.G.T.'s children, Plaintiffs I.G., B.G., J.G., and H.A.G., have struggled as well. The three older children attend school virtually, but the family has no internet and depends on a neighbor's unreliable connection, hampering the children's education. And all four children have had to rely on food banks and community support for meals. Access to the $500-per-child payments that other citizen children have received would mitigate these harms to Citizen Children Plaintiffs.

Through this Motion for Summary Judgment, Plaintiffs seek to remedy the unlawful discrimination inflicted on Citizen Children Plaintiffs through an award of damages or, in the alternative, equitable relief.

BACKGROUND

I. The CARES Act's Requirements for Assistance

Section 2201(a) of the CARES Act, 26 U.S.C. § 6428, requires Secretary Mnuchin to distribute means-tested financial assistance to individuals—up to $1,200 per tax filer and up to $500 per child—who satisfy a number of statutory prerequisites. *See id.* § 6428(a). First,

to receive a payment, the tax filer must be an "eligible" individual, meaning she must be a U.S. citizen or resident alien and must not be claimed as a dependent on anyone else's return. *Id.* § 6428(d). Whether a person is a "resident alien" turns on the amount of time the person has spent in the United States, not on whether she possesses legal immigration status. *See id.* § 7701(b). Second, for a payment to be distributed per "qualify[ing]" child, the child must not provide more than half his own support and must live with the tax filer. *Id.* § 6428(a)(2) (incorporating 26 U.S.C. §§ 24(c) and 152(c)). Third, the tax filer's adjusted gross income must fall below certain statutory limits, which vary depending on whether the person files alone, jointly with a spouse, or as "head of household." *Id.* § 6428(c). For those otherwise entitled to assistance, the statutory limits also determine whether the tax filer will receive the maximum of $1,200 per adult and $500 per child or a lesser amount, as the payment will be reduced "by 5 percent of so much of the taxpayer's adjusted gross income as exceeds" the limits, until the payment is reduced to zero. *Id.* Together, these criteria identify the low- and middle-income individuals and their dependent children expected to be most harmed by the coronavirus pandemic.

Despite the foregoing, an additional provision of the CARES Act denies this much-needed aid to millions of citizen children by limiting assistance to people who have a "valid identification number" (VIN) that appears on their tax return. *Id.* § 6428(g). A VIN is defined as a "social security number (as such term is defined in 26 U.S.C. § 24(h)(7))." *Id.* § 6428(g)(2)(A). Section 24(h)(7), in turn, defines "social security number" (SSN) to mean an SSN issued to one of three categories of persons: (1) "citizen[s] of the United States," (2) "aliens" when they arrive for permanent residence or under a work visa, and (3) other individuals who could have, but did not, receive an SSN at the time of admission and are not "because of [their] alien status, prohibited from engaging in employment." *Id.* (cross-

referencing 42 U.S.C. § 405(c)(2)(B)(i)(I), (III)). A VIN is also defined to include an "adoption taxpayer identification number," which only a citizen can receive. *See* 26 U.S.C. § 6428(g)(2)(B); 26 C.F.R. § 301.6109-3. This definition excludes social security numbers that may be issued to certain noncitizens, including some undocumented immigrants, and that allow such noncitizens to receive certain benefits but do not allow for employment ("benefits-only SSNs"). 26 U.S.C. § 24(h)(7) (excluding SSNs issued under 42 U.S.C. § 405(c)(2)(B)(i)(II)). And, importantly, it also excludes "individual taxpayer identification numbers" ("ITINs") that undocumented immigrants may obtain to fulfill their obligation to pay their taxes. 26 C.F.R. § 301.6109-1(d)(3).

Critically, the CARES Act requires that *both* the child and the tax filer have a VIN as a condition of the payment of up to $500 per child being distributed. Thus, if a parent lacks a VIN, then the government will distribute neither the up-to-$1,200 payment for the tax filer nor the up-to-$500 payment per child, *even if* the child has a VIN. 26 U.S.C. § 6428(g)(1). The VIN requirement thereby precludes citizen children who satisfy every statutory prerequisite from obtaining assistance solely because one or both of their parents' immigration status renders the parent ineligible for a VIN.

II. Distribution of Assistance Under the CARES Act

The CARES Act requires Secretary Mnuchin to distribute this emergency assistance, commonly referred to as "economic impact payments" (EIPs), in two separate timeframes. First, § 6428 directs Secretary Mnuchin to disburse "advance refunds" in 2020[1] to individuals who satisfy the statutory requirements for an EIP based on their 2019 tax return or, if that return has not been filed, based on their 2018 tax return or certain federal benefits

[1] Although there is a December 31, 2020, deadline in § 6428, Defendants have agreed not to raise that deadline as a defense to Plaintiffs' claims. *See* Ex. 1, Aug. 14, 2020, Email from C. Williamson to R. Friedman. All exhibits are attached to the Declaration of Robert Friedman.

statements.[2] *See* 26 U.S.C. §§ 6428(f)(1), (3), (5). Secretary Mnuchin "shall" distribute these advance refunds "as rapidly as possible." *Id.* § 6428(f)(3)(A). Defendants have distributed over $267 billion in economic impact payments to over 150 million individuals. Answer, ECF No. 36, ¶ 4. The payments have been—and continue to be[3]—distributed separately from, and in addition to, any ordinary refunds distributed based on tax filers' 2018 or 2019 returns. *See* Ex. 2, Defs.' Resp. Pls.' Req. Admis. No. 1.

Second, for those who do not receive the maximum advance refund in 2020, § 6428 provides for a refundable tax credit that tax filers can claim when filing their 2020 tax returns in calendar year 2021. *See* 26 U.S.C. §§ 6428(a), (e)(1).[4] When this credit is claimed, an individual's tax liability will be reduced by up to $1,200 per tax filer and up to $500 per child; if the filer's tax liability is reduced below zero, any excess amount will be refunded. *Id.* § 6428(a), (b); *id.* § 6402 (providing the Secretary of Treasury authority to refund any "overpayment" created by a credit reducing tax liability below zero).

III. Plaintiffs Have Experienced Considerable Hardship During the Pandemic

R.V. and N.R. Plaintiff R.V. is a United States citizen and is eight years old. Ex. 3, Declaration of N.R. ("N.R. Decl.") ¶ 3. His mother, N.R., is a citizen of Mexico and an undocumented immigrant.[5] *Id.* ¶ 2. Like many others, N.R. and R.V. have struggled since the onset of the pandemic. N.R. lost her job when the restaurant where she worked closed

[2] The Treasury Department also established an online "portal" for people who have neither filed tax returns nor received a benefits statement to request EIPs. Answer, ECF 36, ¶ 35.
[3] *See IRS extends Economic Impact Payment deadline to Nov. 21 to help non-filers*, Internal Revenue Service, Oct. 5, 2020, *available at* https://perma.cc/9QG3-2WGA (extending deadline to claim EIP through portal until November 21, 2020).
[4] Reflecting Congress's desire to distribute money quickly and inject a stimulus into the economy, a person who receives an EIP as an advance refund in 2020 based on a prior year's tax return or benefits statement is not required to return that refund or any portion of it even if their financial circumstances in 2020 change so that that would not otherwise be entitled to a credit under § 6428 in 2021 based on their 2020 tax returns.
[5] N.R. has a second child who is not a U.S. citizen and is not a party in this case.

because of the coronavirus pandemic. *Id.* ¶ 7. Although, after months without work, she was eventually able to obtain a job delivering food, she receives no hourly wage and is paid only in tips. *Id.* ¶ 8. Her total income therefore remains far below what she earned in recent years. In 2018 and 2019, N.R. had an income of $28,046 and $34,226, respectively. *Id.* ¶¶ 4-5. This year, she will earn less than $10,000. *Id.* ¶ 6.

Because of her financial difficulties, N.R. has been unable to fully provide for R.V. N.R. has had to focus on buying low-cost grocery items, at the expense of providing a well-balanced, but more expensive, diet to R.V. So she has stopped buying meat at the grocery store because it is more expensive than other food staples.[6] *Id.* ¶ 9. N.R. cannot afford to purchase new clothes for R.V., who is growing, so he has to continue to wear clothes that do not fit or rely on the generosity of others to provide hand-me-downs. *Id.* ¶ 10. Early in the pandemic, R.V. and N.R.'s rent became unaffordable, forcing them to leave their home. *Id.* ¶ 11. They now live with four other adults. *Id.* And they can no longer afford to pay for internet. *Id.* ¶ 12. Although R.V. has limited access to a "hotspot" that allows him to attend school virtually, he cannot use it for (and therefore has no means of accessing) non-school-selected educational platforms or other online children's entertainment. *Id.*

Although R.V. is a "qualifying child" and his VIN is listed on N.R.'s 2019 tax return, the government did not distribute the $500 per qualifying child due under the CARES Act solely because N.R. (*not* R.V.) did not satisfy the VIN requirement. Ex. 4, Defs.' Resp. Pls.' Req. Admis. No. 12. Had the government distributed that EIP, N.R. would have used it to buy food, clothing, or internet access for R.V., or to improve their housing situation. Ex. 3,

[6] Refraining from purchasing meat is, unfortunately, not an uncommon response to financial constraints. *See, e.g.*, Zolan Kanno-Youngs, *A Trump Immigration Policy Is Leaving Families Hungry*, N.Y. Times (Dec. 4, 2020), *available at* https://perma.cc/9XUX-BGYD.

N.R. Decl. ¶ 14. N.R. intends to file taxes in the upcoming tax season and, absent relief in this case, no EIP (in the form of a credit) will be distributed then either.[7] *Id.* ¶ 6.

H.A.G., J.G., B.G., I.G., and H.G.T. Plaintiffs H.A.G., J.G., B.G., and I.G. are United States citizens and four, five, seven, and eight years old. Ex. 5, Declaration of H.G.T. ("H.G.T. Decl.") ¶ 3. Their mother, Plaintiff H.G.T., is a citizen of Guatemala and an undocumented immigrant. *Id.* ¶ 2. H.G.T. cares for her children full time. They rely on family and community donations for food and other necessities. *Id.* ¶¶ 9, 11.

Schooling has been particularly challenging for J.G., B.G., and I.G. during the pandemic. Each attends school virtually, but the family cannot afford their own internet access. *Id.* ¶¶ 7-8. They have therefore relied on a neighbor's internet connection, but it does not work well—sometimes cutting out entirely—and thus interferes with their ability to attend online classes and learn. *Id.* ¶ 8. I.G. also had no working computer until she received one through a donation in December. *Id.* ¶ 7. So, for the first months of the school year, I.G. had to rely on a used tablet (all that H.G.T. could afford to purchase) that was not fully functional and thereby inhibited her education. *Id.*

H.G.T. filed her 2018 and 2019 tax returns, reporting zero income each year.[8] *Id.* ¶¶ 4-5. Although each of her children is a "qualifying child" and their VINs are listed on the returns, the government did not distribute the $500 per qualifying child under the CARES Act because H.G.T. did not satisfy the VIN requirement. *Id.* ¶ 10. Had the government distributed the $500 per child, H.G.T. would have used it to purchase internet access for the

[7] N.R. will be filing her taxes jointly next year with her now-husband, who is also undocumented. Ex. 3, N.R. Decl. ¶ 6. He expects to make approximately $25,000 this year, and supports two children of his own. *Id.* ¶¶ 6, 13. He therefore cannot afford to pay for what R.V. is now lacking. *Id.* ¶ 13.

[8] H.G.T.'s 2019 return inadvertently and erroneously reported income, albeit income still far below the statutory limit necessary to receive an EIP. H.G.T. Decl. ¶ 5. She subsequently filed an amended return that accurately reflects her lack of income. *Id.*

children to facilitate their learning and to buy food. *Id.* ¶¶ 10-11. H.G.T. intends to file a tax return in the upcoming tax season and, absent relief in this case, no EIP (in the form of a credit) will be distributed then either. *Id.* ¶ 6.

IV. Procedural History

Plaintiffs filed this class-action lawsuit on May 5, 2020, on behalf of themselves and other similarly situated U.S. citizen children and their undocumented parents, against Defendant Secretary Mnuchin and the United States.[9] Compl., ECF No. 1. Because of the need for dispatch in resolving the claims at issue in this case, the Court requested that Defendants file a letter motion raising the grounds on which they sought dismissal of Plaintiffs' claims, and Plaintiffs filed a letter in opposition. ECF Nos. 26, 32, 33. Treating Defendants' letter as a motion to dismiss, the Court denied that motion. MTD Op., ECF No. 34. Plaintiffs now move for summary judgment on all of their claims.

ARGUMENT

Denying Citizen Children Plaintiffs emergency aid for which they otherwise qualify solely because their parents lack VINs discriminates against those children because of their parents' immigration status. This regime infringes on Citizen Children's right to equal protection of the law because of their parents' immigration status—something entirely out of their control. Accordingly, this statutory scheme should be subjected to heightened scrutiny, which it cannot satisfy. Indeed, even under the deferential rational basis standard Defendants have urged the Court to apply, § 6428 still fails to pass constitutional muster.

The appropriate remedy for this violation is an award of damages. Defendants have violated a mandatory monetary obligation to Plaintiffs, and the Little Tucker Act, 28 U.S.C.

[9] The Complaint named as Plaintiffs members of four different households. Compl. ¶¶ 13-24. Two households voluntarily dismissed their claims. *See* ECF Nos. 53; 56.

§ 1346(a)(2), authorizes this Court to order monetary relief as a result. At a minimum, this Court should issue an injunction or declaratory relief to cure the violation of Citizen Children Plaintiffs' Fifth Amendment rights.[10]

I. The CARES Act Unconstitutionally Discriminates Against Citizen Children Plaintiffs in Violation of the Due Process Clause

A. The CARES Act's Discriminatory Provision Is Subject to Heightened Scrutiny

The equal protection principles embodied in the Fifth Amendment restrain the government from discriminating against children based on their parents' attributes. *See, e.g.*, *Pickett v. Brown*, 462 U.S. 1, 7 (1983). This principle recognizes that "[b]urden[ing] . . . children for the sake of punishing the illicit" conduct of their parents "is illogical and unjust." *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (quoting *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164, 175 (1972)) (applying heightened scrutiny to law classifying children based on their parents' marital status at the time of the child's birth). To protect against the unwarranted effects of such discrimination, any law that disadvantages a child based on her parent's status is subject to heightened scrutiny—that is, the differential treatment must be substantially related to advancing an important government interest. *Clark*, 486 U.S. at 461.

These principles apply with full force to laws, like the CARES Act, that discriminate against citizen children based on their parents' immigration status. The Second Circuit's decision in *Lewis v. Thompson*, 252 F.3d 567 (2001), provides a useful illustration. The plaintiffs in *Lewis* challenged a federal statute that conditioned a newborn child's automatic enrollment in Medicaid on the mother being "eligible for and receiving" Medicaid "on the date of the child's birth." 252 F.3d at 587 (quoting 42 U.S.C.A. § 1396a(e)(4)). Under the

[10] This motion does not address class certification, which the Court decided it would entertain after ruling on summary judgment if Plaintiffs prevail in establishing Defendants' liability.

Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), however, "unqualified aliens"—including pregnant women—are ineligible to receive Medicaid, even if they meet all of the other statutory requirements to qualify. *Id.* at 577-78; 8 U.S.C. § 1611(a). Because undocumented mothers could not receive Medicaid, their children could not be automatically enrolled. *Lewis*, 252 F.3d at 588. As a result, "[a] [newborn] citizen child of an unqualified alien mother [was] disadvantaged compared to a [newborn] citizen child of a citizen mother." *Id.* Accordingly, the Second Circuit held that heightened scrutiny applied—and declared the differential treatment unconstitutional—because the disadvantage was "imposed on the citizen children solely because of the unqualified alien status of their mothers." *Id.* at 591; *see also, e.g.*, *Intercommunity Justice & Peace Ctr. v. Registrar, Ohio Bureau of Motor Vehicles*, 440 F. Supp. 3d 877, 896 (S.D. Ohio 2020) (striking down requirement that children needed to provide proof of parents' lawful immigration status to obtain driver's permit); *cf. Oyama v. California*, 332 U.S. 633, 640 (1948) (striking down law that discriminated against children based on their "parents' country of origin").

This case involves the same type of impermissible discrimination as *Lewis*. In *Lewis*, the mothers' immigration status rendered them ineligible to receive Medicaid. Here, Parent Plaintiffs' immigration status prevents them from obtaining VINs. In *Lewis*, children were denied government assistance—automatic enrollment in Medicaid—because of their mothers' status-based ineligibility for that program. Here, Citizen Children Plaintiffs are denied government assistance—access to the up to $500 in aid earmarked for children—because of their mother's status-based inability to obtain a VIN. In both cases, citizen children are denied aid because of their parents' immigration status. It follows that, as in *Lewis*, heightened scrutiny applies.

Indeed, one district court has already held that a law that denies citizen children legal benefits because their parent lacks a social security number is unconstitutional. In *L.P. v. Commissioner, Indiana State Department of Health*, children born out of wedlock challenged an Indiana rule that required a father seeking to legitimate a child to include his social security number on an affidavit of paternity. *See* No. 1:10-cv-1309-TWP-TAB, 2011 WL 255807, at *1 (S.D. Ind. Jan. 27, 2011). This SSN requirement had the effect of making it impossible for citizen children of undocumented immigrants to be legitimated through such an affidavit. *Id.* The court concluded that Indiana's requirement discriminated against citizen children "because of their parents' immigration status" and enjoined the requirement.[11] *Id.* at *1, *3-4.

Declining to apply heightened scrutiny where citizen children are treated worse because of their parents' immigration status would pave the way for the creation of impermissible "second-class citizenship." *Cf. Schneider v. Rusk*, 377 U.S. 163, 169 (1964) (holding statute that discriminated against naturalized citizens to be unconstitutional). Discriminatory treatment based on characteristics outside of a child's control, like their parents' status, causes lasting stigma that will follow the child for the rest of his life. *Cf. Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 617 (4th Cir. 2020) (holding that transgender students are harmed by the stigma of being prohibited from using facilities that align with their gender identity). And the denial of assistance also can have long-term effects beyond the stigma associated with being denied equal status. For instance, food insecurity—which Citizen Children Plaintiffs are currently facing—is associated with poorer health outcomes, *see, e.g.*, Sharon I. Kirkpatrick, et al., *Child Hunger and Long-term Adverse Consequences for Health*,

[11] The court determined that strict scrutiny applied, but even if it did not, "intermediate scrutiny [wa]s warranted." 2011 WL 255807, at *2. The court then concluded that the requirement failed even under rational basis review. *Id.* at *2-3.

164 Archives of Pediatrics and Adolescent Med. 754 (2010), and diminished academic performance, *see, e.g.*, Meredith Hickson et al., *Too Hungry to Learn: Food Insecurity and School Readiness* (Sept. 3, 2013), *available at* https://perma.cc/6VBY-UNT8. Likewise, poor internet access during the pandemic has been identified as a major cause of educational disparities. *See, e.g.*, Robin Lake & Alvin Makori, *The Digital Divide Among Students During COVID-19: Who Has Access? Who Doesn't?*, Center on Reinventing Public Education, June 16, 2020, *available at* https://perma.cc/F2MQ-GHC6.

These dangers, and the unjustness of punishing a child for her parent's status, support the conclusion of every court to consider the type of discrimination at issue here that such discrimination warrants heightened scrutiny. This Court should follow suit.

B. Defendants' Arguments That Rational Basis Scrutiny Applies Lack Merit

Throughout this litigation, Defendants have contended that the CARES Act's denial of assistance to a citizen child if her parent lacks a VIN should not be subject to heightened scrutiny for three reasons. Each resists the conclusion that the CARES Act treats Citizen Children Plaintiffs differently because of their parents' immigration status. None has merit.

1. Heightened Scrutiny Is Appropriate Even Though Some Immigrants and Their Children Are Not Denied Assistance Under the CARES Act

Defendants previously have argued that, because *some* noncitizens can obtain a VIN (e.g., lawful permanent residents), § 6428 does not set up a classification on the basis of "alienage." Mot. to Dismiss at 4, ECF No. 32. That is wrong. The Supreme Court has held that discrimination against a subset of noncitizens is subject to the same level of scrutiny as discrimination against all noncitizens. *See Nyquist v. Mauclet*, 432 U.S. 1, 7-9 (1977). That makes good sense. In the same way that a law that discriminates against some religions is just as impermissible as a law that discriminates against all religions, discrimination against a

subset of citizen children with noncitizen parents is just as pernicious as discrimination against all citizen children with noncitizen parents. Defendants' contrary rule would permit the exact type of second-class citizenship that this case challenges: the government need only carve out some limited exception to a rule that generally disadvantages citizen children of noncitizen parents to escape more exacting scrutiny.

2. The Valid Identification Number Requirement Cannot Be Separated from Immigration Status

Defendants also have asserted that § 6428 involves no "alienage classification" because whether the government distributes payments for qualifying children "turns on whether a person has an SSN, not alienage." Mot. to Dismiss at 4. This argument rests on an understanding of SSNs—or, more precisely, VINs—that is divorced from the governing definition, which facially discriminates on the basis of immigration status. As described above, a VIN is defined (via incorporation of 26 U.S.C. § 24(h)(7) and 42 U.S.C. 405(c)) to mean SSNs issued to citizens, lawful permanent residents, other classes of noncitizens with work authorization at the time of admission, and other noncitizens after their admission but *only* if the noncitizen is not prohibited from working "because of his *alien status*." 42 U.S.C. § 405(c)(2)(B)(i)(I), (III). The definition of VIN also includes "adoption taxpayer identification number[s]," 26 U.S.C. § 6428(g)(2)(b), which noncitizens cannot receive, *see* 26 C.F.R. §§ 301.6109-3(a)(1), 301.6109-1(d)(3)(i). A provision like the VIN definition that on its face references "citizenship," certain classes of noncitizens, and uses the phrase "because of his alien status," clearly draws lines on the basis of immigration status (or, in Defendants' parlance, "alienage"). *See L.P.*, 2011 WL 255807, at *2.

That the facially discriminatory provisions are incorporated by reference, rather than in § 6428 specifically, is irrelevant.[12] *Lewis* again provides a useful example. In that case, the children were denied automatic enrollment under a provision that conditioned enrollment on their mothers' receipt of Medicaid. *See* 42 U.S.C. § 1396a(e)(4) (providing that a "child born to a woman eligible for and receiving medical assistance under a State [Medicaid] plan" would be automatically enrolled). It was a separate statute—PRWORA—that prohibited undocumented women from receiving Medicaid. *See* 8 U.S.C. §§ 1611(a), (c) (denying "an alien who is not a qualified alien" health benefits).

But the Second Circuit did not dismiss the classification at issue as turning on "receipt of Medicaid"—the equivalent of the government's contention that the CARES Act turns on possession of a VIN. Rather, in view of the interaction between the two statutes, the Second Circuit recognized that "the denial [of automatic enrollment] is based on the alienage of the mother." *Lewis*, 252 F.3d at 590; *see also, e.g.*, *Guinn v. United States*, 238 U.S. 347, 364-65 (1915) (striking down "grandfather clause" because, although "[i]t [wa]s true [the clause] contain[ed] no express words of an exclusion . . . on account of race, . . . the standard itself inherently brings that result into existence since it is based purely upon a period of time before the enactment of the 15th Amendment"). The same reasoning applies here: the VIN requirement should not be viewed in a vacuum so as to turn on whether a person "has an SSN" without regard to the definition that ties that inquiry to immigration status.

Even aside from the facially discriminatory categories employed by the CARES Act, the exclusion of ITINs and benefits-only SSNs from the definition of a VIN serves as a

[12] Notably, a Congressional Research Publication identifies the VIN requirement as an "immigration-related restriction[]." *See Recovery Rebates and Unemployment Compensation under the CARES Act: Immigration-Related Eligibility Criteria*, Congressional Research Service, April 7, 2020, *available at* https://perma.cc/MTY5-QZ8H.

proxy to deny aid to undocumented immigrants and, as relevant here, their citizen children. *See, e.g.*, *McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992) (recognizing that a facially neutral term can serve as a proxy for intentional discrimination). First, the relevant category of ITINs—those held by resident aliens, who are deemed "eligible individuals" under § 6428—are held almost exclusively by undocumented immigrants. Of the 1.9 million ITINs that the IRS issued to U.S. resident aliens who filed a tax return between 2016 and 2019, only 1,626 applicants for ITINs included a visa number, suggesting a lawful immigration status. Ex. 6, Defs.' Answers to Pls.' First Interrogs. Nos. 2-3. In other words, 99.9 percent of ITINs issued to U.S. resident aliens during that period evidently were issued to undocumented immigrants. Second, unlike SSNs that do qualify as VINs under § 6428, non-qualifying benefits-only SSNs may be issued to undocumented immigrants. *See* 20 C.F.R. § 422.104(a)(3)(i). Exclusion of ITINs and benefits-only SSNs, in short, excludes undocumented immigrants.

Finally, that § 6428 creates an exception to the VIN requirement for people who are in the military further bolsters the discriminatory nature of the requirement. 26 U.S.C. § 6428(g)(3). For married couples who file taxes jointly, § 6428 ordinarily requires both spouses to list their VINs, *id.* § 6428(g)(1), but that requirement does not apply when one spouse is in the military. *Id.* § 6428(g)(3). This exception confirms that the VIN requirement is not about "whether a person has an SSN," but is about denying assistance to disfavored individuals and their families.

3. Heightened Scrutiny Applies Even Though the Assistance Is Distributed to the Tax Filer, Not the Citizen Child

Finally, Defendants previously have asserted that, even if § 6428 discriminates on the basis of immigration status, rational basis scrutiny nonetheless applies because "[t]he federal government has 'broad, undoubted power over . . . immigration and the status of aliens.'"

Mot. to Dismiss at 4 (quoting *Arizona v. United States*, 567 U.S. 387, 394 (2012)). This misunderstands Plaintiffs' claims. Plaintiffs challenge discrimination not against N.R., a noncitizen, but against R.V., a citizen. The deferential rational basis standard Defendants invoke, however, applies only to the treatment of noncitizens. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1693-94 (2017) (holding that a gender-based classification should be evaluated under heightened scrutiny even though it arose in the immigration context). Thus, "[a]lthough the denial is based on the alienage of the mother, the 'highly deferential' standard appropriate in matters of immigration is not applicable here because [this case is] concerned with a claim asserted on behalf of a citizen." *Lewis*, 252 F.3d at 590 (citation omitted).

Nor does it matter that EIPs are distributed to the parent, not directly to children. Parents are the direct recipients because Congress used the tax infrastructure to distribute emergency assistance "as rapidly as possible," (including by providing Secretary Mnuchin special authority to deliver payments electronically), 26 U.S.C. § 6428(f)(3)(A)-(C), and because, as a practical matter, parents control the expenditures of young children like the four- to eight-year-old Citizen Children Plaintiffs here. But that convenient and commonsense means of distributing government aid does not mean that the additional up-to-$500 payments are not disbursed for the benefit of the children. *Cf. Sharvy v. Comm'r of Internal Revenue*, 67 T.C. 630, 640 (T.C. 1977), *aff'd*, 566 F.2d 1118 (9th Cir. 1977) ("In the [Aid to Families with Dependent Children program], . . . the children are the intended beneficiaries of the State's payments, even though the payments are given to the parent.").

Indeed, Other types of federal assistance are distributed to parents even when they are unmistakably intended for children. For example, the Housing Choice Voucher Program (i.e., Section 8) allows housing assistance to be distributed on a pro-rata basis in households with undocumented parents (who are ineligible for the assistance) and their citizen children

(who are eligible). *See* 24 C.F.R. §§ 5.516(a)(1)(iii), 5.520. When a citizen child in a mixed-status household is eligible for a voucher, an undocumented parent may still obtain a voucher on the child's behalf. *See* Voucher, *Housing Choice Voucher Program*, U.S. Dep't of Hous. & Urban Dev. (2019), https://perma.cc/GUE4-S8SZ (distributing voucher in the name of a "family representative"). Because of this aspect of the Program, it does not suffer from the type of constitutional infirmity that plagues the CARES Act.

Similar designs avoid discrimination against citizen children of undocumented immigrants in other benefit programs. *See, e.g.*, Olivia Golden & Amelia Hawkins, Urban Inst. & Dep't of Health & Human Servs., Office of Planning, Research & Evaluation, TANF Child-Only Cases 4 (2012), https://perma.cc/Q2QT-WWB6 (Temporary Assistance for Needy Families); 7 C.F.R. § 273.11(c)(2), (3) (Supplemental Nutrition Assistance Program, i.e., "food stamps"). Still other benefit programs avoid such discrimination by not requiring the parent to provide an SSN as a condition of assistance, *see, e.g.*, 26 U.S.C. § 24 (Child Tax Credit); 42 U.S.C. § 1786(d) (Supplemental Nutrition Assistance Program for Women, Infants, and Children), or by exempting certain parents from an otherwise applicable SSN requirement, *see, e.g.*, 7 C.F.R. § 245.6(a)(6) (school lunch program).[13]

[13] Under Defendants' theory, the government could decide tomorrow to deny all of these benefits to citizen children of undocumented immigrants. And this is no mere hypothetical. A rule recently proposed by the Department of Housing and Urban Development would effectively eliminate the Housing Choice Voucher Program's pro-rata distribution mechanism by barring undocumented immigrants from living in housing units subsidized by vouchers. *See* Housing and Community Development Act of 1980: Verification of Eligible Status, 84 Fed. Reg. 20,589 (proposed May 10, 2019). Critics have warned that, if adopted, the proposed rule would introduce into the Program the very type of constitutional defect that is the subject of this lawsuit. *See, e.g.*, N.Y. Legal Assistance Group, Comment in Opposition to HUD's Proposed Rule Change 14-16 (July 9, 2019), *available at* https://beta.regulations.gov/comment/HUD-2019-0044-9919; Xavier Bacerra, Attorney Gen., State of California, Comments on Proposed Rule 44-45 (July 9, 2019), *available at* https://beta.regulations.gov/comment/HUD-2019-0044-10795.

Notwithstanding that the CARES Act lacks a similar mechanism for ensuring that children can obtain EIPs when their parents cannot, there are clear indications that, as in these other programs, Congress intended the $500 per "qualifying child" payment to benefit the child. First, each qualifying child with a VIN triggers an additional EIP of up to $500 without any cap on the number of qualifying children in a family. This distinguishes the CARES Act from the Earned Income Tax Credit (EITC), which caps the credit available at three children per family. *See* 26 U.S.C. § 32. The drafters of § 6428 considered a cap similar to that which exists for the EITC but rejected it in favor of providing a payment for each child. *See* Ex. 7 at USA_2918. Second, the definition of "qualifying child" focuses on characteristics that allow Congress to presume the money will be put to the child's benefit: the child must live with the parent, must be under age 17, and must not be financially independent. *See* 26 U.S.C. § 6428(a)(2); *id.* § 152(c).

Third, in the one scenario in which Congress had a basis to presume that a person receiving an EIP would not use it to support a dependent, Congress withheld the payment. Payments under § 6428 are, to Plaintiffs' knowledge, unlike any other refundable credit in the tax code in that they generally cannot be used to offset certain of the tax filer's existing debts. In the ordinary case, a person who has overpaid their current taxes (and has no prior year federal tax liability) would have the amount she would receive back in the form of a "refund" reduced by the amount of any existing obligation owed to an agency of the federal government, to a state government if the debt is related to taxes or unemployment benefits, or in child support payments. *See* 26 U.S.C. § 6402(c)–(f). Section 2201(d) of the CARES Act, however, eliminates this "offsetting" function generally, but maintains it specifically for

a person with past due child support.[14] In this way, the CARES Act ensures that the stimulus money reaches children. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 2201(d), 134 Stat. 281 (2020).[15]

At bottom, § 6428 creates two different classes of citizen children who meet the definition of "qualifying" child: those whose parents do not have VINs (like the Citizen Children Plaintiffs here), who *do not* benefit from the up-to-$500 EIP, and those whose parents have VINs, who *do* obtain the benefit. That is discrimination against the citizen child, not the parent alone, and that warrants heightened scrutiny.

C. The CARES Act Fails Heightened Scrutiny Because the Discrimination Against Citizen Children Advances No Compelling Government Interest

When a law is subject to heightened scrutiny, the government bears the burden of demonstrating that the challenged discriminatory treatment is substantially related to an important government interest. *United States v. Virginia*, 518 U.S. 515, 531, 533 (1996). Although there are no contemporary statements in the Congressional Record (or elsewhere) explaining the purpose of the requirement—as Defendants acknowledge, *see* Defs.' Answers to Pls.' First Interrog. No. 1—Defendants have contended that the VIN requirement advances the same purpose that the EITC has in requiring a tax filer to list an SSN, namely, limiting assistance to individuals authorized to work. *Id.* This purported purpose is ill-

[14] Section 2101(d) is an administrative amendment that is not codified in the United States Code, but has the force of law. *See, e.g.*, *Smith v. Comm'r*, 114 T.C. 489, 491 (2000).

[15] The IRS's own language also recognizes that the payment is intended to benefit the child. In a press release touting its efforts to distribute EIPs to people who received only a $1,200 payment (on the basis of a federal benefits statement) and not the per child payment, the IRS stated, "The Internal Revenue Service continues to look for ways to help people who were unable to provide their information in time to receive Economic Impact Payments *for their children*." Internal Rev. Serv., No. 2020-180, *IRS Takes New Steps to Ensure People with Children Receive $500 Economic Impact Payments*, Aug. 14, 2020, *available at* https://perma.cc/MK8H-Y5MZ (emphasis added).

matched to the actual operation of the CARES Act and would not, in any case, render the discrimination against Citizen Children Plaintiffs constitutional.

1. Limiting Assistance to People with Work Authorization Is an Improper Post-Hoc Justification

Defendants' claimed justification fails at the outset because a substantial government interest cannot be "hypothesized or invented *post hoc* in response to litigation." *Virginia*, 518 U.S. at 533. Defendants' concession that the Congressional Record is silent as to the purpose of the "valid identification requirement" is proof that the reason they now advance is impermissibly speculative. *See Morales-Santana*, 137 S. Ct. at 1696 (holding that a claimed justification was "hypothesized" where the Congressional Record contained no evidence that the challenged provision was tied to that justification).

Indeed, Defendants' newly asserted rationalization is difficult to reconcile with the structure of § 6428, which differs in significant ways from the EITC. To start, as the name of the EITC suggests, a person must have "earned income" to receive the credit. 26 U.S.C. § 32(a)(1), (c)(2) (defining "earned income" as income from "wages, salaries, tips, and other employee compensation" or from self-employment). This is because the EITC is "intended to provide an incentive to work." *United States v. Cockett*, 330 F.3d 706, 708 n.1 (6th Cir. 2003). And it may well be logical for Congress to impose a work authorization requirement to avoid incentivizing the pursuit of "earned income" among those not permitted to work.

The CARES Act, however, has no earned income requirement. In fact, the drafters of § 6428 considered and rejected such a requirement. *See* Ex. 7, at USA_2918-19 (observing that, unlike the Treasury Department's proposal, the Senate's included an earned income requirement that "may be undesirable in [the] current environment"). And in doing so, the drafters also departed from the design of a 2008 stimulus program, which (with limited exceptions) required earned income to obtain a payment. *See* Economic Stimulus Act of

2008, Pub. L. No. 110-185, § 101(e)(1)(A), 122 Stat. 613, 615 (2008). This reflects that the CARES Act was enacted to provide emergency aid and inject a stimulus into the economy during the midst of a pandemic, not to advance long-term policy goals such as encouraging participation in the work force (EITC) and not limited to replacing or rewarding past work (the 2008 stimulus). Thus, there is no risk here of creating an incentive for those not authorized to work or rewarding their past unauthorized work.

Indeed, the CARES Act not only has no "earned income" requirement, but it also includes specific accommodations to allow EIPs to be distributed to people who are *not* expected to work. For individuals who did not file a 2018 or 2019 tax return, the CARES Act authorizes Secretary Mnuchin to instead review the person's Social Security or Railroad Retirement benefits statement to determine whether to distribute an EIP. 26 U.S.C. § 6428(f)(5)(B). And for those without a requirement to file income tax returns—generally, people with *no* or very little income—and who did not receive a benefits statement, Defendants created an online portal to enable them to request an EIP. Answer ¶ 35.

The requirement that qualifying children *also* must provide a VIN further undermines the notion that the VIN requirement serves to limit aid to those with work authorization. Federal child labor laws generally *prohibit* employers from hiring children under age 16. *See* 29 U.S.C. § 213(c). And even for those children permitted to work, to be "qualifying," the child must still primarily depend on the parent (not their own work income) for financial support. *See* 26 U.S.C. § 6428(a)(2) (incorporating 26 U.S.C. § 152(c)).

The disconnect between the government's claimed interest and how the CARES Act actually operates demonstrates that the work-authorization rationale is merely a post hoc rationalization that is insufficient to justify the challenged discrimination.

2. Limiting Emergency Aid to People with Work Authorization Is Not an Important Government Interest

Even if Defendants' justification were not a post hoc rationalization, it still could not save § 6428's discriminatory treatment of citizen children because restricting emergency aid to a certain category of people—here, those with work authorization—simply for the sake of restricting emergency aid is not a substantial government interest. As the Supreme Court has explained, "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources. The State must do more than justify its classification with a concise expression of an intention to discriminate." *Plyler v. Doe*, 457 U.S. 202, 227 (1982) (citation omitted); *see also Craig v. Boren*, 429 U.S. 190, 198 (1976) ("administrative ease and convenience" is not an important government interest that satisfies heightened scrutiny).

That arbitrary line makes particularly little sense here. The pandemic has disrupted the lives of people with and without work authorization. It has forced families of all stripes to incur additional expenses to follow health guidelines, resulted in widespread job loss and associated loss of income, restrained the ability of communities to provide support, and as the experience of Citizen Children Plaintiffs demonstrates, introduced novel challenges to education with potential long-term adverse consequences. The government advances no important interest by denying these families aid.

3. Discrimination Against Citizen Children Plaintiffs Does Not Advance the Government's Claimed Interest

Finally, even assuming that restricting assistance to those with work authorization is a sufficiently important interest, "the discriminatory means employed are [not] substantially related to the achievement of [that] objective[]." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (citation omitted). In *Pickett v. Brown*, the Supreme Court considered a

Tennessee requirement that mothers seeking to establish the paternity of, and compel support payments for, children born out of wedlock must file a paternity and support action within two years of the child's birth. 462 U.S. 1, 3 (1983). The Court found that the two-year limitation was not substantially related to the state's interest in preventing fraudulent and "stale" claims for two reasons pertinent here. First, children exempted from the two-year limitation—specifically, those likely to become a "public charge"—were "just as" likely to risk fraudulent or stale claims. *Id.* at 14-15. And second, the state's interest could be advanced in a readily available more precise manner, namely, through blood tests. *Id.* at 17.

The VIN requirement is not "substantially related" to the government's purported interest in limiting assistance to people with work authorization for similar reasons. First, as noted, there is an exception to the requirement that both spouses filing taxes jointly have a VIN if one serves in the military. *See* 26 U.S.C. § 6428(g)(3). In those cases, the emergency aid is "just as" certain to reach an individual without work authorization. Second, as described above, the government is fully capable of advancing its interest in denying aid to people without work authorization (or without lawful immigration status) without also denying it to their citizen children, and it normally does so. *See supra* at 16. The failure to use this readily available and more precise method of advancing the government's claimed interest—and departing from the norm in the process—confirms that the VIN requirement is not "substantially related" to work authorization.

In light of these alternatives to accomplishing whatever "work authorization"-related interest the government possesses, it does not advance the government's interest to take the *next* step of also denying the aid to citizen children. More to the point, even if it did, punishing citizen children for their parents' status and denying them the full privileges of their citizenship simply is not a legitimate means of advancing that interest—and especially

not in the context of emergency aid designed to provide funding for food, health supplies, and other basic needs.

D. The Discrimination Against Citizen Children Lacks a Rational Basis

Even if Defendants were correct that rational basis scrutiny applies, the VIN requirement does not rationally advance any of the purposes that Defendants have claimed. *See* Mot. to Dismiss at 5. As just explained, the requirement deprives citizens like R.V, who have VINs that include work authorization, from accessing EIPs. And, because there is no earned income requirement in § 6428, limiting the assistance to those with work authorization cannot rationally be expected to remove an incentive for unauthorized work.

Although Defendants identified limiting assistance to people with work authorization as the only interest that the VIN requirement pursues in their interrogatory responses, they claimed it relates to three other interests in their motion to dismiss. To the extent that Defendants continue to advance those—admittedly hypothetical—rationales, they also cannot justify the discrimination against Citizen Children Plaintiffs.

First, there is no merit to Defendants' previous assertion that requiring a tax filer to have a VIN in order to provide assistance to citizen children reduces "fraud and abuse." *Id.* at 5. The Supreme Court's decision in *Jimenez v. Weinberger*, 417 U.S. 628 (1974), demonstrates why the VIN requirement is not rationally related to preventing fraud. *Jimenez* addressed a provision in the Social Security Act that denied benefits to certain illegitimate children born after the father became disabled. *Id.* at 635-36. The government defended the denial of benefits on the ground that this category of children was unlikely to be dependent on the father, and so allowing such children to claim benefits would permit "spurious" claims. *Id.* at 634. Applying rational basis scrutiny, the Court concluded that the "blanket and conclusive exclusion" of these children was not "reasonably related to the prevention of

spurious claims" in view of the Act's purpose "to provide support for dependents" and the reality that other categories of illegitimate children (who were allowed benefits) stood on "equal footing" as to the risk of fraud presented. *Id.* at 634, 636-37.

The same reasoning demonstrates that the VIN requirement is not rationally related to the prevention of "spurious" EIP claims under the circumstances presented here. There is no basis to believe that tax returns that contain only a child's VIN are more likely to be fraudulent than tax returns containing both a parent's and a child's VIN. Because these two categories of returns stand on "equal footing" in this respect, *Jimenez*, 417 U.S. at 637, it does not rationally advance the statute's purpose of "provid[ing] support for dependents" to conclusively deny aid to Citizen Children Plaintiffs.

Second, Defendants' previous claim that denying *citizen children* the payment attributable to the qualifying child "effectuate[s] section 6428(d)(1)," Mot. to Dismiss 5, makes little sense. That section precludes EIPs from issuing to nonresident aliens. But citizen children are, of course, not "nonresident aliens."

Third, it is unclear how cutting out citizen children rationally enables Defendants to, as they have claimed, "disburse aid efficiently." *Id.* It may well be true that disbursing aid to fewer people will allow the government to complete the process of disbursing aid faster, but a line arbitrarily selected to cut out certain groups is the antithesis of "rational" government action.

It bears emphasis that, although the EIP is distributed through the tax code, what is actually at issue here is the delivery of emergency assistance to Americans in need. That citizen children may have no prior or independent relationship with the tax infrastructure does not make it rational to exclude them from an aid program designed to benefit them.

II. Plaintiffs Are Entitled to Damages

Defendants' failure to disburse EIPs to Citizen Children Plaintiffs can be remedied by payment of damages according to the statutory formula established in § 6428—i.e., a $500 payment per child. A damages remedy is available directly under the CARES Act by virtue of the Little Tucker Act, which, as this Court explained, waives sovereign immunity and allows an injured party to claim damages under a "money-mandating" statute. MTD Op. 11-12. As explained below, the CARES Act is such a statute, and once the unconstitutional discrimination is severed, it obligates Defendants to disburse $500 to Plaintiffs.

A. The CARES Act Is a Money-Mandating Statute

The Little Tucker Act provides jurisdiction over and waives sovereign immunity for any "claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress." 28 U.S.C. § 1346(a)(2). "A statute creates a right" that may be vindicated "within [this] waiver" if it is "money-mandating," that is, if it "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1328 (2020) (citation omitted).

As this Court recognized in ruling on Defendants' motion to dismiss, a statute that directs that the federal government "shall" make a payment ordinarily "create[s] both a right and a remedy under the Tucker Act." MTD Op. 12 (quoting *Me. Cmty.*, 140 S. Ct. at 1329). The Federal Circuit's decision in *Greenlee County v. United States*, 487 F.3d 871 (Fed. Cir. 2007), provides a useful analogy to a statute that satisfies this standard in a manner similar to the CARES Act. *Greenlee County* concerned a claim for compensation under the Payment in Lieu of Taxes Act ("PILT"), 31 U.S.C. § 6901 et seq., which requires the federal government to make payments to local governments where certain federal lands (immune from local taxes)

are located. *Id.* at 873. PILT sets forth a "statutory formula," based on the acreage of federal land at issue and the local population, to calculate how much money each local government is entitled to receive. *Id.* at 874 & n.1. Because PILT provided that "the Secretary of the Interior *shall make a payment* for each fiscal year to each unit of general local government" pursuant to the statutory formula, the Federal Circuit concluded that it was a money-mandating statute under which the plaintiff, a local government, could seek compensation for amounts wrongfully withheld. *Id.* at 877 (emphasis in original). Indeed, courts have "repeatedly recognized that the use of the word 'shall' generally makes a statute money-mandating." *Id.* (citation omitted); *see also, e.g.*, *Me. Cmty.*, 140 S. Ct. at 1320-21 (finding a provision to be money-mandating where it provided that the United States "shall pay" insurers "according to a precise statutory formula"); *Collins v. United States*, 101 Fed. Cl. 435, 458-59 (2011) (statute and accompanying regulations that "compel payment to servicemembers who meet certain conditions" are money-mandating).

For the same reasons, § 6428 is a money-mandating statute under which Plaintiffs can recover for amounts improperly withheld. Section 6428 provides a statutory formula that governs EIPs. The amount of a given payment depends on a tax filer's adjusted gross income and number of children, and the maximum payment is phased out by five percent for each dollar over statutory income thresholds. 26 U.S.C. § 6428(c). And, critically, § 6428 leaves the United States no discretion to deny the payment: "[t]he Secretary *shall*" distribute EIPs to anyone who qualifies based on their 2019 income and must do so "as rapidly as possible." 26 U.S.C. § 6428(f)(3)(A); *cf. Scholl v. Mnuchin*, No. 20-cv-05309, 2020 WL 5702129, at *13 (N.D. Cal. Sept. 24, 2020) ("The use of the word 'shall' [in § 6428] indicates a mandatory command from Congress to the Treasury Department and the IRS to issue the advance refund and to do so rapidly.") Through this language, the CARES Act imposes an

obligation to compensate Plaintiffs for money wrongfully withheld in the same manner as the statute in *Greenlee County*.

In their motion to dismiss, Defendants argued that § 6428 cannot be money-mandating because it is a "tax statute" and thus any claim for damages must be brought as a refund action under 26 U.S.C. § 7422. As this Court recognized, tax statutes and money-mandating ones are not "mutually exclusive" categories. MTD Op. at 14. And, indeed, courts have found tax statutes to be money-mandating. *See, e.g.*, *N.Y. & Presbyterian Hosp. v. United States*, 881 F.3d 877, 882 (Fed. Cir. 2018).

To the extent that Defendants intended to argue that § 7422 provides an exclusive and alternative judicial remedy for obtaining EIPs due this year, that, too, is incorrect. It is true that "the Tucker Act 'is displaced' when 'a law assertedly imposing monetary liability on the United States contains its own judicial remedies.'" *Me. Cmty. Health Options*, 140 S. Ct. at 1329. But even under Defendants' view of the law, § 7422 does not provide a remedy to recover economic impact payments due *now* based on an individual's 2018 or 2019 tax returns. Instead, according to Defendants, § 7422 merely provides a remedy for Plaintiffs to seek compensation that will be due based on their yet-to-be-filed *2020* tax returns. *See* Mot. to Dismiss at 4 ("Plaintiffs' parents may submit a 2020 tax return in 2021 and file a claim with the IRS . . . ."). Because Defendants agree that § 7422 provides no remedy under any circumstances for money due now based on Plaintiffs' 2019 returns—i.e., the subject of this claim—§ 7422 cannot "displace" the avenue for relief provided under the Little Tucker Act.[16]

[16] An example illustrates the disconnect between Defendants' position that § 7422 provides no remedy now, but nonetheless displaces the Little Tucker Act as an alternative remedial scheme. Consider a person who supports a child who is 16 years old in 2019 and turns 17 in 2020. They would be entitled to an EIP of $1,700 in 2020, $1,200 for the tax filer and $500

B. Plaintiffs Meet the Statutory Requirements for an EIP

Because § 6428 is a money-mandating statute, the remaining question is whether Plaintiffs have proved their claim on the merits, that is, whether they meet the statutory requirements for the up-to-$500 payment. *See, e.g.*, *Fisher v. United States*, 402 F.3d 1167, 1184 (Fed. Cir. 2005) (remanding for determination of merits after holding that statute was money-mandating). As the undisputed record evidence demonstrates, they do.

As an initial matter, in evaluating whether Plaintiffs meet the requirements of § 6428, the statute must be read "in light of the Fifth Amendment." *Gentry v. United States*, 546 F.2d 343, 346 (Ct. Cl. 1976). In other words, the Court must "construe[] the statute without the constitutionally offensive language" in assessing Plaintiffs' entitlement to an EIP. MTD Op. 13; *see also, e.g.*, *Collins*, 101 Fed. Cl. at 462 (allowing claim to proceed where plaintiffs receiving separation pay argued that, if the court struck provisions "relating to homosexuality . . . because they violate the Equal Protection clause, the remaining regulations would allow plaintiff to recover full pay").[17]

With the unconstitutional component of § 6428 excised, Plaintiffs satisfy the remaining prerequisites to receiving the up-to-$500 payment per child under the CARES Act. First, as stated on their tax returns, Parent Plaintiffs' adjusted gross income falls below the relevant income limits. *See* 26 U.S.C. § 6428(c); Ex. 3, N.R. Decl. ¶¶ 4-5; Ex. 5, H.G.T.

---

for the child. But if no EIP were distributed, a refund action under § 7422 based on the *2020 return* would not provide an opportunity to receive the $500 attributable to the child because, at that point, the child will have "aged out" and can no longer be a qualifying child. Moreover, because the child would remain a dependent, she could not claim her own EIP.

[17] That approach is consonant with the general approach that courts take when rectifying the discriminatory denial of benefits. *See, e.g.*, *Califano v. Westcott*, 443 U.S. 76, 89 (1979) ("nullif[ying]" unconstitutional provision and extending benefits); *Jablon v. Sec'y of Health, Ed. & Welfare*, 399 F. Supp. 118, 131–33 (D. Md. 1975) (three-judge court) (eliminating dependency requirement for males to be eligible for Social Security spousal benefits to remedy equal-protection violation), *aff'd* 430 U.S. 924 (1977).

Decl. ¶¶ 4-5. Second, N.R. and H.G.T. are resident aliens and not dependents of any other tax filer. 26 U.S.C. § 6428(d); N.R. Decl. ¶ 2; H.G.T. Decl. ¶ 2. Third, Citizen Children Plaintiffs are "qualifying" children because they are under the age of 17, do not earn income, and live with their parents. 26 U.S.C. § 6428(a)(2); 152(c). N.R. Decl. ¶¶ 4-5; H.G.T. Decl. ¶¶ 4-5. Fourth, Citizen Children Plaintiffs each have a VIN. 26 U.S.C. § 6428(g); N.R. Decl. ¶¶ 4-5; H.G.T. Decl. ¶¶ 4-5; *see also* Ex. 4, Defs.' Resp. Pls.' Req. Admis. No. 12. (admitting that, with the exception of N.R. not having a VIN, Plaintiffs satisfy every statutory requirement); Exs. 8-12 (Parent Plaintiffs' tax returns).

Accordingly, Plaintiffs are entitled to $500 per child in damages.

III. In the Alternative, Plaintiffs Are Entitled to a Permanent Injunction Against Defendants' Discriminatory Conduct

In the event that this Court concludes that § 6428 is not a money-mandating provision, the Court should issue a permanent injunction (1) restraining the enforcement of the VIN requirement as it applies to tax returns with qualifying citizen children, and (2) requiring Defendants to promptly redetermine Plaintiffs' entitlement to an EIP. This is the same relief as that granted in *Scholl v. Mnuchin*, No. 20-CV-05309-PJH, 2020 WL 5702129, at *26 (N.D. Cal. Sept. 24, 2020), which held that Defendants' refusal to distribute EIPs to incarcerated individuals was unlawful.

A party seeking an injunction must, in addition to establishing success on the merits, demonstrate (1) irreparable injury, (2) lack of an adequate remedy at law, (3) that the balance of hardships between the parties weighs in favor of an injunction, and (4) that an injunction is in the public interest. *See, e.g.*, *eBay Inc. v. MercExchange, L.L.C.*, 547 US. 388, 391 (2006); *Legend Night Club v. Miller*, 637 F.3d 291, 302-03 (4th Cir. 2011). Where the government is a party, analysis of the final two permanent injunction factors—the balance of equities and the public interest—merge. *See Kravitz v. U.S. Dep't of Commerce*, 366 F. Supp. 3d 681, 755 (D.

Md. 2019) (quoting *Pursuing Am. Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 511 (D.C. Cir. 2016)). Each of these requirements is satisfied here.

A. Citizen Children Will Suffer Irreparable Injury Absent an Injunction

In the absence of relief, Plaintiffs will suffer irreparable injury in multiple ways. First, the unequal treatment § 6428 inflicts is, on its own, an irreparable injury. "Intentional discrimination under the Equal Protection Clause . . . constitute[s] irreparable injury." *Reaching Hearts Int'l, Inc. v. Prince George's Cty.*, 584 F. Supp. 2d 766, 795 (D. Md. 2008), *aff'd*, 368 F. App'x 370 (4th Cir. 2010); *see also, e.g.*, *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001) (violation of a civil rights statute supports presumption that plaintiff has been irreparably injured). Indeed, the Supreme Court "regularly has affirmed District Court judgments ordering that welfare benefits be paid to members of an unconstitutionally excluded class," *Westcott*, 443 U.S. at 90, confirming that irreparable injury exists in cases such as this.

Moreover, the denial of EIPs causes irreparable injury because individuals like Plaintiffs, who are at the "margins of the economy," are irreparably injured by the wrongful denial of government assistance. *Scholl*, 2020 WL 5702129, at *11, 19 (reaching this conclusion regarding EIPs denied to incarcerated individuals); *see also, e.g.*, *Kildare v. Saenz*, 325 F.3d 1078, 1083 (9th Cir. 2003) (holding that "economic hardship constitutes irreparable harm" for social security claimants because "back payments cannot erase either the experience or the entire effect of several months without food, shelter or other necessities" (quotation marks omitted)); *Chu Drua Cha v. Noot*, 696 F.2d 594, 599 (8th Cir. 1982) ("For people at the economic margin of existence, the loss of $172 a month and perhaps some medical care cannot be made up by the later entry of a money judgment."); *Peña Martínez v. U.S. Dep't of Health & Human Servs.*, 18-cv-01206, 2020 WL 4437859, at *20 (D.P.R. Aug. 3,

2020), (holding, in the permanent-injunction, context that plaintiffs had "undoubtedly suffered irreparable injury" by being denied public benefits on account of their status as residents of Puerto Rico); *Henrietta D. v. Giuliani*, 119 F. Supp. 2d 181, 214, 218, (E.D.N.Y. 2000) (holding that denial of "meaningful access to critical subsistence benefits[] in contravention of the law" constituted "grave and irreparable harm" for the purpose of a permanent injunction); *cf. also Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (holding that a post-deprivation hearing after termination of welfare benefits was insufficient for due-process purposes).

The consistent finding of irreparable harm in these cases reflects the injuries that Citizen Children Plaintiffs now face. As explained above, the food insecurity and lack of access to schooling and other education opportunities—which would be substantially lessened, if not eliminated, by access to $500 per child—can carry long-term consequences in health and education. *See supra* at 11-12.[18] The educational risks are exacerbated in the midst of the current pandemic, as students like Citizen Children Plaintiffs are already facing extraordinary challenges engaging in virtual learning and experiencing unprecedented failure rates as a result. *See, e.g.*, Donna St. George, *Failing grades double and triple — some rising sixfold — amid pandemic learning*, Wash. Post (Dec. 3, 2020), https://perma.cc/4Z2K-8MHN.

B. Citizen Children Lack an Adequate Remedy at Law

If the Court concludes that § 6428 is not a money-mandating provision, Plaintiffs lack an adequate remedy at law.[19] Defendants' assertion that a refund action *next year* would

[18] *Cf. also* David Simon, et al., *The Earned Income Tax Credit, Poverty, And Health*, Health Affairs, Oct. 4, 2018, *available at* healthaffairs.org/do/10.1377/hpb20180817.769687/full/ (discussing positive health and educational outcomes associated with earned income credit).

[19] Although economic injury suffered by individuals in less dire straits than Citizen Children Plaintiffs is not always deemed irreparable in the *preliminary*-injunction context, courts deem such injury irreparable where there is no adequate remedy at law, as would be the case here if

cure the injuries Citizen Children Plaintiffs are currently suffering lacks merit. And indeed, courts have consistently rejected that challenges brought to the denial of EIPs must be brought as refund actions next year. *See Scholl,* 2020 WL 5702129, at *19; *Amador v. Mnuchin*, No. 20-cv-1102, 2020 WL 4547950, at *8-9 (D. Md. Aug. 5, 2020); *cf. Doe v. Trump*, 20-cv-00858, 2020 WL 5076999, at *5-6 (C.D. Cal. July 8, 2020).

Money next year (or later) cannot remedy the discrimination faced now. Waiting for the opportunity to seek a refund on their 2020 tax returns would force Plaintiffs to endure at least an additional year of unequal treatment and associated stigma while others who are similarly situated have already received EIPs. Plaintiffs would have to wait until after they filed a tax return to first submit a refund claim; wait up to six months for the IRS to respond and deny the claim pursuant to the statutory text; and only then could they seek to bring a claim in federal district court or the Court of Federal Claims, which, along with an appeal, would take months more to resolve. *See* 26 U.S.C § 6532(a) (no refund claim can be brought until the IRS has denied the claim or six months have passed). Payment at that distant point in the future cannot remedy the discrimination, economic anxiety, food and housing insecurity, and reduced learning opportunities that Citizen Children Plaintiffs would continue to experience during the period of delay. *Cf. Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1424 (11th Cir. 1984) (loss of "safe" and "decent" home and superior schooling from housing discrimination constitute irreparable harms not remediable by final judgment); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1045 (7th Cir. 2017) ("[H]arm is considered irreparable if it cannot be prevented or fully rectified by the final judgment after trial.") (citation omitted).

---

the Court rejects the Little Tucker Act claim. *See Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) (holding that a contractor's loss of right to bid on public contracts was irreparable because sovereign immunity barred a damages recovery).

C. The Balance of Equities and Public Interest Are in Plaintiffs' Favor

Enjoining the discriminatory distribution of EIPs is in the public interest. The government "is in no way harmed" by an injunction that prohibits the enforcement of unconstitutional restrictions. *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 191 (4th Cir. 2013). "If anything, the system is improved by such an injunction." *Id.* For this reason, the Fourth Circuit has held that "upholding constitutional rights serves the public interest." *Newsom ex rel. Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003).

In addition to safeguarding the constitutional rights of citizen children—a sufficient basis to support an injunction on its own—the injunction Plaintiffs seek would also advance the public interest in multiple other ways. It would inject an additional stimulus into the economy, consistent with the design of the CARES Act. It would provide cash assistance that Citizen Children Plaintiffs and numerous others (if the remedy were later extended on a class-wide basis) would use for food and clothing, thereby protecting the public health. *See Pashby v. Delia*, 709 F.3d 307, 331 (4th Cir. 2013) ("safeguarding public health" is in the public interest); *J.S.G. ex rel. Hernandez v. Stirrup*, 20-cv-1026, 2020 WL 1985041, at *11 (D. Md. Apr. 26, 2020) (supporting public health during the pandemic is in the public interest). And it would facilitate Citizen Children Plaintiffs' learning. It would enable them to attend school without the complications of food insecurity or the anxiety of inadequate clothing and housing, and critically, it would remedy the limited internet access that hampers their education. *See supra* at 11-12, 32. "Internet access is so central to children's education that allowing students to go without it is like sending them to classrooms without textbooks."[20] Ensuring the education of citizen children is in the public interest, too *Cf. Nieves-Marquez v.*

[20] Moriah Balingit, *'A National Crisis': As Coronavirus Forces Many Schools Online this Fall, Millions of Disconnected Students Are Being Left Behind*, Wash. Post, Aug. 16, 2020, *available at* https://perma.cc/47Z4-CRTA.

Puerto Rico, 353 F.3d 108, 114, 122 (1st Cir. 2003) (affirming district court's holding that injunction that would limit harm to plaintiff's education was in the public interest).

The combination of these benefits to the public as well as the vindication of Plaintiffs' constitutional rights far outweighs whatever administrative burdens compliance with an injunction would impose on the government. Indeed, the very enactment of the CARES Act—which pursued these exact goals for millions of others—demonstrates that the relief sought here is in the public interest.

IV. At A Minimum, Plaintiffs Are Entitled to a Declaratory Judgment Against Defendants' Unlawful Discrimination

Should the Court conclude that any of the factors supporting an injunction are absent here, it should issue a declaratory judgment. "[T]he traditional equitable prerequisites to the issuance of an injunction" need not "be satisfied before the issuance of a declaratory judgment." *Steffel v. Thompson*, 415 U.S. 452, 471 (1974). Such a remedy is a viable solution to rectify legislation that is legally wanting. *See NAACP v. Bureau of Census*, 382 F. Supp. 3d 349, 356 (D. Md. 2019) (holding that Congress's alleged failure to appropriate adequate funds for the 2020 Census could plausibly be redressed by "declaratory relief that would make it likely that sufficient funds will be appropriated"). Accordingly, because Plaintiffs have established a violation of Citizen Children Plaintiffs' constitutional rights and because the evidence shows that Plaintiffs will (absent other relief) be in the same scenario next year when Parent Plaintiffs file their tax returns, Ex. 3, N.R. Decl. ¶ 6, Ex. 5, H.G.T. Decl. ¶ 6, Plaintiffs are entitled, at a minimum, to a declaratory judgment.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs summary judgment and award Plaintiffs $500 per child in damages, issue an injunction, or grant declaratory relief, and also order the parties to confer regarding briefing on class certification.

Dated: December 17, 2020

Respectfully submitted,

/s/ Jonathan L. Backer

Jonathan L. Backer (D. Md. 20000)

Robert D. Friedman*
Amy L. Marshak*
Mary B. McCord*
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
Georgetown University Law Center
600 New Jersey Ave., N.W.
Washington, D.C. 20001
(202) 662-9835
jb2845@georgetown.edu

Leslie Book*
Villanova University
Charles Widger School of Law
299 N. Spring Mill Rd.
Villanova, PA 19085
(610)519-6416
book@law.villanova.edu

Attorneys for Plaintiffs

**Admitted pro hac vice*