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.

JANET L. YELLEN, et al.,

Defendants.

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

PLAINTIFFS' REPLY MEMORANDUM
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND
IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendants' cross-motion and opposition brief leaves no doubt about the stakes of this case. Although they raise a variety of procedural arguments and attempt to frame the denial of emergency aid as aimed only at Parent Plaintiffs or based on work authorization, the crux of Defendants' argument is that the federal government should be able to discriminate against U.S. citizen children on the basis of their parents' immigration status so long as it can identify some rational, even if hypothetical, basis for doing so.

Citizen Children Plaintiffs are not, however, the second-class citizens that Defendants envision. The Constitution demands more—in particular, an "exceedingly persuasive justification" necessary under intermediate scrutiny—to punish them for their parents' status. *See United States v. Virginia*, 518 U.S. 515, 531 (1996); *infra* at 22. Defendants fail to satisfy that demanding standard here. Indeed, the challenged discrimination is so lacking in legitimacy that there is not even a rational basis for the injury inflicted on Citizen Children Plaintiffs.

As the pandemic rages on into its second year and more aid is on the way for millions of others, Citizen Children Plaintiffs remain out in the cold. Congress has now amended the CARES Act to provide assistance to mixed-status married couples, i.e., those in which one spouse is a citizen and one is undocumented, who were also denied equal aid in the original enactment. Yet, for mixed-status families like Plaintiffs', where the only citizens are children and the parents are excluded from the political process, the discrimination persists.

Because this ongoing discrimination violates the Fifth Amendment, Plaintiffs' motion should be granted and Defendants' cross-motion denied.

ARGUMENT

I. Plaintiffs Have Standing to Sue

In challenging Plaintiffs' standing, Defendants primarily advance the same arguments the Court already has found unpersuasive. *See R.V. v. Mnuchin,* No. 20-cv-1148, 2020 WL 3402300, at *3-4 (D. Md. June 19, 2020). Defendants' arguments are no better now than they were before. And although Defendants raise new facts related to Plaintiff H.G.T., they are insufficient to preclude her standing.

A. Plaintiffs Have an Injury-In-Fact Necessary for Article III Standing

Standing, at its core, is about whether a plaintiff has "such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 261 (1977) (citation and alteration omitted). Courts evaluate whether that requisite personal stake exists through the application of three familiar elements: injury-in-fact; causation; and redressability. *R.V.*, 2020 WL 3402300, at *3. Here, Defendants challenge only the existence of an injury-in-fact. They are wrong.

1. A Victim of Disparate Treatment Possesses an Injury in Fact

This case is about discrimination against Citizen Children Plaintiffs that has resulted in the treatment of Citizen Children Plaintiffs as less than the full citizens that they are. No more is needed to establish standing.

The Supreme Court has "long recognized" that unequal treatment inflicts an injury that confers standing. *See Heckler v. Mathews*, 465 U.S. 728, 738 (1984); *see also, e.g.*, *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 790 (4th Cir. 2004) ("Discriminatory treatment is a harm that is sufficiently particular to qualify as an actual injury for standing purposes."). By treating Citizen Children Plaintiffs less favorably than similarly situated citizen children whose parents are

themselves citizens or possess a different immigration status, Congress has sent the unmistakable (and unconstitutional) signal that it considers such children less worthy of government support. *Cf. Schneider v. Rusk*, 377 U.S. 163, 169 (1964) (statute that created "second-class citizenship" for naturalized citizens was unconstitutional). Citizen Children Plaintiffs have standing to seek a remedy for this disparate treatment. Although Defendants contend that Citizen Children Plaintiffs do not have standing because the CARES Act treats them no differently than other children, *see* Defs.' Mot. at 12, ECF No. 72, that argument is both incorrect in its own right, *see infra* Section II, and attacks the merits of Plaintiffs' claims, which is an invalid basis for questioning Citizen Children Plaintiffs' standing. *See Md. Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 214 n.5 (4th Cir. 2020) ("[S]tanding to assert a claim is distinct from the merits of that claim . . . .").

2. Citizen Children Plaintiffs Have a Personal Stake in Their Households Receiving the Portion of Emergency Aid Earmarked for Children

Apart from the injury Citizen Children Plaintiffs suffer from discriminatory treatment, they also have a "personal stake" in their households receiving the portion of the aid under § 6428 that Congress provided for each child in a household. Given the fungibility of money, children necessarily will benefit from a $500-per-child influx of cash into their households, and the denial of those funds results in a cognizable injury. *See Conservation Council of N.C. v. Costanzo*, 505 F.2d 498, 501 (4th Cir. 1974) ("The claimed injury need not be great or substantial; an 'identifiable trifle,' if actual and genuine, gives rise to standing." (citation omitted)). Moreover, Parent Plaintiffs' uncontradicted declarations demonstrate that they would spend any funds they receive to care for Citizen Children Plaintiffs in ways that would improve their nutrition, access to internet for education and entertainment, and home environment. Ex. 3 to Pls.' Mot., ECF 59-1, N.R. Decl. ¶ 14; Ex. 5 to Pls.' Mot., ECF 59-1, H.G.T. Decl. ¶¶ 10-11. Citizen Children Plaintiffs' clear financial interest in their households receiving the monetary assistance to which they are entitled guarantees the "concrete adverseness which sharpens the presentation of issues upon which the court so largely

depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962); *see also Md. Shall Issue,* 971 F.3d at 210 ("'[F]inancial harm is a classic and paradigmatic form of injury in fact." (citation omitted))

Defendants argue, however, that the injury that Citizen Children Plaintiffs have suffered fails to confer Article III standing because it is an "indirect or secondary injury" that results from "alleged discrimination against" Parent Plaintiffs.[1] Defs.' Mot .at 12, 16. In making this argument, Defendants place significant weight on the fact that aid is distributed to Plaintiff Parents in the first instance. *See id.* at 12-14.

But that does not preclude standing. Even assuming that Defendants are correct that the injury here is "indirect," "[w]hen a governmental prohibition or restriction imposed on one party causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights." *Warth v. Seldin*, 422 U.S. 490, 505 (1975).

This Court already has recognized this principle in discussing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), and *W. Va. Ass'n of Cmty. Health Ctrs, Inc. v. Heckler*, 734 F.2d 1570 (D.C. Cir. 1984), in its opinion denying Defendants' motion to dismiss. *See R.V.*, 2020 WL 3402300, at *3. Those cases illustrate that a plaintiff can have Article III standing even though another person or entity would have been the direct recipient of a government benefit. Defendants unpersuasively attempt to reframe the injuries in those cases as different than the injuries here. Defs.' Mot. at 16-17. Contrary to what Defendants argue, the individual plaintiff in *Arlington Heights* did not challenge the city's zoning scheme writ-large, but, rather, its denial of a rezoning application

[1] Defendants' assertion that Citizen Children Plaintiffs must depend on third-party standing because they "seek to remedy alleged discrimination against their parents," Defs.' Mot. at 19, misunderstands Plaintiffs' claims. This case is about discrimination against children, specifically, not their parents. *See infra* Section II.

for a particular housing development. 429 U.S. at 264 (distinguishing *Warth v. Seldin*, 422 U.S. 490 (1975), on that basis). The city's denial of the rezoning application injured the developer-applicant directly, but the individual plaintiff who "would probably move" to the housing development if it were constructed suffered an injury-in-fact as well. *Id.* at 563. And, in *West Virginia*, the challenged reduction of a federal block grant that would have been distributed to states in the first instance nonetheless caused a sufficient injury for standing to *potential* recipients of funding derived from the block grants. *See* 734 F.2d at 1574-76 (finding standing despite the government's argument "that West Virginia would have complete discretion to award any additional funding it might receive to other [organizations] within the State which are not parties to this lawsuit").

Regardless, *Arlington Heights* and *West Virginia* are far from the only cases in which such injuries have served as the basis for Article III standing. *See, e.g.*, *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 110 (1979) (discriminatory housing practices aimed at prospective home buyers caused injury-in-fact to municipality in the form of a diminished tax base); *Leibovitz v. N.Y.C. Transit Auth.*, 252 F.3d 179, 185 (2d. Cir. 2001) (employee had standing to bring a Title VII claim even though the alleged "hostile [work] environment may have been an indirect result of the harassment of other women"); *Jet Courier Servs., Inc. v. Fed. Reserve Bank of Atlanta*, 713 F.2d 1221, 1226 (6th Cir. 1983) (air couriers had standing to challenge a fee schedule promulgated by the Federal Reserve based on "economic losses flowing from" their private-bank customers' response to schedule).[2]

[2] To be sure, establishing standing where a third party would be the direct recipient of a government benefit can be "substantially more difficult." *Warth*, 422 U.S. at 505. But that it is attributable to difficulties establishing causation and redressability, not whether there is an injury-in-fact. As Defendants tacitly acknowledge in not challenging those elements of standing, they are easily satisfied here. *See R.V.*, 2020 WL 3402300, at *4 ("The Government does not dispute that [Plaintiffs'] injury is fairly traceable to the challenged action of the defendant or that the injury would be redressed by a favorable decision."). But for the CARES Act's VIN requirement, Citizen Children Plaintiffs' households would receive the portion of emergency aid earmarked for children, and money damages or equitable relief would thus redress their wrongful exclusion.

3. Plaintiffs Are Not Challenging Anyone's Tax Liability

Defendants resist the conclusion that Citizen Children Plaintiffs have standing by arguing that third parties lack standing to challenge tax liability. Defs.' Mot. at 11, 14-16. That argument runs aground for three reasons.

First, Citizen Children Plaintiffs challenge disparate treatment directed at them, not the computation of Parent Plaintiffs' tax liability. This is not a case where the plaintiff argues that the IRS miscalculated their taxable income and, consequently, their liability. Rather, Citizen Children Plaintiffs claim that, based on the undisputed income reflected in Parent Plaintiffs' returns, emergency aid should be distributed to their household under § 6428 just as it has been for tens of millions of others. Defendants have distributed "economic impact payments" (EIPs) in calendar year 2020 separately from all other refunds disbursed and credits applied based on taxpayers' 2019 returns. *See* Ex. 2 to Pls.' Mot., ECF 59-1, Defs.' Resp. Pls.' Req. Admis. No. 1. Likewise, for those to whom aid was distributed based on a 2018 return (because no 2019 return was filed), any ordinary refund would have been long since distributed.[3] And perhaps the clearest indication that this is not a challenge to tax liability is that Defendants have distributed the emergency aid when there is no tax return at all, but there is a social-security benefits statement, a railroad-retirement benefits statement, or a qualifying entry in an online portal that Defendants set up to allow for the speedy distribution of emergency assistance even for those who had not previously filed a filed tax return. *See* 26 U.S.C. § 6428(f)(5); Defs.' Answer, ECF 36, ¶ 35.

Second, even if Citizen Children Plaintiffs' claims are viewed as third-party challenges to their parents' tax liability, Defendants are wrong that Article III imposes a rigid barrier to such

[3] In fact, the CARES Act directed the distribution of aid even to people who owed money to the government based on their past returns, *see* Pub. L. No. 116-136, § 2201(d), 134 Stat. 281 (2020), further distinguishing the aid at issue here from an overpayment that would generate an ordinary refund.

challenges. Although parties *generally* may not challenge the tax liabilities of others, *this rule is not unyielding*." *United States v. Williams*, 514 U.S. 527, 539 (1995) (emphasis added). *Williams* itself allowed the plaintiff to challenge a tax imposed on another. Likewise, the Supreme Court allowed South Carolina to challenge a law that would result in taxes being imposed on individual holders of bearer bonds, even though South Carolina would "incur no tax liability" under the law and the individuals could have later brought suit on their own. *See South Carolina v. Regan*, 465 U.S. 367, 379-81 (1984).

Fulani v. Brady, 935 F.2d 1324 (D.C. Cir. 1991), does not, as Defendants suggest, recognize a categorical rule that "individuals do not have Article III standing to assert a challenge related to another's tax liabilities." Defs.' Mot. at 15. In that case, the D.C. Circuit held that, under the particular facts of that case, the plaintiff lacked standing to challenge an organization's tax-exempt status because revocation of that status would not have satisfied the traceability and redressability requirements for standing (elements not challenged here). *Id.* at 1329-31. The court relied on the principle that standing may be lacking when a plaintiff sues the government to change the conduct of a third-party not before the court. *Id.* at 1330-31. By contrast, Plaintiffs here (like the plaintiffs in *Arlington Heights* and *West Virginia*) are trying to change only the conduct of the government. Moreover, the Second Circuit reached the opposite conclusion when the same plaintiff brought a similar challenge to a different institution's tax-exempt status, undermining Defendants' claimed consensus against challenging another's tax status. *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 623 (2d Cir. 1989); *see also Fulani v. Brady*, 935 F.2d at 212 (Mikva, C.J., dissenting) (arguing that the plaintiff had standing).

Third, the remaining cases that Defendants cite do not address Article III standing. *See In re Campbell*, 761 F.2d 1181 (6th Cir. 1985); *United States v. Formige*, 659 F.2d 206 (D.C. Cir. 1981) (per curiam); *Myers v. United States*, 647 F.2d 591 (5th Cir. Unit A June 1981). None of them mention

Article III, injury-in-fact, causation, or redressability, and *Myers* does not even use the word "standing." That is because these cases are addressing the distinct concept of statutory standing, or the availability of a cause of action.

4. Parent Plaintiffs Have Standing

Defendants conspicuously challenge only Citizen Children Plaintiffs' standing. And it is clear that Parent Plaintiffs, who, in the absence of the emergency assistance at issue, must struggle to provide for their children, possess standing. To be clear, it is Citizen Children Plaintiffs' legal rights at issue. But to the extent that prudential impediments—such as the purported barrier to challenging another party's tax liability or the alleged inability of Citizen Children Plaintiffs to bring a claim for damages—prevent Citizen Children Plaintiffs from asserting their own claims, then Parent Plaintiffs are the appropriate plaintiffs to vindicate their children's' rights. *Cf. Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017) (discussing the requirements for third-party standing). At bottom, it cannot be that *no one* has standing to challenge the discrimination inflicted on Citizen Children Plaintiffs. *Cf. Rose*, 361 F.3d at 791-92 ("If we were to deny standing to the plaintiffs, it is unlikely that anyone would have standing, and the Act would effectively be immune from attack.").

5. The Factual Dispute over H.G.T.'s Tax Returns is Immaterial to Her and Her Children's Standing

Defendants submit that the Internal Revenue Service has no record of H.G.T.'s 2018 or 2019 tax returns. Defs.' Mot. at 13 n.6. As stated in her sworn declaration, H.G.T. mailed her 2018 and 2019 federal tax returns to the IRS. H.G.T. Decl. ¶¶ 4-5. Plaintiffs filed with their Motion for Summary Judgment redacted copies of those tax returns along with an amendment to H.G.T.'s 2019 tax return. Exs. 10-12 to Pls.' Mot., ECF 59-1. At the same time that she mailed her federal tax returns to the IRS, H.G.T. also filed state tax returns by mail, which the Office of the Maryland

Comptroller received. *See* Ex. 1, H.G.T. Maryland Certification of Tax Filing. Plaintiffs have no knowledge of why the IRS lacks a record of H.G.T.'s returns.[4]

But whatever befell those returns, their status is immaterial to H.G.T.'s or her children's standing.[5] Defendants claim that, in the absence of a return, H.G.T. had to use the non-filer portal to have standing here. Defs.' Mot. at 13 n.6. But using the non-filer portal was not a realistic option for H.G.T. because it imposed the same unconstitutional barrier by incorporating the discrimination challenged here.[6] *See Rose*, 361 F.3d at 791 (plaintiffs had standing despite not applying for specialty license plate because the law did not allow the message the plaintiffs wanted to convey). That any effort to obtain an EIP would have been futile under the CARES Act distinguishes H.G.T.'s situation from that of the plaintiff in *Morton v. United States Virgin Islands*, who was legally entitled to aid according to the plain text of the CARES Act but had not received it. *See* No. 20-cv-0109, 2020 WL 7872630, at *5 (D.V.I. Dec. 31, 2020). H.G.T. should not be required to pointlessly query the IRS's non-filer portal when she knew that the CARES Act discriminatorily bars her household from obtaining the $500-per-child payments. Doing so "would neither change [her] stake in the controversy nor sharpen the issues for review." *Rose*, 361 F.3d at 791.

Finally, even if Defendants are correct that their inability to locate H.G.T.'s return precludes standing as to her and her children's challenge to the denial of aid based on her 2018 or 2019 tax returns, it imposes no barrier to her standing to seek declaratory relief that would apply to her not-

[4] News reports suggest that H.G.T.'s 2019 return may be one of millions waiting to be processed. *See* Breana Pitts, *'It's Unacceptable,' IRS Still Processing Millions Of 2019 Tax Returns*, CBS Boston (Dec. 28, 2020), https://boston.cbslocal.com/2020/12/28/irs-tax-return-delays-late-refund-checks-2019/.

[5] Defendants do not question R.V. and N.R.'s standing on this basis. *See* Defs.' Mot. at 13 n.6.

[6] Indeed, the non-filer portal's FAQs plainly stated that although an Individual Taxpayer Identification Number (ITIN) can be used to access the portal, "in most cases, the law does not allow an Economic Impact Payment (EIP) for individuals who file a return using an ITIN," with military families being "[t]he only exception" to that rule. *Get My Payment Frequently Asked Questions*, IRS.gov, https://web.archive.org/web/20210114053015/https://www.irs.gov/coronavirus/get-my-payment-frequently-asked-questions#collapseCollapsible1610564252889 (Jan. 14, 2021).

yet-filed 2020 return. Plaintiffs specifically requested such declaratory relief as an alternative remedy, and, as explained below, Defendants have waived any argument that such relief would be improper. *See infra* at 27.[7]

B. Citizen Children Plaintiffs' Claims Fall Within the Zone of Interests Protected by the CARES Act and the Fifth Amendment

Defendants also err in arguing that Citizen Children Plaintiffs' claims fall outside the statutory zone of interests protected by the CARES Act because the Act does not "mandate" that the $500-per-child payments be used for the benefit of children.[8] Defs.' Mot. at 18. This argument—which concerns only Citizen Children Plaintiffs' damages claims—misunderstands the zone-of-interests analysis.

The zone-of-interests test "is not meant to be especially demanding." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)). It denies a right to judicial review only where "the plaintiff's interests are so marginally related to or inconsistent with the purposes of the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke*, 479 U.S. at 399. Indeed, the test permits judicial review even when—unlike here—a claim is brought by individuals other than those whom "Congress specifically intended to benefit." *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998).

Citizen Children Plaintiffs' interest in their households receiving monetary assistance to which they are entitled easily falls within the zone of interests protected by the CARES Act. Congress specifically structured § 6428 to provide $500 for each "qualifying child[]" in a household,

[7] Alternatively, because the status of H.G.T.'s 2018 and 2019 returns is genuinely disputed, this Court could defer resolution of her claims until trial.

[8] The heading to Defendants' section addressing the zone-of-interests test states that Parent Plaintiffs also fall outside the zone of interests, but Defendants make no argument supporting that assertion, so it is waived. *See* Defs.' Mot. at 18. In any case, it is self-evident that Parent Plaintiffs fall within the zone of interest of a statute that would distribute payments to them.

demonstrating Congress's concern about children's wellbeing during the pandemic and the accompanying economic downturn. 26 U.S.C. § 6428 (a)(2). Given this choice by Congress, Citizen Children Plaintiffs' interest in receiving assistance cannot be said to be "marginally related" to Congress's purposes in enacting the CARES Act. *Clarke*, 479 U.S. at 399; *cf. Kadel v. Folwell*, 446 F. Supp. 3d 1, 12 (M.D.N.C. 2020) children of university employees fell within the zone of interests of Title IX and could challenge university's health insurance plan over a denial of coverage even though their "only ties to the University Defendants are through their parents' employment").

Finally, even if this Court were to find that Plaintiffs' money-damages claims (Counts II and III) fail because Citizen Children Plaintiffs do not fall within the zone of interests protected by the CARES Act, their claim for declaratory and injunctive relief under the Fifth Amendment (Count I) could still proceed. Compl. ¶¶ 71–74, ECF No. 1. Assuming a zone-of-interests test applies, Plaintiffs fall within the relevant zone of interest for that claim, too. Equal protection principles exist to safeguard "the right of similarly situated persons to be treated equally." *Club Italia Soccer & Sports Org. v. Charter Twp. of Shelby*, 470 F.3d 286, 296 (6th Cir. 2006), *overruled on other grounds by Engquist v. Oregon Dep't of Agr.,* 553 U.S. 591 (2008) (citing *Vacco v. Quill*, 521 U.S. 793, 799 (1997)). That is the precise interest Citizen Children Plaintiffs seek to vindicate here. *See id.*

II. The CARES Act Is Subject to Heightened Scrutiny

On the merits, Plaintiffs' claims raise constitutional concerns that trigger heightened scrutiny. Defendants resist this conclusion on three grounds. First, they contend, as they did in their motion to dismiss, that § 6428 imposes a classification only on the basis of work authorization, not on the basis of immigration status. Second, they argue that any classification disadvantages only the noncitizen parent to whom rational basis scrutiny applies, not the citizen child. Third, they assert that, even if § 6428 discriminates against children, that discrimination is still subject to rational basis review. Each of these claims lacks merit.

A. The VIN Requirement Discriminates on the Basis of Immigration Status

Defendants' argument that rational basis scrutiny applies because the VIN requirement "tracks" work authorization, Defs.' Mot. at 20, ignores that the applicable statutory text, on its face, discriminates on the basis of immigration status. As Plaintiffs explained, *see* Pls.' Mot. at 13, ECF No. 59, a VIN is defined to mean an SSN issued to a citizen, lawful permanent resident, a noncitizen with work authorization at the time of admission, or a noncitizen after their admission but only if the noncitizen is not prohibited from working "because of his alien status." 26 U.S.C. 24(h)(7)(A); 42 U.S.C. § 405(c)(2)(B)(i)(I), (III). Defendants do not explain how a statutory definition that expressly draws lines on the basis of "alien status" and citizenship can be read to not impose a classification based on immigration status.[9] They cite *Cassano v. Carb* as support for applying rational basis scrutiny to an SSN requirement, but they fail to mention that the plaintiffs in that case argued the requirement discriminated against "those who refuse to disclose their SSNs for fear of identity theft," not anything related to immigration status. *See* 436 F.3d 74, 76 (2d Cir. 2006). And Defendants do not confront that *L.P. v. Comm'r, Ind. State Dept. of Health*, which addressed a similar issue to that raised here, held that an SSN requirement imposed a classification based on "immigration status." No. 10-cv-1309, 2011 WL 255807, at *1-2 (S.D. Ind. Jan. 27, 2011).

Defendants also fail in their attempt to evade the VIN requirement's immigration-based classifications by tracing it to an SSN requirement added to the Earned Income Tax Credit by the

[9] Former President Donald J. Trump, who signed the CARES Act into law, appeared to understand the discriminatory effect of the VIN requirement. In remarks expressing his opposition to the recent amendment that makes a VIN-holding citizen spouse who jointly files their taxes with an undocumented spouse eligible for emergency aid, President Trump stated that the amendment gave more money to "family members of illegal aliens" than "Americans." Donald. J. Trump, *Special Message from President Trump*, YouTube (Dec. 22, 2020), at 2:17-31, https://youtu.be/ABYC7ikFIuY. Of course, citizen family members of undocumented immigrants are as American as any other citizen.

Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA). Defs.' Mot. at 10. As Defendants note, the legislative history for that provision states that the SSN requirement reflected the "belie[f] that individuals who are not authorized to work in the United States should [not] be able to claim the credit." *Id.* (quoting H.R. Rep. No. 104-651, at 1457 (1996)). There is no evidence that the VIN requirement shares the same purpose. *See infra* at 22. But in any event, Defendants ignore that PRWORA has as its express purpose "remov[ing] the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C § 1601(6). PRWORA thus demonstrates that an SSN requirement is one mechanism by which discrimination based on immigration status is carried out.

Finally, Defendants err in arguing that there is no alienage-based classification because some noncitizens can obtain an SSN. Defs.' Mot. at 20-21. Plaintiffs have twice explained that the Supreme Court rejected this reasoning in *Nyquist v. Mauclet*, 432 U.S. 1, 7-9 (1977), which held that discrimination against a subset of noncitizens still imposes an alienage-based classification. *See* Pls.' Mot. at 12; Pls.' Opp'n to Mot. to Dismiss at 3 n.4, ECF No. 33. Defendants have again offered no response.[10]

B. The VIN Requirement Challenged Here Punishes Citizen Children Plaintiffs Based on Their Parents' Immigration Status

Defendants next contend that, even if the VIN Requirement discriminates on the basis of immigration status, it does so only against Parent Plaintiffs. And because federal government discrimination against noncitizens like Parent Plaintiffs is subject to rational basis review,

[10] Defendants additionally do not grapple with the evidence that the VIN requirement, even if not facially discriminatory (which it is), is nonetheless an impermissible proxy. Unable to dispute the evidence that Plaintiffs have advanced, *see* Pls.' Mot. at 15, they merely assert, in conclusory fashion and without citation, that this evidence "does not make the [VIN] requirement a 'proxy.'" Defs.' Mot. at 21.

Defendants assert that "the same provision [cannot be] subject to a higher standard" when challenged by Citizen Children Plaintiffs. Defs.' Mot. at 25.

This argument misunderstands Plaintiffs' claim. Separate provisions bar the $1,200 payments attributable to Parent Plaintiffs and the $500 payments attributable to Citizen Children Plaintiffs:

> (A) In general.—In the case of a return other than a joint return, the $1,200 amount in subsection (a)(1) shall be treated as being zero unless the taxpayer includes the valid identification number of the taxpayer . . . .
> . . .
> (C) Qualifying child.—A qualifying child of a taxpayer shall not be taken into account under subsection (a)(2) unless—
> (i) the taxpayer includes the valid identification number of such taxpayer (or, in the case of a joint return, the valid identification number of at least 1 spouse) . . . , and
> (ii) the valid identification number of such qualifying child is included . . . .

26 U.S.C. §§ 6428(g)(1)(A), (C).[11] Plaintiffs agree that subsection (A), which governs the application of the VIN requirement to the $1,200 payments, is subject to rational basis scrutiny because it governs the treatment of the noncitizen Parent Plaintiffs alone. *See* Defs.' Mot. at 26.

But that is not the provision that Plaintiffs challenge. Rather, they challenge the operation of subsection (C), which governs the up-to-$500 payment attributable to children. That provision discriminates against children on the basis of their parents' immigration status by providing that a "qualifying child . . . shall not be taken into account" if the child's parent lacks a VIN *even if* the child has one. *See* 26 U.S.C. § 6428(g)(1)(C) (requiring the child "*and*" parent have a VIN). By requiring the *parent* to produce a VIN in order for the *child* to be "taken into account," this provision discriminates against the child based on the immigration status of the parent. In this way,

[11] The quoted language articulates how the VIN requirement applies to the distribution of assistance through a credit based on a 2020 tax return. 26 U.S.C. §§ 6428(g)(2)(A) and (C) articulate how the VIN requirement applies to the distribution of assistance through an "advance refund" based on a 2018 or 2019 return. Although the phrasing is different (a product of the amendment addressing mixed-status married couples), the requirement operates in the exact same way for Citizen Children Plaintiffs' claims.

subsection (C) operates in the same discriminatory fashion against citizen children as the status-based requirements that disadvantaged citizen children in *L.P.*, 2011 WL 255807, at *1 (by requiring the parent have an SSN), *Lewis v. Thompson*, 252 F.3d 567, 587-88 (2d Cir. 2001) (by requiring the mother receive Medicaid), and *Intercommunity Justice & Peace Ctr. v. Registrar, Ohio Bureau of Motor Vehicles*, 440 F. Supp. 3d 877, 896 (S.D. Ohio 2020) (by requiring the parent to prove lawful residence). *See also, e.g.*, *Fuentes v. White*, 709 F. Supp. 1026, 1030 (D. Kan. 1989) ("[T]here is little question that the policy applied by the defendants—not allowing public assistance benefits to children who are United States citizens because their parents are not United States citizens or legal aliens—violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.").

For this reason, the cases Defendants cite about the deportation of noncitizens (*e.g.*, *Perdido v. INS*, 420 F.2d 1179, 1180-81 (5th Cir. 1969)) and the denial of visa preferences (*Fiallo v. Bell*, 430 U.S. 787 (1977)) are inapposite. *See* Defs.' Mot. at 26-27. In those cases, the government privilege (the right to remain in the country or to obtain a visa) was intended to benefit the noncitizen; the discrimination was aimed at the noncitizen; and the effect on the citizen plaintiff was incidental. Those cases would be analogous only if Plaintiffs challenged the denial of the $1,200 payment to Parent Plaintiffs and the downstream effect that had on Citizen Children Plaintiffs. But those cases have no bearing here, where Plaintiffs challenge solely the $500 payment that is attributable to and primarily intended to benefit the "qualifying child."

Nor is the discrimination directed solely against Parent Plaintiffs simply because the payment is distributed to the parent and not to the child directly. Indeed, Defendants recognize that the child can be the intended beneficiary of aid even where the parent is the applicant or direct recipient. *See* Defs.' Mot. at 17 (citing *Ruiz v. Blum*, 549 F. Supp. 871 (S.D.N.Y. 1982), approvingly). That is the case here. As Plaintiffs explained, Congress rejected a cap on the amount of assistance attributable

to multiple children in a family to ensure that aid is distributed that accounts for every child. *See* Pls.' Mot. at 18. And it imposed a definition of "qualifying child" as well as a limitation on "offsets" for preexisting liabilities that reflect an expectation that the aid distributed will benefit the children to which it is attributable. *See id.* Further proof that the money is intended to benefit the child is that § 6428 does not provide a $500 payment for *adult* dependents. *Compare* 26 U.S.C. § 6428(a)(2) (limiting additional aid to dependent children under age 17), *with id.* § 152 (defining dependent to include certain adults). If the government merely wanted to provide supplemental aid to reward people with additional financial obligations without regard to who would benefit, it could have extended benefits to all dependents. The statutory focus on children shows that children are the target of this additional aid.

Defendants also suggest that the CARES Act is not intended to benefit children because it "does not require parents to spend" the up to $500 in aid on their children. Defs.' Mot. at 14. But the lack of an express requirement does not contradict that the distribution of aid attributable to "qualifying children" is, in fact, intended to benefit those children. Congress is justified in enacting a law against the expectation that parents will adequately care for the children whom they claim as dependents. Separate legal requirements, like child neglect laws that exist in all 50 states, mandate that they do so. And money is fungible. So even if the parent uses the aid on non-childcare expenses, doing so frees up other resources to be expended on the child. Notably, under Defendants' reasoning, it would also be the case that the Child Tax Credit, which similarly lacks restrictions on how it can be spent, is not intended to benefit children. That defies reason.

Defendants' formalistic approach to the CARES Act's beneficiaries is also in tension with the context in which this aid is being distributed. As Defendants recognize, the CARES Act was designed to provide "immediate relief" in the midst of a pandemic. Defs.' Mot. at 2. To accomplish this, the Act directed the Secretary of the Treasury to distribute aid "as rapidly as possible" and

conferred special authority to distribute payments electronically. 26 U.S.C. § 6428(f)(3)(A)-(C). That the CARES Act adopted the fastest approach to distribute aid payments—rather than, for example, developing from scratch (in the middle of a pandemic) the mechanisms to distribute aid directly to millions of children—does not undermine the fact that the $500-per-child payments were intended for the benefit of children.

The use of the tax code to rapidly distribute the assistance at issue in this case adds a layer of complexity that can shroud what is truly at issue, but an analogy helps bring the dispute into sharper focus. Consider if, instead of doling out financial assistance in a pandemic, the government distributed food assistance in a famine. The government provided to every adult a meal and, if that adult had a dependent child, a kid's meal, all distributed directly to the parent for expediency purposes. In Defendants' view, because the law does not impose legal sanctions on a parent if she chooses to eat the kid's meal, that meal is not intended to benefit the child. That simply is not plausible. And because it is intended to benefit the child, a rule that denies distribution of the kid's meal if the parent is undocumented constitutes discrimination against the child on the basis of the parent's immigration status.

C. Laws That Discriminate Against Citizens Based on Their Parents' Immigration Status Warrant Heightened Scrutiny

Defendants acknowledge that discrimination against children based on their parents' status ordinarily warrants heightened scrutiny. *See* Defs.' Mot. at 29-30 (citing legitimacy cases). And they agree that state discrimination against citizen children based on their parents' immigration status, in particular, is subject to heightened scrutiny. *Id.* at 29. But they argue that when the *federal* government imposes burdens on children for their parents' immigration status, rational basis scrutiny applies. *Id.* This dangerous argument lacks any support in precedent or the Constitution's text, and it should be rejected.

As Defendants recognize, the only case to address this issue, *Lewis v. Thompson*, 252 F.3d 567 (2d Cir. 2001), applied heightened scrutiny.[12] Nonetheless, they ask this Court to follow a convoluted path to conclude that *Lewis*'s holding is "in doubt." Defs.' Mot. at 28. *Lewis* explained that, "[a]lthough the denial [at issue] [wa]s based on the alienage of the mother, the 'highly deferential' standard appropriate in matters of immigration [wa]s not applicable" because the court was "concerned with a claim asserted on behalf of a citizen." 252 F.3d at 590. Defendants contend, however, that subsequent Supreme Court case law has clarified that the only exception to the "highly deferential" standard is when there is a "gender-based distinction" in an immigration statute. Defs.' Mot. at 28. According to Defendants, this undermines *Lake v. Reno*, 226 F.3d 141, 148 (2d. Cir. 2000), a case on which *Lewis* relied, as well as *Lewis*'s ultimate determination that what level of scrutiny applies turns on whether it is a noncitizen (rational basis scrutiny) or a citizen (heightened scrutiny) who is suffering the discrimination. *Id.*

Subsequent case law, however, has confirmed the correctness of *Lewis*'s holding, not repudiated it. In *Sessions v. Morales-Santana*, the Supreme Court, addressing the same cases that Defendants claim cast doubt on *Lake* and *Lewis*, explained that the federal government has "'exceptionally broad power' to admit or exclude *aliens*," but that more exacting scrutiny applies to claims brought by "a U.S. citizen." 137 S. Ct. 1678, 1693-94 (2017) (emphasis added) (citing *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53 (2001), and *Miller v. Albright*, 523 U.S. 420 (1998)). To be sure, *Morales-Santana* arose in the context of a gender-discrimination claim, but nothing in its holding is so limited. In fact, the Second Circuit's decision in *Morales-Santana*, which the Supreme Court affirmed

[12] Defendants' extended discussion of *Plyler v. Doe*, 457 U.S. 202, 216 (1982), attacks a straw man. *See* Defs.' Mot. at 30-31. Plaintiffs did not cite *Plyler*, which addressed the rights of *undocumented* children, for the proposition that heightened scrutiny applies. Rather, they cited *Plyler* only to explain what constitutes a "substantial government interest." Pls.' Mot. at 22.

on this point, relied on *Lake* and *Lewis* to reach that conclusion. *See Morales-Santana v. Lynch*, 804 F.3d 520, 529 (2d Cir. 2015).

Defendants' position that only gender-based discrimination against citizens warrants heightened scrutiny finds no support in the Constitution either. The federal government's "broad" power "over the subject of immigration and the status of aliens" derives from Congress's authority to establish a "uniform Rule of Naturalization," U.S. Const. Art. I, § 8, cl. 4, and the federal government's "inherent power" over foreign relations. *Arizona v. United States*, 567 U.S. 387, 394 (2012). But neither of these sources demands deference to the federal government in its treatment of citizens. To the contrary, the Supreme Court has held that the Constitution forbids the government from creating separate classes of citizenship. *See Schneider*, 377 U.S. at 169.

Yet that is exactly what allowing for differential treatment of citizens based on their parents' immigration status would permit (absent the "exceedingly persuasive justification" that heightened scrutiny requires, *see infra* at 22). Under Defendants' reasoning, so long as some hypothetical rational basis exists, the federal government can deny citizen children employment opportunities, financial aid, housing, or any other right or privilege. Indeed, Defendants do not dispute that a ruling in their favor here would extend to the numerous aid programs Plaintiffs referenced in their moving brief. *See* Pls.' Mot. at 17.

This would allow nearly limitless discrimination. The government, for instance, would be "rational" to claim that withholding all recurring long-term benefits from first-generation citizens whose parents were undocumented would deter illegal immigration. But allowing that "rational" approach would destroy the concept of birthright citizenship enshrined in the Constitution. *See* U.S. Const. amend. XIV, § 1.

Fiallo v. Bell, 430 U.S. 787 (1977), is not to the contrary. *Fiallo* applied rational basis scrutiny to a challenge to gender and legitimacy-based classifications in the definition of which *noncitizens*

were eligible for a special immigration preference to enter the country. *Id.* at 788. Defendants note that the dissent in *Fiallo* asserted that the case "involve[d] the rights of citizens, not aliens." Defs.' Mot. at 27 (quoting *Fiallo,* 430 U.S. at 806 (Marshall, J., dissenting)). And Defendants conclude that the majority's application of rational basis scrutiny in the face of the dissent's assertion compels its application here, too. *Id.*

Defendants overlook, however, that the majority rejected the "basic premise" of the dissent's argument that the government right at issue was granted to the "citizen and not to the putative immigrant." *Id.* at 795 n.6. Rather, although the majority recognized it was "plausible" that the "families of putative immigrants certainly have an interest in their admission," the line drawing at issue in *Fiallo* reflected that "Congress has determined that certain classes of *aliens* are more likely than others to satisfy national objectives . . . [and] has granted preferential status only to those classes." *Id.* (emphasis added). In other words, the preference was granted for the benefit of the noncitizen; the noncitizen was the subject of the discrimination; and the harm to the citizen was only incidental. But had the opposite been true—as it is in this case—the *Fiallo* majority agreed that the dissent's call for heightened scrutiny "would be persuasive." 430 U.S. at 795 n.6. Subsequent cases have reaffirmed this limitation on *Fiallo*'s holding. *See Morales-Santana*, 137 S. Ct. at 1693 (explaining that *Fiallo* addressed "entry preference for aliens," not claims by a person who "is, and since birth has been, a U.S. citizen"); *Lewis*, 252 F.3d at 590 n.33 ("[T]he citizen plaintiff child [in *Fiallo*] was making *no claim for himself*; the claim in that case was for an immigration preference for the child's alien father, a matter unquestionably subject to Congress's broad power over immigration." (emphasis added)).[13]

[13] Defendants' reliance on *Johnson v. Whitehead*, 647 F.3d 120 (4th Cir. 2011), for the application of rational basis scrutiny is also misplaced. As an initial matter, *Johnson* pre-dates the Supreme Court's decision in *Morales-Santana*. Following *Morales-Santana*, the Third Circuit held that heightened scrutiny applies to the same provision addressed in *Johnson*, suggesting that *Johnson* is no longer good

Doe v. Trump, which addressed the pre-amendment version of § 6428 insofar as it denied aid to citizens married to undocumented immigrants, also does not support applying rational basis scrutiny here. *See* No. 20-cv-00858, 2020 WL 5076999 (C.D. Cal. July 8, 2020). The *Doe* court recognized that the denial of aid to the citizen plaintiff "hinge[d] on the 'alien' status of her spouse," but nevertheless determined that rational basis scrutiny applied because the case involved a "*federal* classification based on alienage." *Id.* at *9. Neither of the two cases that *Doe* cited for that proposition, however, addressed claims brought by citizens. *See id.* (citing *Mathews v. Diaz*, 426 U.S. 67, 83 (1976); *Korab v. Fink*, 797 F.3d 572, 580 (9th Cir. 2014)). Moreover, the court did not address—and the plaintiff in *Doe* did not cite—*Morales-Santana* or *Lewis*. Importantly, although Defendants fail to mention it, Judge Hollander, in denying a motion to dismiss the same claim that the *Doe* plaintiff raised, rejected that rational basis scrutiny applies. *See Amador v. Mnuchin*, 476 F. Supp. 3d 125, 152 (D. Md. 2020).

Finally, Defendants' observation that rational basis scrutiny has been applied to statutes distinguishing between documented and undocumented immigrants, *see* Defs. Mot. at 21, does not counsel a different result. Plaintiffs do not dispute that rational basis scrutiny applies when the federal government draws such lines among *noncitizens*. But the distinction challenged here is that which the CARES Act draws between citizen children of undocumented immigrants and all other citizen children. Those lines, if left standing, would relegate Citizen Children Plaintiffs to second-class citizenship.

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law. *See Tineo v. Attorney Gen. United States of Am.*, 937 F.3d 200, 210 (3d Cir. 2019) (discussing 8 U.S.C. § 1432(a)(3) and overruling circuit precedent based on *Morales-Santana*). In any event, *Johnson* is distinguishable. The petitioner there was indisputably born a noncitizen but challenged a statute that prevented him from deriving citizenship after his father naturalized. *Johnson*, 647 F.3d at 125-36. It was therefore the noncitizen, as in *Fiallo*, who suffered discrimination. Citizen Children Plaintiffs, by contrast, are like the petitioner in *Morales-Santana* in that "[t]he[y] [are], and since birth [have] been, [] U.S. citizen[s]." 137 S. Ct. at 1693-94.

III. The VIN Requirement Fails Heightened Scrutiny

Once heightened scrutiny is applied, Defendants cannot meet their burden of providing an "exceedingly persuasive justification" for the discrimination against Citizen Children Plaintiffs. *Virginia*, 518 U.S. at 531. Defendants argue that the challenged discrimination advances Congress's interest in limiting aid to people with work authorization. *See* Defs.' Mot. at 31.

Yet Defendants have failed to identify any contemporaneous evidence that this was, in fact, Congress's aim, and "post hoc" justifications are insufficient under heightened scrutiny. *See Virginia*, 518 U.S. at 533. Defendants attempt to tie this purpose to Congress's reason for imposing an SSN requirement in the Earned Income Tax Credit and Economic Stimulus Act of 2008, but that is purely (and impermissibly) speculative. As Plaintiffs explained—but Defendants fail to address—there are material differences between the EITC and ESA, on the one hand, and § 6428, on the other, that would make a work-authorization limitation sensible in the former but not in the latter. *See* Pls. Mot. at 20.

Defendants also compare the VIN requirement to an SSN requirement for the Child Tax Credit. *See* Defs.' Mot. at 10. But, critically, the CTC requires only that the child have an SSN, so the emergency aid would be distributed to Plaintiffs here if § 6428 followed the CTC's rule. *See* 26 U.S.C. § 24(h)(7) (applying SSN requirement only to the child). Thus, for purposes of identifying Congress's actual purpose, the CTC demonstrates the opposite of what Defendants claim: the inclusion of an SSN or VIN requirement does *not* advance the same purpose in every statute.[14] And here, there is no evidence it is tied to work authorization.

[14] Defendants also assert that § 6428 "expresses Congress's 'important interest' in ameliorating the effects of the economic downturn caused by the pandemic emergency, not, as Plaintiffs contend, excluding people from receiving an advance refund of a tax credit." Defs.' Mot. at 31-32. The relevant question, however, is not what interest § 6428 as a whole advances, but what interest the discriminatory "classification" advances. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

Defendants' claimed interest is further undermined by the fact that the CARES Act now pursues it only half the time. Following the amendments to § 6428, mixed-status married couples who file their taxes jointly now receive an up-to-$1,200 payment as well as up to $500 for each child. *See* 26 U.S.C. § 6428(g); Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, § 273, 134 Stat. 1182. Although there is no doubt that this aid is intended to benefit and is attributable to the individual with a VIN (i.e., the citizen or documented spouse), the aid is still distributed to the couple on a joint basis even though one lacks work authorization. That is the functional equivalent of what Plaintiffs seek, except that the VIN-holder is the child rather than the spouse. If this work-authorization purpose demanded aid not be distributed in the case of Plaintiffs here, then it would also demand aid not be distributed in the case of mixed-status couples.

Even if this were not an improper after-the-fact rationale, limiting emergency aid to benefit only those children whose parents have work authorization is not an important government interest. Defendants cite nothing for the proposition that it is. Rather, they claim that Congress must draw "some lines" in distributing aid in the face of limited resources, citing a case finding that states have an important interest in reducing juvenile crime and fostering children's welfare, *see Schleifer ex rel. Schleifer v. City of Charlottesville*, 159 F.3d 843, 848 (4th Cir. 1998), and a case applying rational basis scrutiny to the denial of food stamps to people voluntarily unemployed, *see Wilson v. Lyng*, 856 F.2d 630, 633 (4th Cir. 1988). *See* Defs.' Mot. at 32. However, when the line excludes citizen children on the basis of their parent's immigration status (or gender or legitimacy), it must advance some important interest beyond the bare denial of aid to certain people. *See Plyler v. Doe*, 457 U.S. 202, 227 (1982) ("[A] concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources."). It is Defendants' burden to make that showing,

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Even Defendants acknowledge that the VIN requirement has the purpose of excluding certain people.

and merely asserting the interest is important does not make it so. That is especially true when, as just explained, the CARES Act pursues the asserted interest only in the case of mixed-status families like Plaintiffs' but not in families where the parents are mixed status.

Finally, Defendants have not carried their burden of demonstrating that the discrimination at issue substantially advances the claimed interest in limiting aid to people with work authorization. Rather than affirmatively prove that relationship, Defendants deflect by asserting that Plaintiffs seek to apply strict scrutiny. Defs.' Mot. at 32. But Plaintiffs never mention "strict scrutiny" and relied only on a case applying heightened scrutiny to demonstrate that the VIN requirement does not have an "an evident and substantial relation" to the interest Defendants claim to advance. *See* Pls.' Mot. at 22-23; *Pickett v. Brown*, 462 U.S. 1, 8 (1983) (citation omitted).

IV. The VIN Requirement Fails Rational Basis Scrutiny

Even if this Court applies rational basis scrutiny, the VIN requirement is still unconstitutional.

First, the VIN requirement is not rationally related to ensuring that "nonresident aliens are excluded."[15] Defs.' Mot. at 23. Citizen Children plaintiffs (and the putative class they represent) as citizens are, by definition, not nonresident aliens. Denying aid to them thus does nothing to advance any interest in denying aid to nonresident aliens.

To the extent that Defendants mean to argue that the VIN requirement ensures that the tax filer will not be a nonresident alien, that, too, is wrong. The statute makes this clear by excluding nonresident aliens in a different provision. *See* 26 U.S.C. § 6428(d)(1). If the purpose of the VIN

[15] As Plaintiffs have explained, Pls.' Mot. at 24-25, *Jimenez v. Weinberger* highlights the suspect rationality of any "blanket and conclusive exclusion" of children from a benefit meant to "provide support for dependents" on the basis of their parents' characteristics, 417 U.S. 628, 634, 636 (1974). Defendants do not address *Jimenez* at all.

requirement were to ensure that only resident aliens receive aid, then there would be no need to have a separate statutory requirement excluding nonresident aliens.

Instead, whether someone is a "resident alien" is determined by whether they have a green card or have been in the country for a certain period of time, not by whether they have a VIN. *See* 26 U.S.C. § 7701(b). Indeed, both Parent Plaintiffs are resident aliens, but neither has a VIN. Conversely, noncitizens who arrive under a work visa may remain in the country for only a limited period of time, and they will have a VIN but be "nonresident aliens." In practice, the resident alien requirement is enforced not by the poor proxy that the VIN requirement would provide, but by separate tax-return forms: resident aliens, like citizens, use a Form 1040, whereas nonresident aliens use a Form 1040NR.

Second, the VIN requirement does not rationally further "administrative exigency." Defs.' Mot. at 24. Defendants assert that *Doe* upheld the challenged VIN requirement on this basis, but that is not correct. *See Doe v. Trump*, No. 20-cv-00858, 2020 WL 5492994, at *5 (C.D. Cal. Sept. 2, 2020). *Doe* more narrowly addressed an administrative concern specific to the (now defunct) requirement that both spouses in a married couple filing taxes jointly have a VIN. The plaintiff in *Doe* argued that the IRS should have distributed $1,200 to her as if she were filing alone. But because income on joint returns is not attributed to a specific spouse, determining whether the citizen spouse's income fell below the statutory threshold would have involved a significant administrative burden of evaluating attachments to the return. Thus, the court held that, in the context of mixed-status married couples, denying all aid served the legitimate purpose of avoiding that administrative burden. *Id.* The risk of that administrative burden simply does not exist here. There are no income requirements for "qualified children" that the IRS would have to discern.

Third, even in the face of limited resources, the line Congress draws in distributing aid cannot be arbitrarily selected and must advance some legitimate purpose beyond simply denying aid

to certain groups. In other words, although deferential, rational basis scrutiny still requires that a classification must advance some governmental interest. The cases Defendants cite reflect this. *See Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 854 (1984) (classification furthered legitimate interests in incentivizing registration in Selective Service and allocating resources fairly to those who complied with that obligation); *Wilson*, 856 F.2d at 633 (classification denied food stamps when people voluntarily quit jobs, thereby encouraging work and directing aid to those whose situation need was involuntary); *McElrath v. Califano*, 615 F.2d 434, 440, 441 (7th Cir. 1980) (upholding SSN requirement not because it limited the amount of aid that would be distributed but because it "avoid[ed] . . . administrative errors due to recipients having identical names" and helped determine eligibility);[16] *Schinasi v. Comm'r of Internal Revenue*, 53 T.C. 382, 384 (1969) (classification eliminated "impossible" task of calculating aggregate income in joint returns filed by certain married couples); *Barr v. Comm'r*, 51 T.C. 693, 695 (1969) (classification responded to fraud concerns). In the absence of such an interest, denying aid to people without work authorization is just as arbitrary and unconstitutional as denying aid to people with brown hair as a means of preserving limited resources.

Defendants have not identified any interest here that the claimed work-authorization limitation advances. The closest they come is their (misplaced) comparison to PRWORA, Defs.' Mot. at 10, a statute that, as noted, has as its purpose "remov[ing] the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C § 1601(6). But whereas PRWORA generally addresses long-term benefits such that one could rationally expect a deterrent effect, it is not rational to expect any deterrent effect to follow from the denial of emergency aid responding to an unforeseeable pandemic. *Cf. Lewis*, 252 F.3d at 590 (questioning whether denial of

[16] The Plaintiffs in *McElrath* did not bring a challenge related to immigration status. And the administrative concerns addressed in *McElrath* do not apply here because they are equally served by Plaintiff Parents' Individual Taxpayer Identification Numbers.

the time-limited benefits of automatic Medicaid enrollment to infants could rationally be expected to deter illegal immigration by mothers).[17]

V. Plaintiffs Are Entitled to Equitable Relief

Defendants do not contest that, if Plaintiffs prevail on the merits and damages are unavailable, equitable relief is warranted. Nor do they challenge the specific nature of that relief that Plaintiffs have requested. *See* Pls. Mot. at 30, 35. Although, as explained next, this Court *can* award Plaintiffs damages, Defendants have now conceded that, at a minimum, equitable relief should issue if Plaintiffs are correct on the merits.

VI. Plaintiffs Are Entitled to Damages

Because § 6428 is a money-mandating statute, the Little Tucker Act waives sovereign immunity and provides this Court with jurisdiction to award damages for the wrongful denial of emergency aid to Plaintiffs. See 28 U.S.C. § 1346(a)(2). Defendants' arguments otherwise elide the statute's text and misconstrue the nature of the relief Plaintiffs seek.

A. The CARES Requires the Secretary of the Treasury to Distribute Payments

This Court held, and Defendants do not contest, that a statute is money-mandating "if it contains 'will pay' or 'shall pay' language" directing payment to individuals. *See* Defs.' Mot. at 34 (citing *R.V.*, 2020 WL 3402300, at *6). Defendants argue that § 6428 (f)(3)(A)—which governs the distribution of aid based on 2019 or 2018 tax returns—does not satisfy this standard, however, because it "simply addresses the timing and manner" of that aid and "does not direct the payment of funds to any individual." Defs.' Mot. at 35.

The text of the statute makes clear that is wrong. It does not state that "if" aid is to be distributed, then certain timing and other procedures will apply. Rather, the statute mandates that

[17] Defendants have now abandoned their claim that the VIN requirement is rationally related to preventing fraud and abuse, which Plaintiffs addressed in their opening brief.

the Secretary "shall" distribute the aid and then directs that it issue "as rapidly as possible." 26 U.S.C. § 6428(f)(3)(A); *R.V.*, 2020 WL 3402300, at *7. Defendants' contrary interpretation would mean that, had the government distributed zero money in 2020, as the pandemic raged, Defendants nonetheless would have complied with the statute. The only other court to address this issue (albeit in the context of an APA claim) has rejected that illogical conclusion of Defendants' argument:

> While defendants are correct that subsection (f)(3)(A)'s use of the verb "shall" does require the IRS to act "as rapidly as possible," that verb also compels it to "refund" or "credit." Plainly read, then, the IRS must (subject to other provisions of title 26) refund or credit an overpayment attributable to section 6428 and do so as quickly as possible. . . .
>
> [A]s plaintiffs point out, defendants' position on this issue would, if adopted, permit it to lawfully withhold issuing any refund or credit in the first instance. Such an outcome is at odds with . . . the Act's broader economic stimulus goals.

Scholl v. Mnuchin, No. 20-cv-05309, 2020 WL 6065059, at *17 (N.D. Cal. Oct. 14, 2020).

Defendants no longer contend, as they did in their motion to dismiss, that a "tax statute" cannot be money-mandating. *See* Defs.' Mot. to Dismiss at 4, ECF No. 32. They now advance the narrower claim that the cases on which this Court relied are distinguishable because they "address[] payments that cannot be construed as 'any internal-revenue tax' eligible for a section 7422(a) refund action." Defs.' Mot. at 36. But the denial of emergency assistance based on Parent Plaintiffs' 2019 tax returns also cannot be the subject of a refund action. Plaintiffs are not seeking to recover an "internal revenue tax" that was "erroneously or illegally assessed or collected" based on their 2019 return, as required for § 7422(a) to apply. 26 U.S.C. § 7422(a); *see also R.V.*, 2020 WL 3402300, at *7. Although Defendants have argued that Parent Plaintiffs could bring a refund action to challenge the denial of a credit next year based on (and not until after they file) their *2020* tax returns, it is the

denial of the emergency aid based on the *2019* returns that is the subject of Plaintiffs' damages claim.[18] There is *no dispute* that a refund action is unavailable as a means to obtain those amounts.

B. Parent Plaintiffs Satisfy the Statutory Requirements to Receive Emergency Aid If the Constitutional Infirmity Is Removed

Defendants also contend that there is no "unconstitutional component" of the CARES Act that can be removed such that, in its absence, Plaintiffs will satisfy the remaining terms of § 6428. *See* Defs.' Mot. at 37-39. To the contrary, it is quite simple to eliminate the constitutional infirmity. As explained above, § 6428 violates the Constitution by conditioning distribution of payments attributable to citizen children not only on the children having a VIN, but also on their parents having a VIN (which is inextricably tied to the parents' immigration status). *See supra* at 14. This can be remedied merely by removing the word "and" in § 6428 (g)(2). After excising that conjunctive requirement, the statute, in relevant part, would provide, "No refund shall be payable under subsection (f) to an eligible individual who does not include on the return of tax for the taxable year . . . in the case of any qualifying child taken into account under subsection (a)(2), the [VIN] of such qualifying child."[19] With the constitutional infirmity eliminated, the $500 payments would no longer be precluded and, for these Plaintiffs, would be required: Parent Plaintiffs are "eligible individuals"; Citizen Children Plaintiffs are "qualifying children taken into account under subsection (a)(2)"; Citizen Children Plaintiffs' VINs have been provided; and Plaintiffs satisfy the residency and income requirements set forth in other subsections. *See* Pls.' Mot. at 29-30.

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[18] As Plaintiffs described in their opening brief, an individual may be entitled to emergency aid based on their 2019 return but not entitled to same amount, or any at all, based on their 2020 return. *See* Pls.' Mot. at 28 n.16.

[19] To the extent that, with "and" removed, the statute might be ambiguous as to whether the remaining language imposes a disjunctive or conjunctive requirement with respect to the parent's and child's VINs, the canon of constitutional avoidance requires that the ambiguity be read to impose a disjunctive requirement. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1216 (2018) ("[I]t is the Court's 'plain duty' . . . to adopt any reasonable construction of a statute that escapes constitutional problems." (citation omitted)).

This remedy would go no further than curing the constitutional violation challenged—the denial of the per-child payments. Because § 6428 (g)(2)(C) applies only "in the case of any qualifying child taken into account under subsection (a)(2)," the requirement that Plaintiff Parents provide a VIN to receive any other payment, codified in § 6428 (g)(2)(A), would still apply to block the up-to-$1,200 payment attributable to the tax filer under subsection (a)(1).[20] Defendants incorrectly assert that the latter payment is a "prerequisite" to distribution of payment attributable to a child. *See* Defs.' Mot. at 2. Although the VIN requirement currently has the practical effect of pairing those two payments, nothing in the statute actually conditions one payment on the other, including the term "plus" in § 6428(a) on which Defendants focus. $0 "plus" $500 is still $500.

Defendants also contend that Parent Plaintiffs have conceded they are not entitled to payment and that nothing in the CARES Act "mandate[s] money *to the Children*." *See* Defs.' Mot. at 37. To the former, that "concession" was based on the presence of the unconstitutional provision challenged in this case. Plaintiffs have been quite clear that, if it is removed, Parent Plaintiffs would be entitled to payment. To the latter, Plaintiffs have never argued that the payment must issue to Citizen Children Plaintiffs. Quite the opposite. Plaintiffs brought damages claims directly by the Parent Plaintiffs in Count III of their Complaint. To be sure, Plaintiffs also brought a damages claim by Citizen Children Plaintiffs, but they did so as a protective measure in the event that this Court concluded that the children, rather than the parents, were the proper plaintiffs for such a claim.

[20] As described above, *see supra* at 14, § 6428(g)(1) uses different language in applying the VIN requirement to credits based on 2020 tax returns. To the extent that § 6428(g)(1) can be read to modify when an "advance refund" may issue because it applies to "subsection (a)," then this Court should also excise § 6428(g)(1)(C)(i). That provision contains the same constitutional defect, albeit phrased differently.

C. This Court Has Authority to Award Damages Even Though Doing So Involves Severing Unconstitutional Language

Defendants finally argue that damages are not available because Plaintiffs' claims seek equitable relief at their "core." Defs.' Mot. at 39. Cases like *Gentry v. United States*, 546 F.2d 343 (Ct. Cl. 1976), and *Collins v. United States*, 101 Fed. Cl. 435 (2011)—which Defendants have not argued were wrongly decided—demonstrate that when, as here, a claim for damages involves a challenge to an unconstitutional element of a statute, the claim is not primarily an equitable one. As *Gentry* explained,

> The money claim is grounded, according to plaintiff, on the statute as it now exists—at least when read in light of the Fifth Amendment—and thus states a claim for money presently due, not requiring further action on anyone's part to create the entitlement thereto. *This is exactly the kind of claim within our jurisdiction* . . . . The issue of the constitutional validity of the [challenged] requirement arises only incidentally, necessitating an answer by the court in the course of construing the [relevant] statute to determine whether payment[] is indeed owing to plaintiff.

546 F.2d at 346 (emphasis added) (distinguishing *United States v. King*, 395 U.S. 1 (1969), on which Defendants rely).

In any event, the question in this case is largely theoretical. Even if this Court concludes that Plaintiffs seek primarily equitable relief, Defendants have not contested that this Court has jurisdiction to award declaratory relief under 28 U.S.C. § 1331. That is important because "[t]he Tucker Act does not forbid a district court from issuing a declaratory judgment . . . , even if that judgment later serves as a basis for money damages." *Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203, 210 (4th Cir. 1992). So, this Court could issue a declaratory judgment and then award damages on the basis of that judgment.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment should be granted, and Defendants' Motion should be denied.

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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*