**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**

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| R.V., a minor, by and through his mother and next friend, N.R., *et al*.,<br><br>Plaintiffs,<br><br>v.<br><br>STEVEN T. MNUCHIN, *et al*.,<br><br>Defendants. | Civil Action No. 8:20-cv-1148-PWG |

**UNITED STATES' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Defendants Steven T. Mnuchin and the United States of America submit this memorandum in support of their motion to for summary judgment and in opposition to Plaintiffs' motion for summary judgment.

Respectfully submitted,

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Plaintiffs ask the Court to rewrite the refundable tax credit created by the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), 26 U.S.C. § 6428 ("CARES Act Credit"), to permit ineligible parents to receive part of the credit because their dependent children are United States citizens. The children, or the parents on behalf of their dependent children, seek money damages in the amount of $500 for each child. The children also seek a declaratory judgment and other equitable relief for an alleged violation of the Fifth Amendment. Plaintiffs are not entitled to the requested relief.

*First*, section 6428 is a tax statute and must be evaluated accordingly. Under the plain text of the statute, no dependent child, regardless of her parents' immigration status, is allowed any amount of the CARES Act Credit. *See* 26 U.S.C. § 6428(d)(2). The credit goes to the taxpayer alone.

*Second*, the exclusion in section 6428(d)(2) also means that neither the children nor their parents have standing to assert a claim on behalf of the children for the denial of $500 per qualifying child. Because the parents do not allege that they are personally eligible for the CARES Act Credit, or any part thereof, no party has established standing to bring this case.

*Third*, Congress has the authority under the Constitution to deny a refundable tax credit, like section 6428, to individuals not authorized to work in the United States. Even if section 6428 draws lines on the basis of alienage rather than work authorization, it is still permitted because Congress has broad authority over immigration matters. Differential treatment on the basis of work authorization or alienage does not violate equal protection as long as there is a rational basis for doing so. As the Central District of California recently held in rejecting a constitutional challenge to the prior version of section 6428(g)(1)(B), section 6428 satisfies rational basis review. *See Doe v. Trump*, 2020 WL 5492994, at *4-*5 (C.D. Cal. Sept. 2, 2020).

*Fourth*, Plaintiffs are not entitled to the money damages. The CARES Act is not a money-mandating statute that allows an action for which sovereign immunity is waived under the Little Tucker Act. Even if it were, payment to the Plaintiffs is not mandatory. Moreover, Plaintiffs are not eligible for the damages they seek unless the Court issues a declaratory judgment that the CARES Act is unconstitutional. Their requested remedy therefore is equitable, rather than legal, and the Little Tucker Act cannot provide jurisdiction.

Accordingly, the Court should enter judgment in favor of the United States.

## BACKGROUND

### 1. The CARES Act

#### a. 26 U.S.C. § 6428

The CARES Act creates a refundable tax credit by adding section 6428 to the Internal Revenue Code. Section 6428(a) affords an "eligible individual" a refundable tax credit against the individual's federal income tax liability for his or her "first taxable year beginning in 2020." Eligible individuals are entitled to a credit of up to $1,200, or $2,400 in the case of eligible individuals filing a joint return, plus $500 per qualifying child. *See* 26 U.S.C. § 6428(a), (c). Because an eligible individual receives a credit of up to $1,200 *plus* $500 per qualifying child, receipt of the credit in subsection (a)(1) is a prerequisite to the "plus-$500" amount from subsection (a)(2). *See id.*, § 6428(a).

To provide more immediate relief to eligible individuals, the CARES Act Credit is implemented, in part, through advance tax refunds. Section 6428(f) provides that an eligible individual may receive an advance refund of the CARES Act Credit during 2020. Generally, each eligible individual is treated as having made a payment against his or her 2019 federal income tax liability, based on a filed 2019 income tax return, which enables the IRS to issue an

advance refund (prior to filing a 2020 tax return) of the CARES Act Credit. Section 6428(f)(5) allows the Secretary of the Treasury to compute and issue an advance refund of the CARES Act Credit based on the 2018 tax information of an individual who has not filed a 2019 income tax return or based on other information obtained about certain non-filers.

Section 6428(f)(3)(A) provides that advance refunds are to be made "as rapidly as possible," but the Act does not confer upon any individual a right to receive the credit in advance of filing a 2020 return. If the IRS does not issue an advance refund to an individual who qualifies based on a 2018 or 2019 return, the taxpayer may claim the credit on a 2020 return. In that case, any advance refund will be reconciled with the CARES Act Credit reported on the individual's 2020 tax return. *See* 26 U.S.C. § 6428(e) (reducing (but not below zero) the amount of any CARES Act Credit by the aggregate amount of any advance refunds and credits made or allowed under subsection (f)); 26 U.S.C. § 6428(f)(3)(A) (providing that any advance refunds and credits will be made by December 31, 2020).

Thus, an eligible individual who qualifies for a tax credit under section 6428 will receive it in one of three ways: (1) as an advance refund on or before December 31, 2020; (2) as a CARES Act Credit upon filing a 2020 tax return; or (3) as a combination of an advance refund and a CARES Act Credit. Some individuals may have received a smaller advance refund than expected or no advance refund at all. These individuals need to file a 2020 return to claim and receive the CARES Act Credit. *See https://perma.cc/M3U2-DWLP* ("If you did not receive the full amount to which you believe you are entitled, you will be able to claim the additional amount when you file your 2020 tax return, if eligible.").

**b. Eligibility for the CARES Act Credit**

Not every individual is entitled to a CARES Act Credit. The credit is limited based upon

an individual's adjusted gross income, phasing out for joint tax return filers with an adjusted gross income over $150,000, head of household filers with an adjusted gross income over $112,500, and all other filers with an adjusted gross income over $75,000. *See* 26 U.S.C. § 6428(c).

The CARES Act Credit is available only to an "eligible individual," defined as any individual other than (1) a nonresident alien individual; (2) an individual for whom a deduction under 26 U.S.C. § 151 is allowable to another taxpayer (which excludes the children in this case); or (3) an estate or trust. 26 U.S.C. § 6428(d). Plaintiffs do not challenge these eligibility criteria. Rather, they challenge section 6428(g) which, in relevant part and as recently amended,[1] disallows a credit to an eligible individual who does not include on his or her tax return a valid identification number for the taxpayer (if filing a joint return, the credit is limited to the individual providing a valid identification number), and any qualifying child taken into account for the credit. *See* 26 U.S.C. § 6428(g)(1).

A "valid identification number" is a social security number ("SSN") as defined in section 24(h)(7) or, for certain qualifying children, his or her adoption taxpayer identification number, if applicable. *See* 26 U.S.C. § 6428(g)(2). The SSN must be valid for employment in the United States and be issued before the due date of the tax return that the IRS considers.

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[1] 26 U.S.C. § 6428(g) was amended on December 27, 2020 to permit a $1,200 credit for an eligible individual even if only one spouse on a joint income tax return for the taxable year includes an SSN valid for employment. *See* Pub. L. 116–260, § 272, 134 Stat. 1976 (Dec. 27, 2020) (amending section 6428). The prior version of Section 6428(g)(1)(B), signed into law on March 27, 2020, required taxpayers to include SSNs of both spouses filing a joint return unless one was in the armed forces. That provision did not apply to an otherwise-eligible U.S. citizen who is married to a spouse without the required SSN and files a separate return. The December 27, 2020 amendment does not affect the claims of any remaining Plaintiff in this case.

**2. Plaintiffs' Complaint**

The plaintiffs in this lawsuit are five children, R.V., H.A.G., J.G., B.G., and I.G (collectively, the "Children")), and their mothers, N.R. and H.G.T. (collectively, the "Parents") suing on their children's behalf, who seek to invalidate certain eligibility requirements of the CARES Act.[2] The Children are United States citizens whose mothers were not eligible to receive an advance refund of the CARES Act Credit, including the "plus-$500" amount that would have been added to the tax credit if they were eligible individuals. Plaintiffs contend the Children's equal protection rights were violated by the allegedly denial of $500 based on their mothers' status as undocumented immigrants. Plaintiffs request an order declaring that the CARES Act is unconstitutional; an injunction requiring the United States to issue advance refunds "for the benefit" of the Children; and $500 in damages for each Child. Dkt. 1 at 27. The Court construed a letter setting forth certain bases for dismissal of this lawsuit as a motion to dismiss and denied the motion without prejudice to reasserting such arguments during summary judgment briefing. *See R.V. v. Mnuchin*, 2020 WL 3402300 (D. Md. June 19, 2020).

**3. Dismissal of a Similar Lawsuit in the Central District of California**

The Central District of California recently denied a temporary restraining order and granted the United States' motion to dismiss a similar proposed class action lawsuit challenging the constitutionality of the prior 26 U.S.C. § 6428(g)(1)(B), brought by a citizen married to an individual who lacks an SSN. *See Doe v. Trump*, 2020 WL 5076999 (C.D. Cal. July 8, 2020) (denying motion for temporary restraining order); *Doe*, 2020 WL 5492994 (granting motion to

[2] This case was brought by four sets of plaintiffs. During the course of discovery in this case, two sets of plaintiffs voluntarily dismissed their claims rather than respond to the United States' discovery requests. *See* Dkts. 53, 58.

dismiss). It held that the plaintiff's constitutional challenge to the CARES Act Credit failed to state a claim for relief because the challenged provision did not implicate a fundamental right or make an inherently suspect distinction, and because the plaintiff failed to affirmatively establish that the provision has no possible rational basis. *Id.* at *7.[3]

**ARGUMENT**

**I. Section 6428 provides a tax credit and must be evaluated in that context.**

Plaintiffs challenge the constitutionality of 26 U.S.C. § 6428, which provides a tax credit to "eligible individual(s)." Despite section 6428's unequivocal statutory text creating a refundable tax credit and placement in the Internal Revenue Code, Plaintiffs ask that the CARES Act Credit be construed as if it were a means-tested benefit separate from the Internal Revenue Code.[4] *See* Dkt. 1, ¶29 ("Though administered through the tax code, economic impact payments are means tested benefits just like various other benefits, such as housing and food assistance, that are intended to benefit both adults and children."). Indeed, in their discussion of section 6428, Plaintiffs cite no cases involving a tax provision, focusing instead on cases analyzing claims for state and federal benefits outside the tax realm.

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[3] The Court permitted the submission of two *amicus curiae* briefs in this action. *See* Dkts. 67-71. The *amici* represent the interests of certain local governments and advocacy organizations and set forth public policy reasons to expand the CARES Act Credit to include individuals like the Children. Both briefs primarily concentrate on policy justifications for expanding the CARES Act Credit; they do not extensively argue – much less establish – that the limitation contained in section 6428(g) is unconstitutional. They also were filed before Congress amended the CARES Act to make eligible for the tax credit (including the "plus-$500" amounts) mixed-status households where one joint filer possesses an SSN.

[4] The local government *amici curiae* also ignore that the CARES Act Credit is a tax credit. They exclusively describe it as a federal benefit payment without any mention of its placement in the Internal Revenue Code and operation as a refundable tax credit. *See* Dkt. 69-1.

When interpreting a federal statute, courts must begin with the actual text, "give that text its 'ordinary, contemporary, common meaning' and must 'enforce it according to its terms.'" *Harrell v. Freedom Mortgage Corp.*, 976 F.3d 434, 439 (4th Cir. 2020) (quoting *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004); *Crespo v. Holder*, 631 F.3d 130, 133 (4th Cir. 2011); *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 515 F.3d 344, 357 (4th Cir. 2008)). In understanding the plain meaning of a statute, courts should consider its location within a statutory scheme for context. *See Davis v. Michigan Dep't of Treas.*, 489 U.S. 803, 809 (1989). Congress chose to codify the CARES Act Credit within the Internal Revenue Code, to refer to it as a tax credit, and to have the Department of the Treasury and Internal Revenue Service administer it like any other tax credit.

### A. Section 6428 excludes all dependent children, not just the Children here, from receiving a CARES Act Credit.

The plain text of section 6428 demonstrates that Congress excluded all dependents, and not just these Children, from receiving any amount of the CARES Act Credit:

> In the case of an eligible individual, there shall be allowed as a credit against the tax imposed by subtitle A for the first taxable year beginning in 2020 an amount equal to the sum of—
>
> (1) $1,200 ($2,400 in the case of eligible individuals filing a joint return), plus
>
> (2) an amount equal to the product of $500 multiplied by the number of qualifying children (within the meaning of section 24(c)) of the taxpayer.

26 U.S.C. § 6428(a). In other words, both the $1,200 or $2,400 credit amount in subsection (a)(1) *and* the $500 per child addition in subsection (a)(2) are provided to the eligible individual(s) alone. No individual is entitled to the "plus-$500" amount under subsection (a)(2) if he or she did not receive the base tax credit under subsection (a)(1).

"Eligible individual," in turn, is statutorily defined as:

> any individual other than–

> (1) any nonresident alien individual,
>
> (2) any individual with respect to whom a deduction under section 151 is allowable to another taxpayer for a taxable year in which the individual's taxable year begins, and
>
> (3) an estate or trust.

26 U.S.C. § 6428(d).

The exclusion from "eligible individual' contained in subsection (d)(2) is critical. Under 26 U.S.C. § 151, taxpayers may claim deductions for personal exemptions for themselves, their spouses, and for "each individual who is a dependent (as defined in section 152) of the taxpayer for the taxable year." In turn, 26 U.S.C. § 152 defines a "dependent" either as a "qualifying child" (described in § 152(c)) or a "qualifying relative" (described in section 152(d)).

Thus, Congress specifically excluded *all* dependents, including these Children, from the definition of "eligible individual" under the CARES Act. The interlocking definitions in the statute preclude the Children from claiming the credit themselves. That is, the "plus-$500" is an addition to eligible parents' base CARES Act credit, not a tax credit payable to a qualifying child. *See* 26 U.S.C. § 6428(a). The preclusion in section 6428(d)(2) applies to all dependents, regardless of the citizenship of their parents, and has not been challenged by Plaintiffs.

**B. Section 6428 provides CARES Act Credits only to those eligible individuals authorized to work in the United States, mirroring other tax statutes.**

No "eligible individual" may receive a CARES Act Credit unless he or she includes on a tax return a SSN valid for employment issued before the due date of the return. *See* 26 U.S.C. § 6428(g) (the "SSN requirement"). Such SSNs are issued to citizens and to aliens authorized to work in the United States. Because SSNs valid for employment are not issued exclusively to U.S. citizens, this requirement is not a distinction based on alienage. Many non-U.S. citizens have SSNs valid for employment. Those individuals are entitled to receive a CARES Act Credit

if they otherwise meet the eligibility requirements of section 6428(d).

While the SSN requirement in section 6428(g)(1)(A) and the bar on nonresident alien eligibility in section 6428(d)(1) overlap – as many nonresidents are ineligible for SSNs[5] – the SSN requirement most closely tracks *work authorization*. *See* 20 C.F.R. § 422.104 ("Who can be assigned a social security number"); U.S. CONGRESSIONAL RESEARCH SERVICE, *Unauthorized Immigrants' Eligibility for COVID-19 Relief Benefits: In Brief*, REPORT R46339 at 5-6 (2020) (SSNs are "typically issued to U.S. citizens, lawful permanent residents, and noncitizens with work authorization"); U.S. CONGRESSIONAL RESEARCH SERVICE, *Federal Income Taxes and Non-Citizens*, REPORT R43840 at 4 (2014) (the Social Security Administration largely stopped providing "nonwork SSNs" once ITINs were established); 61 Fed. Reg. 26788, 27689 ("an ITIN creates no inference regarding the . . . right of that individual to be legally employed in the United States"). Thus, those who are ineligible to receive SSNs are, mostly, not authorized to work in the United States, regardless of their sustained presence in the United States.

By contrast, "nonresident alien" status, for taxation purposes, generally involves duration of presence in the United States, rather than work authorization. *See* IRS Pub. 519 at 3 ("Nonresident Alien or Resident Alien?"). Individuals who are not permanent residents and who do not have a "substantial presence" in the United States are treated as "nonresident aliens," regardless of whether they work here. *Compare* IRS Pub. 519 *with* 20 C.F.R. § 422.104. The distinction between resident and nonresidents is critical for tax enforcement because residents must pay tax on their worldwide income, but nonresidents do not. *See* IRS Pub. 519; *see*

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[5] Those who are ineligible to receive SSNs, but must file tax returns, include many classes of nonresident aliens. Such individuals may be issued an Individual Taxpayer Identification Number ("ITIN"). *See* *https://perma.cc/S6BP-FZSW.*

*generally* 26 U.S.C. § 7701(b)(3); 26 CFR §§ 301.7701(b)-1 through 301.7701(b)-4.

The SSN requirement mirrors the identification number requirements in Internal Revenue Code provisions for the Earned Income Tax Credit ("EITC"), 26 U.S.C. § 32(c)(1)(E), (m); the Child Tax Credit ("CTC"), 26 U.S.C. § 24(h)(7); and recovery rebate credits under section 101 of the Economic Stimulus Act of 2008, Pub. L. No. 110-185, 122 Stat. 613 (Feb. 13, 2008) ("ESA"). The EITC is not available to nonresident aliens. *See* 26 U.S.C. § 32(c)(1)(D). In 1996, Congress amended the EITC through the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWOR") to disallow the EITC for any eligible individual who does not include on his or her income tax return an SSN valid for employment for the taxpayer, and, if the taxpayer is married, an SSN valid for employment of the taxpayer's spouse. *Id.* §§ 32(c)(1)(E), (m). Taxpayers also must provide SSNs for any qualifying child for the EITC. *See id.* §§ 32(c)(3)(D), (m). The House Ways and Means Committee reported that the law was amended because it "does not believe that individuals who are not authorized to work in the United States should be able to claim the credit," which clarifies that the SSN requirement is related to work authorization, not alienage. H.R. Rep. No. 104-651 at 1457 (1996).

Congress subsequently used similar limitations in the ESA and the CTC. Like the CARES Act, the ESA amended 26 U.S.C. § 6428 to create a refundable tax credit during an economic crisis. The ESA also excluded from the definition of an eligible individual: (1) nonresident aliens; (2) estates or trusts; and (3) dependents. 26 U.S.C. § 6428(e)(3) (2008). The law denied credit to an individual who did not include a SSN on his or her tax return. *See id.* § 6428(h) (2008). A qualifying child was taken into account in determining the amount of the eligible individual's credit only if an SSN for the child was included on the return. *Id.* § 6428(h)(1)(C) (2008). The CTC uses similar language. *See* 26 U.S.C. § 24(h)(7).

## II. No party has established standing in this case.

To have standing to sue, Plaintiffs must show they suffered a concrete and particularized injury-in-fact that is actual or imminent. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). They also must establish a fairly traceable causal connection between the injury and defendants' conduct and that the alleged harm will be redressed by a favorable ruling. *See id.* at 560-61. The "standing inquiry has been especially rigorous when reaching the merits of the dispute would force [a court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997).

The CARES Act Credit is treated the same as a tax payment under the Internal Revenue Code. *See* 26 U.S.C. § 7422(d) ("The credit of an overpayment of any tax in satisfaction of any tax liability shall, for the purpose of any suit for refund of such tax liability so satisfied, be deemed to be a payment in respect of such tax liability at the time such credit is allowed."). There is no standing for someone other than the taxpayer to seek a refund or credit of tax. *See United States v. Williams*, 514 U.S. 527, 539 (1995); 26 U.S.C. § 7701(a)(14) (defining "taxpayer," as "any person subject to any internal revenue tax"). The Parents, who are the only taxpayers in this case, *see* 26 U.S.C. § 7701(a)(14), do not allege wrongdoing or seek relief on their own behalf. They do not have SSNs, making them ineligible for the credit. Plaintiffs concede the Children are not taxpayers and are claimed as dependents on their Parents' returns. The Children are precluded therefore from challenging the denial of the credit to their Parents.

Nevertheless, the Children (and the Parents on their children's behalf) argue their Fifth Amendment rights have been violated because they have been denied "the benefits of emergency cash assistance … based solely on the fact that on or both of their parents are undocumented immigrants." Dkt 1, ¶1. Plaintiffs contend that they have standing because the Children are

injured by "losing the actual benefits earmarked for children that they otherwise would have enjoyed were it not for their parent's undocumented status." Dkt. 33 at 4. The Court found that such allegations of indirect or secondary injury – that the Children were "denied the opportunity to benefit" from their parents' tax refund – were facially sufficient to confer standing and prevent Rule 12(b) dismissal. *R.V.*, 2020 WL 3402300, at *3. However, none of the Plaintiffs has established a more direct injury that would provide standing to proceed further.

As described above, section 6428 excludes dependent children from claiming the CARES Act Credit. Moreover, no court has found standing for a third-party beneficiary of a tax credit to challenge the tax liabilities of another individual, and the benefits-related cases cited by Plaintiffs do not support standing. Further, because of their exclusion from the CARES Act Credit, the Children are not within the "zone of interests" of section 6428, which precludes statutory standing. Finally, because the Parent Plaintiffs – the only parties that plausibly could assert a direct injury in this case – have not made any claim on their own behalf, the lack of standing in this case is of Plaintiffs' own making. The Court, therefore, lacks subject matter jurisdiction to hear the merits of Plaintiffs' claims.

### A. Because the Children, like all other dependents, are excluded from receiving the CARES Act Credit, they have not been treated differently than other citizen children, which precludes Article III standing here.

Plaintiffs incorrectly allege the Children have been injured because the CARES Act treats them differently than other citizen children. *First*, by the express language of the statute and contrary to Plaintiffs' contentions, the Children are not "otherwise qualif[ied]" for the credit." Dkt. 59 at 15. *All* dependent children are excluded from the definition of eligible individuals. *See* 26 U.S.C. § 6428(d)(2). The Children, just like all dependent children, meet the definition of "qualifying child," which is used solely for purposes of calculating the amount of credit provided to an eligible taxpayer. *See* 26 U.S.C. §§ 6428(a)(2), (g)(1)(C). Thus, the Children were not

denied anything "solely because of their parents' disfavored immigration status."[6] Dkt. 59 at 8.

*Second*, the statutory text shows that the CARES Act Credit is not a government benefit owed, let alone denied, to dependent children like the Children, because the CARES Act does not provide *any* government benefit to dependents. Section 6428 provides a tax credit for eligible individuals; it is not a guarantee of emergency assistance for their children. Like other statutory tax credits discussed below, Congress provided the CARES Act Credit directly to certain taxpayers, not to their children. An individual who is not the intended recipient of a tax credit cannot establish standing by claiming an indirect injury caused by the denial of the credit.

*Third*, Plaintiffs cannot overcome their lack of standing by arguing they intend to use the $500 per child for the benefit of the Children. *See* Dkt. 59 at 8-9; Dkt. 59-1 at 26, ¶14; *id.* at 33, ¶10. Nothing in section 6428 requires parents to expend any amount of the CARES Act Credit for the benefit of their children. But again, even if the $500 amount was intended by Congress to benefit dependent children, it was not directed *to* or *for* those dependent children. The statute

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[6] During discovery, N.R. and H.G.T. provided their unredacted tax returns. Counsel for the United States reviewed information maintained by the Service regarding Plaintiffs' 2018 and 2019 tax returns to determine if they meet the definition of "eligible individual," other than the SSN requirement, for the CARES Act Credit. *See* Williamson Decl., ¶9. Based on that review, it appears N.R. meets the eligibility requirements, other than the SSN requirement. *See id.*, ¶10. By contrast, it does not appear that H.G.T. meets the eligibility requirements because there is no record or other indication that she filed a 2018 or 2019 tax return with the Service. *See id.*, ¶¶10-26; Exs. 1-6. Nor is there any record sufficient for the IRS to conclude that she would be eligible for the advance refund. There is no allegation that she utilized the non-filer portal to request advance refund of the CARES Act Credit. Thus, she does not have standing to bring her claim because, even if this Court determines the SSN requirement is unconstitutional, she is not entitled to an advance refund. *See Morton v. United States Virgin Islands*, 2020 WL 7872630, at *8 (D.V.I. Dec. 31, 2020) (dismissing challenge brought by incarcerated individual to exclusion from receiving the CARES Act credit because he had not filed a tax return or used the non-filer portal prior to bringing suit). Accordingly, the claims of H.G.T. and her children, H.A.G., J.G., B.G., and I.G., should be dismissed.

does not require parents to spend any amount of the credit, including the $500, in any particular manner, or at all, for the benefit of any individual. If merely alleging an intent to use a tax refund or credit for the benefit of another were sufficient to confer standing, third-party suits, like this one, would be plentiful rather than prohibited.

**B. The Children cannot claim entitlement to the tax credits or deductions allegedly owed to their parents.**

Plaintiffs admit section 6428 gives no benefit directly to dependents; rather, were they to prevail, the Parent Plaintiffs would receive a CARES Act Credit. *See R.V.*, 2020 WL 3402300, at *3. By the denial of credit to their parents, the Children allegedly were harmed indirectly because their parents would have used the credit for the benefit of their children. *See id.* Plaintiffs contend this indirect injury establishes standing because "a person need not be the immediate recipient of a government benefit to have Article III standing to challenge its denial." *Id.* (citing *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, 1573-76 (D.C. Cir. 1984)). Their argument is a vast and unwarranted expansion of standing that is unsupported by precedent.

To establish standing in this case, the Children, or the Parents on behalf their children, must prove a valid exception to the general rule that a party "may not challenge the tax liabilities of others." *Williams*, 514 U.S. at 539. This rule also applies to tax credits, which are treated as payments by 26 U.S.C. § 7422(d), and deductions, "which are taxes in reverse." *See Assoc. of Am. Physicians and Surgeons, Inc. v. Koskinen*, 768 F.3d 640, 642 (7th Cir. 2014) (citing *Hein v. Freedom from Religion Fdn., Inc.*, 551 U.S. 587 (2007); *Allen v. Wright*, 468 U.S. 737 (1984); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975)). None of the limited exceptions to the general rule applies when the result is a refund due the taxpayer. *See Williams*, 514 U.S. at 539 (discussing claims on behalf of taxpayers by

fiduciaries, decedent estates, transferees).

Courts consistently have held that individuals do not have Article III standing to assert a challenge related to another's tax liabilities. *See, e.g., Fulani v. Brady*, 935 F.2d 1324, 1325 (D.C. Cir. 1991) (holding one person "lacks standing to challenge the tax-exempt status" of another); *Myers v. United States*, 647 F.2d 591, 604 (5th Cir. 1981) (rejecting for lack of standing a Fifth Amendment challenge brought by purchaser of tax lien-encumbered property to the validity of the underlying assessment because tax "assessments are not open to collateral attack by non-taxpayers"); *In re Campbell*, 761 F.2d 1181, 1185-86 (6th Cir. 1985) (rejecting for lack of standing husband's challenge to order permitting IRS to enter home to levy property in satisfaction of wife's tax liability); *United States v. Formige*, 659 F.2d 206, 208 (D.C. Cir. 1981) (upholding denial of motion to intervene for lack of standing by daughter to overturn judgment for unpaid taxes entered against her mother).

This is true even where claims related to the dependent, if successful, would inure to the benefit of the child through a larger refund to his or her parents. Like the CTC and the EITC, Congress provided the section 6428 credit directly to certain taxpayers, not to their dependent children. *See In re Parisi*, 2010 WL 1849386, at *2 (Bankr. E.D.N.Y. May 6, 2010) ("there is no evidence that the CTC was intended to be given to parents in trust for their children with the parents being the conduit"); *In re Hardy*, 787 F.3d 1189, 1193-94 (8th Cir. 2015) (noting that the CTC was enacted to recognize the financial responsibilities on the parents of raising dependent children and to promote family values). Cases recognizing that federal tax statutes benefit taxpayers – not their dependent children – admittedly do not often address the standing of those children. *See R.V.*, 2020 WL 3402300, at *4 (discussing *Parisi*, 2010 WL 1849386, at *1, *Hardy*, 787 F.3d at 1197). But if a non-taxpayer cannot challenge the tax liabilities of a

taxpayer, it is necessarily the case that the non-taxpayer lacks standing to assert such a claim. In tax cases like this one, the taxpayer alone may seek to vindicate her alleged injuries.[7]

**C. Cases finding standing based on status as an intended beneficiary of a statute do not support third party standing here.**

In an attempt to establish standing in this tax case, Plaintiffs cite only two inapposite benefits-related cases. In *Village of Arlington Heights*, the Supreme Court held that an African American man was injured and had standing to sue based on "his quest for housing nearer his employment has been thwarted by official action that is racially discriminatory." 429 U.S. at 264. The challenged zoning restriction precluded all affordable housing projects, not just the particular project at issue. Thus, the individual plaintiff himself was injured by the zoning restriction, because the ordinance had the effect of precluding him from living in Arlington Heights. In that way, he suffered a direct injury. He was not, like Plaintiffs here, attempting to assert a secondary injury resulting from alleged discrimination against others.

Similarly, in *Heckler*, the D.C. Circuit recognized standing for a group of federally

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[7] 26 U.S.C. § 7426(a) sets forth a list of civil actions to recover money or property that may be brought against the United States by persons other than the taxpayer, but none applies here. In any such suit, "the assessment of tax upon which the interest or lien of the United States is based shall be conclusively presumed to be valid." 26 U.S.C. § 7426(c). That is, non-taxpayers still cannot challenge the underlying liability of the taxpayer, even if they are secondarily harmed by that assessment. Section 7426(a)(4), enacted after the Supreme Court's decision in *Williams*, forecloses the right of third parties to pay the amount of tax owed by a taxpayer and challenge the tax liability itself. *See First Am. Title Ins. Co. v. United States*, 520 F.3d 1051, 1053 (9th Cir. 2008) ("*EC Term of Years Trust v. United States*[, 550 U.S. 429 (2007)] narrows the permissible interpretation of *Williams* and there can no longer be any good argument for allowing a third-party challenge to an assessment, barred by § 7426, to be made under § 1346"). Under 26 U.S.C. § 6901, which also is inapplicable here, a transferee of an asset is treated as the original taxpayer for purposes of the asset and may contest the underlying tax liability. *See Williams*, 514 U.S. at 539. There are also inapplicable provisions related to excise taxes. Under 28 U.S.C. § 2410, holders of certain property interests can challenge a lien of the United States arising from an unpaid tax liability but such challenges are limited to the lien and not the underlying liability.

funded health centers to challenge a decision to reduce funding for their state. *See* 734 F.2d at 1572-73. It held that "once appellants demonstrated that they would qualify to receive these funds, they need not shoulder the additional burden of demonstrating that they are certain to receive funding." *Id*. at 1576. Plaintiffs here, unlike those in *Heckler*, cannot demonstrate that they would qualify for any amount of credit under section 6428 because the statute specifically excludes dependent children from the definition of eligible individual. Likewise, they do not argue that the Parents qualify as eligible individuals, because they are also excluded.

Plaintiffs' citations in support of their constitutional arguments also underscore their failure to establish standing. In *Lewis v. Thompson*, the plaintiffs challenged a provision of PRWOR that prevented a citizen child from obtaining a government benefit expressly designated for her – automatic enrollment in the Medicaid program – which would entitle her to Medicaid coverage and associated services for *her* care. *See* 252 F.3d 567, 588-89 (2d Cir. 2001). The child was the primary beneficiary of the Medicaid services, because the benefit, by its nature, was non-transferrable and unavailable for the parents' own needs. *See id.*; *see also Ruiz v. Blum*, 549 F. Supp. 871, 876, 877 (S.D.N.Y. 1982) (concluding that the child, rather than the parent, was the primary beneficiary of a statute providing for day care services).

Other benefits, such as the Aid to Families with Dependent Children ("AFDC") program, also are government benefits intended for the child. The Supreme Court has stated: "As its name indicates, the AFDC program 'is designed to provide financial assistance to needy dependent children and the parents or relatives who live with and care for them.'" *Anderson v. Edwards*, 514 U.S. 143, 146 (1995); *see also King v. Smith*, 392 U.S. 309, 313 (1968) ("The category singled out for welfare assistance by AFDC is the 'dependent child'"); *Dandridge v. Williams*, 397 U.S. 471, 479 (1970). Other courts repeatedly identify children as recipients of AFDC

benefits. *See, e.g., Cancel v. Wyman*, 441 F.2d 553, 554 (2d Cir. 1971); *Smyth v. Carter*, 168 F.R.D. 28, 29-30 (W.D. Va. 1996); *Dullea v. Ott*, 316 F. Supp. 1273, 1274 (D. Mass. 1970).

**D. Neither the Children, nor the Parents on behalf of their children, have statutory standing to bring these claims.**

Under the theory of prudential or statutory standing, a litigant is barred from raising another's legal rights or adjudicating general grievances, and her complaint must "'fall within the zone of interests protected by the law invoked.'" *Lexmark Int'l Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) (quoting *Allen*, 468 U.S. at 751). The Court previously found that Plaintiffs sufficiently alleged that they were within the zone of interests of the CARES Act because Congress intended that they "enjoy the benefit of the economic impact payments for food, shelter, and supplies, are squarely within [the] zone of interests of the statute." *R.V.*, 2020 WL 3402300, at *4. Because the CARES Act simply created a refundable tax credit subject to the Internal Revenue Code's refund procedures, it is doubtful that Congress intended a "legislatively conferred cause of action." *Lexmark*, 572 U.S. at 126-29. Moreover, the undisputed material facts show that the Children – as dependent children of individuals ineligible for the Credit – are not within any zone of interests protected by the CARES Act.

As discussed above, section 6428 provides a tax credit to eligible individuals, not to qualifying children. The zone of interests arguably protected by section 6428, therefore, would be restricted to eligible individuals. Even if Congress generally intended that children benefit from the "plus-$500" amount issued to their eligible parents, it plainly did not mandate that the tax credits benefit the children, or even be used for the general benefit of the family. The Children simply are "the wrong persons to litigate" these claims. *Koskinen*, 768 F.3d at 642-43.

**E. The Parents' choice not to raise their own claim precludes standing.**

Plaintiffs have asserted the specter that their injuries would evade court review if the

Children lack standing to pursue these allegations. *See* Dkt. 33 at 4; *see also R.V.*, 2020 WL 3402300, at *5 (expressing concern that Defendants' position on standing would prevent any challenge to the alleged discrimination in this case). That is incorrect. The Children seek to remedy alleged discrimination against their parents, which they contend resulted in injury to themselves. They do not have standing to challenge the denial of their parents' tax credits. The Parents, as the taxpayers directly affected by section 6428, could have brought suit on their own behalf – and alleged their own injury – to challenge the validity of the SSN requirement. Their choice not to raise such claims precludes standing in this case.

Plaintiffs do not explain why the Children may lawfully vindicate the alleged right of their Parents to a CARES Act Credit. Plaintiffs claim only that the Parents may assert a claim for damages on behalf of the Children, because third-party standing is appropriate "when a 'hindrance' prevents the third party from asserting its own rights." Dkt. 33 at 4 (quoting *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017)). *Sessions* found third-party standing only because the injured party had died years before. *See id*. Further, nothing precludes the Parents from themselves asserting that they are entitled to $500 per qualifying child under the CARES Act, even though they are not "eligible individuals." The Parents' choice not to raise such claims is not a "hindrance" sufficient to establish third-party standing in this case.[8]

## III. Plaintiffs' Fifth Amendment rights have not been violated.

The Constitution does not require the United States to extend CARES Act credits to

[8] Plaintiffs assert the claims of the Children, rather than the Parents, seemingly attempting to avoid rational basis scrutiny that applies to alienage classifications. Their tactical reliance on third-party standing does not entitle them to ratchet up the applicable level of scrutiny and the Children's claims do not call for heightened scrutiny of the SSN requirement.

individuals who are not authorized to work in this country, even if they have U.S. citizen children. Plaintiffs challenge a SSN requirement that aided the Government in rapidly distributing advance refunds of the CARES Act Credit to individuals with work authorization and individuals who meet the statute's other (unchallenged) eligibility criteria. The classification is subject to rational basis review and Plaintiffs have not met their burden of establishing it lacks a rational basis. Even if heightened scrutiny were applicable, the SSN requirement still survives as it is substantially related to the Government's important interest in rapidly and accurately distributing payments to individuals whom a separate part of the Act defines as eligible.

**A. The SSN requirement is valid under rational basis review.**

The SSN requirement does not treat people differently because of a suspect classification like race or religion, or even a quasi-suspect classification like gender or child "illegitimacy." Instead, the SSN requirement tracks work authorization. It is therefore presumably valid and subject only to rational basis review. Even if the SSN requirement were instead interpreted to draw lines on the basis of alienage or immigration status, which it does not, it still is subject to rational basis review. *See Doe*, 2020 WL 5492994, at *4 (finding that the SSN requirement had a rational basis and rejecting application of heightened scrutiny).

Distinctions turning on whether an individual has work authorization are presumed to be constitutional under the Equal Protection Clause because "classification is the very essence of the art of legislation." *Moss v. Clark*, 886 F.2d 686, 689 (4th Cir. 1989); *Cassano v. Carb*, 436 F.3d 74, 76 (2d. Cir. 2006) (applying rational basis review to law requiring employers to furnish Social Security numbers). As discussed above, the SSN requirement distinguishes individuals based on whether they have an SSN that authorizes them to work in the United States. That statutory classification is not based on alienage, as non-citizens may be authorized to work in the

United States. *See* 42 U.S.C. § 405(c)(2)(B)(i)(I), (III). Although work authorization is granted as a matter of course to citizens, and a subset of aliens do not have such work authorization, that does not make the SSN requirement a "proxy" for "undocumented immigrant" status.

Even if section 6428(g)(1)(A) is construed as classifying on the basis of alienage rather than work authorization, it is still subject only to rational basis review. *See Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976); *see also Doe*, 2020 WL 5076999, at *9. The Supreme Court "has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens," and "in the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (citations and internal quotation marks omitted). "[T]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress . . . in the area of immigration and naturalization." *Mathews*, 426 U.S. at 81-82 (internal citations omitted). Courts have upheld under rational basis statutes drawing alienage-based distinctions, including distinctions between "legal" and undocumented aliens. *See, e.g., Fiallo*, 430 U.S. 787; *Mathews*, 426 U.S. 67; *United States v. Carpio-Leon*, 701 F.3d 974, 982-83 (4th Cir. 2012); *Aleman v. Glickman*, 217 F.3d 1191 (9th Cir. 2000); *City of Chicago v. Shalala*, 189 F.3d 598 (7th Cir.1999); *Rodriguez ex. rel. Rodriguez v. United States*, 169 F.3d 1342, 1350-53 (11th Cir. 1999).

***1. Rational basis review is extraordinarily deferential.***

Under rational basis review, a law "is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related" to a legitimate interest. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). The Supreme Court "has described the rational basis standard of review as 'a paradigm of judicial restraint.'" *Van Der Linde Hous.*,

*Inc. v. Rivanna Solid Waste Auth.*, 507 F.3d 290, 293-94 (4th Cir. 2007) (quoting *F.C.C. v. Beach Commc's., Inc.*, 508 U.S. 307, 314 (1993)). The "rational" aspect of this review "refers to a constitutionally minimal level of rationality; it is not an invitation to scrutinize . . . whether the classification is the best one suited to accomplish the desired result[] or . . . whether the public policy sought to be achieved is preferable to other possible public ends." *Id.* at 295.

Courts should refrain from examining the wisdom, desirability, or fairness of the classification, *see Van Der Linde*, 507 F.3d at 293-94, and a classification does not lack rational basis because it "'is not made with mathematical nicety or because in practice it results in some inequality.'" *Dandridge*, 397 U.S. at 485 (quoting *Lindsley v. Nat'l Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)). The classification is "not subject to courtroom fact-finding," and a defense of the law "may be based on rational speculation unsupported by evidence or empirical data." *Id.*

Given the deference owed the legislature under rational basis review, a plaintiff challenging a statutory classification "bears the heavy burden of negating every conceivable basis which might reasonably support the challenged classification." *Van Der Linde*, 507 F.3d at 294; *see also Madden v. Kentucky*, 309 U.S. 83, 88 (1940); *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 681 (2012). The government "has no obligation to produce evidence to sustain the rationality of a statutory classification." *Doe*, 2020 WL 5492994, at *4 (finding that plaintiffs failed to negate all rational bases for section 6428(g)) (quoting *Aleman*, 217 F.3d at 1201).

Rational basis applies in the tax context as well. The Supreme Court has acknowledged that courts lack the level of expertise possessed by the legislative branch in the "complex arena" of fiscal policy. *See San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40-42 (1973)). Thus, "'[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes,'" even in constitutional cases, and courts must give "substantial deference" to a

legislative "judgment" regarding a "tax" provision that is challenged under the constitution. *Mueller v. Allen*, 463 U.S. 388, 396 (1983) (quotation omitted); *see also Armour*, 566 U.S. at 680; *Regan v. Taxation with Representation*, 461 U.S. 540, 547 (1983); *United States v. Md. Savings-Share Ins. Corp.*, 400 U.S. 4, 6-7 (1970).

Ultimately, "the power of Congress in levying taxes is very wide, and where a classification is made of taxpayers that is reasonable, and not merely arbitrary and capricious, the Fifth Amendment cannot apply." *Barclay & Co. v. Edwards*, 267 U.S. 442, 450 (1924).

***2. The SSN requirement passes rational basis review because, among other possible bases, it helps enforce eligibility criteria and ensures that payment recipients have work authorization.***

Plaintiffs improperly attempt to shift their burden to the Government, arguing that certain possible bases for the SSN requirement are irrational. *See* Dkt. 59 at 31-32. But it is Plaintiffs' burden to negate all rational justifications for section 6428(g). They cannot do so.

Initially, nonresident aliens are excluded from those entitled to the CARES Act Credit, *see* 26 U.S.C. § 6428(d)(1), and the SSN requirement ensures that the Credit is available only to eligible individuals.[9] The Supreme Court has held that "[t]he administrative difficulties of individual eligibility determinations are without doubt matters which Congress may consider when determining whether to rely on rules which sweep more broadly than the evils with which they seek to deal." *Weinberger v. Salfi*, 422 U.S. 749, 784 (1975).

The Central District of California, also evaluating the SSN requirement of the CARES

[9] Plaintiffs do not challenge the constitutionality of section 6428(d)(1), but instead challenge only the separate SSN requirement in 6428(g). *See* Dkt. 1, ¶¶31, 37. To the extent that the SSN requirement helps to distinguish individuals who meet section 6428(d)'s eligibility criteria from those that do not, subsection (g) plainly furthers a "legitimate end."

Act, held that plaintiffs failed to negate at least one rational basis for the SSN requirement: administrative exigency. *See Doe*, 2020 WL 5492994, at *4-*5. It concluded that Congress, in an attempt to rapidly distribute payments to eligible individuals, could rationally limit those payments to individuals with SSNs, because this limitation helped ensure that the recipients are authorized to work in the United States and are not nonresident aliens. *See id.*

Another justification for the SSN requirement is that Congress decided to allocate refundable tax credits only to individuals authorized to work in this country, given the scarcity of government resources during the pandemic emergency. *See Selective Serv. Sys. v. Minnesota Pub. Interest Research Grp.*, 468 U.S. 841, 859 n.17 (1984) (law "easily" satisfied rational basis review based on legitimate Government objective of "fairness in the allocation of scarce federal resources"); *McElrath v. Califano*, 615 F.2d 434, 441 (7th Cir. 1980) (rejecting equal protection challenge to requirement that all members of a family provide an SSN as a condition of public aid eligibility). While this statutory exclusion affects many individuals, "[t]he Constitution certainly does not put legislatures to the choice of solving the entirety of a social problem or no part of it at all." *Schleifer by Schleifer v. City of Charlottesville*, 159 F.3d 843, 851 (4th Cir. 1998) (internal citation omitted). "Legislation and regulation necessarily involve inclusion and exclusion along general lines that may affect particular individuals in ways that seem arbitrary or unfair," and "'[i]n a social welfare case we must recognize the 'limitations on the practical ability of the State to remedy every ill.'" *Wilson v. Lyng*, 856 F.2d 630, 633 (4th Cir. 1988) (quoting *Lugo v. Schweiker*, 776 F.2d 1143, 1150-51 (3d Cir. 1985), in turn quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

Courts construing other tax statutes have found a rational basis for similar classifications. In *Barr v. Commissioner*, the United States Tax Court found a rational basis for 26 U.S.C.

§ 152(b)(3), which allows a taxpayer to claim a child as a dependent only if the child "is a citizen of the United States, a resident of the United States or certain other countries, or makes his principal place of abode in the home of the taxpayer." 51 T.C. 693, 694 (1969). Taxpayers supported their noncitizen son, who resided in South Korea. In rejecting taxpayers' argument that the statute violated the Fifth Amendment, the court noted that Congress added the restriction in section 152(b)(3) "because [it] became convinced that dependency deductions were being claimed in questionable situations," and "[i]t was impracticable for the Internal Revenue Service to investigate all these claims." *Id.* The court concluded that "the statutory restrictions may be the only practicable answer to the problem – surely, we cannot say that they are without reason." *Id.; see also Schinasi v. Comm'r*, 53 T.C. 382, 383 (1969) (holding that 26 U.S.C. § 6013(a)(1), which barred individuals who are nonresident aliens for any part of a taxable year from filing a joint return, had a rational basis for differential treatment); *Hofstetter v. Comm'r*, 98 T.C. 695, 701-02 (1992) (rejecting alienage challenge to 26 U.S.C. § 6013, because the restriction at issue applied "equally to all taxpayers whose spouses are nonresident aliens, regardless of their nationality") (citing *Schinasi*, 53 T.C. at 384; *Black v. Comm'r*, 69 T.C. 505 (1977); *Bhargava v. Comm'r*, T.C. Memo 1978-197 (1978)).

**B. The SSN requirement is not subject to heightened scrutiny.**

Plaintiffs seek to avoid their burden under rational basis by arguing that their status as citizens requires heightened scrutiny. *See* Dkt. 59 at 22-26. They contend that even if their parents' equal protection claims would be subject to rational basis review, the Children's challenge to the *same provision* is subject to a higher standard.

The court's review of an alienage-based classification in a statute cannot shift based on the classification's burden on a child, even a U.S. citizen child. Many immigrant households include citizen children. Courts cannot apply heightened scrutiny to laws drawing alienage-

based distinctions merely because there is a citizen child in the home. If they did, differential treatment to an alien could be recast as a disadvantage to such citizen children, which would undermine the latitude and deference courts are supposed to grant to Congress in the area of immigration and naturalization. *See Fiallo*, 430 U.S. at 792. Thus, even though the claim is nominally brought by the Children rather than the Parents, heightened scrutiny does not apply.

***1. Plaintiffs do not challenge a distinction based on characteristics of the Children, so rational basis review applies.***

Plaintiffs' arguments in support of heightened scrutiny are flawed and contradict their professed basis for standing. Plaintiffs essentially ask the Court to find that they have been directly discriminated against for purposes of applying a standard of review, but indirectly injured for purposes of standing. Both cannot be true.

In order to avoid rational basis review, Plaintiffs contend that the CARES Act unconstitutionally discriminates against the Children based on their parentage. *See* Dkt. 59 at 22-26. However, as discussed above, section 6428(g) makes no such classification; it only distinguishes between an "eligible individual" who possesses an SSN and one who does not. *See* 26 U.S.C. § 6428(g)(1)(A). The Parents, not the Children, are denied the CARES Act Credit under section 6428(g)(1)(A), due to their own "status-based inability to obtain a VIN." Dkt. 59 at 17. Section 6428(g)(1)(A) is a distinction based on the characteristics of a taxpayer. It does not classify the dependent child in any way.

***2. Rational basis review applies to distinctions related to immigration and nationality, even where citizens allege harm based on those distinctions.***

Even if section 6428(g)(1)(A) was a statutory classification of the Children and not the Parents, rational basis review still applies. Courts have repeatedly applied only rational basis review to laws with alienage classifications, even if those laws result in a disadvantage to the children of some immigrants. For example, in *Johnson v. Whitehead*, the Fourth Circuit cited

Congress' plenary power over immigration and naturalization in upholding an immigration law disadvantaging certain immigrant children in the conferral of citizenship through their parents. 647 F.3d 120, 126-27 (4th Cir. 2011). Numerous courts have rejected arguments by citizen children that deportation orders against their parents deprive them of their own constitutional rights. *See, e.g., Perdido v. INS*, 420 F.2d 1179, 1180-81 (5th Cir. 1969) (collecting cases); *Delgado v. INS*, 637 F.2d 762, 764 (10th Cir. 1980); *Kruer ex rel. S.K. v. Gonzales*, 2005 WL 1529987, at *7 (E.D. Ky. June 28, 2005) ("Congress sets the conditions for an alien's presence in this country and has the authority to do so without violating constitutional rights, even where conditions might be burdensome to children or the family.").

In *Fiallo*, the Supreme Court upheld the constitutionality of a law granting preferential immigration status to "legitimate children" of U.S. citizens or lawful permanent residents, as well as out-of-wedlock children in instances where the mother, but not the father, was a U.S. citizen or lawful permanent resident. 430 U.S. at 787. There, one of the petitioners was a citizen child of an alien parent and one was the citizen father of an alien child. 430 U.S. at 790 n.3; *see also id.* at 806 (Marshall, J., dissenting) ("This case, unlike most immigration cases that come before the Court, directly involves the rights of citizens, not aliens."). *Fiallo* acknowledged that the challenged law arguably infringed on the rights of those citizens, not just aliens, but nonetheless "rejected the suggestion that more searching scrutiny [than rational basis review] is required" based on that factor. *Id.* at 794. In light of its majority opinion and pointed dissent, *Fiallo* must be read to apply rational basis review to laws that draw distinctions on the basis of alienage, even when those distinctions create alleged harm to United States citizens.

Significantly, the Central District of California applied rational basis review in dismissing a challenge to the SSN requirement. *Doe*, 2020 WL 5076999, at *9. The court held that the

deferential review accorded to federal immigration statutes must govern, notwithstanding the citizen plaintiff's attempt to invoke heightened scrutiny. *Id.* It explained:

> Plaintiff is a U.S. citizen, not an alien, but the express operation of the Exclusion Provision does hinge on the "alien" status of her spouse, because if her spouse was a U.S. citizen (or an alien with a SSN), she would be eligible to receive the Advance Credit. But even assuming that heightened scrutiny based on the alienage status of Plaintiff's husband applies to the classification contained in the Exclusion Provision with regard to its impact on Plaintiff, in the specific context of federal classifications based on alienage, such distinctions are subject to rational basis review.

*Id*. (citing *Mathews*, 426 U.S. at 83; *Korab v. Fink*, 797 F.3d 572, 580 (9th Cir. 2014)).

***3. The cases cited by Plaintiffs do not require heightened scrutiny.***

None of the cases cited by Plaintiffs requires the application of heightened review. They rely primarily on *Lewis v. Thompson*, which applied rational basis review to a federal law denying Medicaid prenatal care to "illegal immigrant" mothers but heightened scrutiny where the same law denied automatic Medicaid enrollment upon birth to their citizen children. 252 F.3d at 583-84. The court held that the "'highly deferential' standard appropriate in matters of immigration . . . is not applicable here because we are concerned with a claim asserted on behalf of a citizen." *Id.* at 590 (citing *Lake v. Reno*, 226 F.3d 141, 148 (2d. Cir. 2000)). The *Lewis* decision was compelled by the earlier ruling in *Lake v. Reno*, which, in turn, "drew inferences" from the concurrences forming the fractured Supreme Court decision in *Miller v. Albright*, 523 U.S. 420 (1998). *Lewis*, 252 F.3d at 591 (citing *Lake*, 226 F.3d at 145-48)).

However, the proposition for which Plaintiffs cite *Lewis* is in doubt. Less than one month after *Lewis*, the Supreme Court vacated and remanded *Lake* for further consideration in light of *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001). *See Ashcroft v. Lake*, 533 U.S. 913 (2001). *Nguyen* clarifies that *Miller* applied heightened scrutiny because of a *gender-based* distinction within the statute, and not, as the Second Circuit concluded in *Lake* and then *Lewis*,

because the law deprived U.S. citizen children of a benefit. *See Nguyen*, 533 U.S. at 56-57 ("The statute imposes different requirements for the child's acquisition of citizenship depending upon whether the citizen parent is the mother or the father."); *id.* at 60-61 ("for a gender-based classification to survive equal protection scrutiny," it must pass heightened scrutiny). Thus, the aspect of *Lewis* that is the centerpiece of Plaintiffs' argument for heightened scrutiny has been undermined – if not invalidated – by the Supreme Court.

Other than *Lewis*, Plaintiffs do not point to a single case in which a court applied heightened scrutiny to a federal law where an alienage-based distinction deprived a citizen child of a benefit which he or she would otherwise receive. Plaintiffs cite *Intercommunity Justice and Peace Ctr. v. Ohio Bureau of Motor Vehicles*, which is irrelevant as it deals with a *state* law drawing classifications based on national origin (not at issue here) and alienage. 440 F. Supp. 3d 877, 895 (S.D. Ohio 2020). Because states do not have the same authority over immigration as Congress, state classifications based on alienage face strict scrutiny. *Compare id.* (a state law or policy that classifies based on race, national origin, or alienage violates the Equal Protection Clause unless the state can demonstrate that the policy is "necessary to further a compelling governmental interest" and "narrowly tailored to that end.") *with Carpio-Leon*, 701 F.3d at 982-83 (federal alienage-based classification subject to rational basis); *see also Doe*, 2020 WL 5076999, at *9 (citing *Mathews*, 426 U.S. at 84-85) (cases regarding state regulation of aliens are inapposite to a section 6428(g) challenge).

Plaintiffs rely on cases applying heightened scrutiny to statutes drawing distinctions based on gender, *see Craig v. Boren*, 429 U.S. 190, 197 (1976), or distinctions based on "illegitimacy," *see Clark v. Jeter*, 486 U.S. 456, 461 (1988) (applying heightened scrutiny on the rationale that such laws unjustly burden children "for the sake of punishing the illicit relations of

their parents") (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972); *see also L.P. v. Comm'r, Indiana State Dept. of Health*, 2011 WL 255807 (S.D. Ind. Jan. 27, 2011). It is well established that "illegitimacy" classifications (outside of the immigration context) and gender-based classifications call for heightened scrutiny. *City of Cleburne*, 473 U.S. at 441. But these cases do not support heightened scrutiny here because the Supreme Court has observed that "heightened scrutiny has generally been applied *only* in cases that involve discriminatory classifications based on sex or illegitimacy." *See Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 460 (1988) (emphasis added). Another case that Plaintiffs cite is even further from the mark, involving invidious racial classifications not present here. *See Oyama v. California*, 332 U.S. 633, 640-41, 644 (1948) ("The only basis for this discrimination against an American citizen, moreover, was the fact that his father was Japanese and not American, Russian, Chinese, or English"); *id.* at 646 ("There remains the question of whether discrimination between citizens on the basis of their racial descent, as revealed in this case, is justifiable.").

Plaintiffs reliance on the Supreme Court's decision in *Plyler*, which applied heightened scrutiny to a law making alienage-based classifications that burdened children, is unavailing. The Court "has not extended [*Plyler*'s] holding beyond the 'unique circumstances' that provoked its 'unique confluence of theories and rationales.'" *Kadrmas*, 487 U.S. at 460. The statute in *Plyler* prevented children of undocumented immigrants from attending public school in Texas. 457 U.S. 202. Further, *Plyler* addressed a state law. *Id.* at 205; *Rodriguez*, 169 F.3d at 1350 ("Nothing in *Plyler* even arguably suggests that a heightened level of scrutiny would have applied if the challenged statute had been enacted by Congress"). Moreover, it involved the denial of an irreplaceable governmental benefit directed to children — a free public education — rather than a one-time cash payment to an "eligible individual," who is not the child, but the

parent. *See Plyler*, 457 U.S. at 221 (public education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation"). The Children's ineligibility to receive a one-time tax credit cannot be compared to the denial of a free public education, which the Court found would "take an inestimable toll" on the deprived children for the rest of their lives and would also harm the State and the nation by "promoting the creation and perpetuation of a subclass of illiterates within our boundaries." *Plyler*, 457 U.S. at 222, 230.

### C. Even if the Act's eligibility requirement were subjected to heightened scrutiny, the requirement is "substantially related" to an "important government i31nterest."

To pass heightened scrutiny, a statutory classification must be substantially related to advancing an important government interest. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020). Here, the SSN requirement survives heightened scrutiny for many of the reasons explained above. The provision helps ensure that the funds available for the refundable tax credit – which are limited and must be distributed rapidly – go only to statutorily eligible individuals who are permitted to work in this country. *Doe*, 2020 WL 5492994, at *4-*5. Complying with the CARES Act's mandate to rapidly issue advance refunds of the tax credit to eligible individuals, in an accurate way, is an "important government interest." The SSN requirement is, at least, "substantially related" to advancing that interest.

Plaintiffs argue that the law fails heightened scrutiny because: (1) the Government does not have an important interest in limiting the payments to those authorized to work; (2) the SSN requirements do not advance this interest; and (3) any purported interest could be advanced without the same adverse impact on Plaintiff children. *See* Dkt. 59 at 20-22. Their contentions and analysis are incorrect.

Section 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. In the face of finite resources, Congress prioritized individuals authorized to work in the United States. Even non-tax social benefit programs limit and restrict payments along *some* lines. *See, e.g.*, *Lyng*, 856 F.2d at 632-33; *Schleifer*, 159 F.3d at 851. The decision to prioritize those authorized to work in this country does not show animus or an "intention to discriminate." Further, even if not every individual authorized to work actually does so, that does not mean Congress did not have an "important interest" in limiting distribution of the credit. The SSN requirement is "substantially related" to this interest because it promoted the rapid issuance of advance tax refunds to work-authorized individuals, while enforcing the exclusion of those not authorized to work.[10]

Plaintiffs argue that the SSN requirement does not survive heightened scrutiny because they claim there is another "readily available and more precise method for advancing the government's claimed interest." Dkt. 59 at 30. Plaintiffs' suggestion that the statutory classification must be "narrowly tailored" – but that is a requirement of strict scrutiny that is inapplicable here. *See Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 312 (2013). Heightened scrutiny asks only whether the challenged distinction substantially serves an important government interest. *Grimm*, 972 F.3d at 607. It does not – as Plaintiffs urge – ask whether the statute could be modified to serve the same interest without causing the alleged injury.

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[10] Similarly, the limited exception to the SSN requirement for members of the military does not make the requirement pretextual. Congress can treat service members preferentially while laying down eligibility requirements for the populace as a whole. *Cf. Rodriguez*, 169 F.3d at 1350-52 (not irrational for Congress to extend welfare benefits to only certain subcategories of aliens "to reward them for their special contributions," while denying the benefits to others). The Central District of California rejected a similar challenge for this very reason, observing that "special benefits to military members are provided throughout the Tax Code, and even expressly include preferential treatments with regard to other tax credits." *Doe*, 2020 WL 5492994 at *7.

## IV. Plaintiffs are not entitled to damages under the CARES Act.

In Counts II and III of the complaint, Plaintiffs seek the payment of $500 per qualifying child under section 6428 through the jurisdictional grant provided by the Little Tucker Act, 28 U.S.C. § 1346(a).[11] However, Plaintiffs' damages claims are without merit, since (1) the Little Tucker Act does not waive sovereign immunity for this type of action; (2) all Plaintiffs are statutorily ineligible to receive any amount of CARES Act Credit; (3) there is no language in the statute that can be excised to make Plaintiffs eligible for the relief they seek; and (4) Plaintiffs seek an inherently equitable remedy that is not available in a damages action.

### A. The Little Tucker Act does not waive sovereign immunity for this suit.

The United States, its agencies, and its employees acting within the scope of their employment cannot be sued without an "unequivocally expressed" statutory waiver of sovereign immunity. *Lane v. Pena*, 518 U.S. 187, 192 (1996). Waivers are to be strictly construed "so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires[.]" *F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012).

Counts II and III rely upon the sovereign immunity waiver contained in the Little Tucker Act, 28 U.S.C. § 1346(a)(2), to seek money damages under the CARES Act. *See* Dkt. 1, ¶¶75-88. The Tucker Act creates federal court jurisdiction and waives sovereign immunity for an action falling within its jurisdictional grant. *See United States v. Mitchell*, 463 U.S. 206, 212-18 (1983); *United States v. Testan*, 424 U.S. 392, 397-98 (1976). That provision permits a claim

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[11] "The Tucker Act consists of the 'Big' Tucker Act, 28 U.S.C. § 1491, which vests exclusive jurisdiction in the Court of Federal Claims for actions against the United States in excess of $10,000, and the 'Little' Tucker Act, 28 U.S.C. § 1346(a)(2), which grants concurrent jurisdiction to federal district courts for claims less than $10,000" against the United States. *Meridian Invests., Inc. v. Fed. Home Loan Mortgage Corp.*, 855 F.3d 573, 578 (4th Cir. 2017).

against the United States "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort[.]" 28 U.S.C. § 1346(a)(2). However, section 1346(a)(2) does not itself create a cause of action; instead, it "merely confers jurisdiction … whenever the substantive right exists." *Testan*, 424 U.S. at 398 (citing *Eastport S.S. Corp. v. United States*, 83 F.2d 1002, 1007-09 (Ct. Cl. 1967)).

In order to come within the Tucker Act's jurisdictional reach and sovereign immunity waiver, a plaintiff must identify a separate "money-mandating" statute that creates the right to compensation for damages he or she sustained due to government misconduct. *Mitchell*, 463 U.S. at 217; *Testan*, 424 U.S. at 398. A statute creates a right capable of grounding a claim within section 1346(a)(2)'s waiver of sovereign immunity "if, but only if, it 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472-73 (2003) (quoting *Mitchell*, 463 U.S. at 217). Since the United States' consent to be sued is "not lightly inferred," *Mitchell*, 463 U.S. at 218, money-mandating provisions are "uncommon." *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1327-29 (2020). In these rare circumstances, courts consider a statute to be money-mandating if it contains "will pay" or "shall pay" language that directs the government to pay a specific amount in damages to a particular claimant. *R.V.*, 2020 WL 3402300, at *6 (quoting *Maine Cmty. Health Options*, 140 S. Ct. at 1329).

Section 6428 cannot be fairly interpreted to intend an individual right to an advance payment or a judicial remedy through a damages action against the United States. The provision that Plaintiffs contend mandates payment, section 6428(f)(3)(A), simply addresses the timing and manner of advance refund of the CARES Act Credit. *Id.*, § 6428(f)(3)(A) (entitled "Timing

and Manner of Payments – Timing"). That provision does not direct the payment of any funds to any individual. *Id.* There is no language in the CARES Act that confers a right for an individual to obtain an advance refund at all, or an advance refund in the correct amount. Rather, eligible individuals who did not receive the full amount or any advance refund will have to file a 2020 tax return to claim the credit. In the event the credit is denied after a return is filed, the remedy is a refund suit under 28 U.S.C. § 1346(a)(1), not a suit for damages under 26 U.S.C. § 1346(a)(2).

Section 6428's language directing the timing and manner of refundable tax credits is not analogous to language mandating the payment of a sum certain to individuals considered in the cases relied upon by Plaintiffs. *See* Dkt. 59 at 33-35. In *Maine Community Health Options*, the Supreme Court found that the Affordable Care Act was a money-mandating statute because the law directed that the Secretary of Health and Human Services "shall establish and administer" the program, "shall provide" for payment to insurers according to a statutory formula, and "shall pay" qualifying insurers like the petitioners in that case. 140 S. Ct. at 1329. In *Greenlee County, Ariz. v. United States*, the Federal Circuit Court of Appeals considered a claim for compensation under the Payment in Lieu of Taxes Act, which mandated that the Secretary of the Interior "shall make a payment" to eligible units of local government like Greenlee County. 487 F.3d 871, 877 (Fed. Cir. 2007). The Court of Federal Claims found as money-mandating the separation pay provisions of the 1991 National Defense Authorization Act that directed that an eligible service member like Collins "is entitled to separation pay." *Collins v. United States*, 101 Fed. Cl. 435, 458-59 (Fed. Cl. 2011). Because the law mandated payment to eligible individuals, the Tucker Act's waiver of sovereign immunity applied. *Id.*

By contrast, section 6428 is an individual income tax provision and does not mandate money to any individual. It is placed within the Internal Revenue Code and affords taxpayers a

credit on their 2020 tax returns, which can – but need not – be issued as an advance refund. By providing an advance refund of a credit for 2020, Congress also assured that any claim that the credit was unlawfully or improperly denied would be brought as a tax refund claim under 26 U.S.C. § 7422(a) and 28 U.S.C. § 1346(a)(1). *See, e.g., United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 7 (2008) ("Five 'any's' in one sentence and it begins to seem that Congress meant the statute to have expansive reach.")

The CARES Act Credit is unlike the provisions considered in *Pfizer v. United States*, 939 F.3d 173, 179 (2d Cir. 2019) (considering claim for interest on tax overpayments under 26 U.S.C. § 6611) and *New York & Presbyterian Hosp. v. United States*, 881 F.3d 877 (Fed. Cir. 2018) (considering employer's claim for reimbursement of FICA taxes withheld and paid on behalf of employee under 26 U.S.C. § 3102(b)). These cases addressed payments that cannot be construed as "any internal-revenue tax" eligible for a section 7422(a) refund action or the associated jurisdictional grant of 28 U.S.C. § 1346(a)(1). *See also Bank of America v. United States*, 964 F.3d 1099, 1108 (Fed. Cir. 2020) (holding district court lacked jurisdiction under the Tucker Act regarding standalone overpayment interest claims). Neither interest on tax overpayments nor indemnification for withheld FICA taxes are internal-revenue taxes. *See, e.g., See General Elec. Co. v. United States*, 384 F.3d 1307, 1312 (Fed. Cir. 2004) (holding that a claim for interest on a tax overpayment is "a general debt of the government" under the Tucker Act); *McDonald v. Southern Farm Bureau Life Ins. Co.*, 291 F.3d 718, 724 (11th Cir. 2002) ("Because Congress requires employers to withhold the FICA contribution and pay the excise tax, it included the indemnification provision to protect employers from lawsuits by employees who do not want their salaries reduced in compliance with FICA.")

There is no basis to infer that Congress intended a damages remedy for the denial or

miscalculation of the CARES Act provisions of the Internal Revenue Code. The law simply directs the Treasury Secretary to promptly issue advance refunds and a refund remedy already is housed in the Internal Revenue Code and a separate subsection of 28 U.S.C. § 1346. Accordingly, Plaintiffs cannot take advantage of the sovereign immunity waiver of the Little Tucker Act for Counts II and III of their complaint, and those counts should be dismissed.

**B. Plaintiffs do not qualify for any payments that allegedly are mandated under the CARES Act.**

Even if section 6428 is construed as a money-mandating statute for purposes of jurisdiction, Plaintiffs cannot succeed on the merits of their claims for damages because they are not eligible for a tax credit under its plain terms. In order to prevail, Plaintiffs must establish that *they* are due payment under the CARES Act. As shown above – and as Plaintiffs concede – the Children themselves are not eligible for the "plus-$500" amount as the statute currently is written. *See* Dkt. 59 at 29-30 (requesting Court to construe their eligibility for CARES Act Credit by excising unidentified portions of the law). So if section 6428 is construed as a money-mandating statute, it does not mandate money *to the Children*.

As the Court of Federal Claims explained, "whether a plaintiff's claims fairly fall within the boundaries of a statute is a determination separate from whether the statute itself is money-mandating, and one that comes after the court has assumed jurisdiction over the matter." *Collins*, 101 Fed. Cl. at 441. That a plaintiff may recover under a money-mandating statute is a "determination made by the court on the merits and is irrelevant for purposes of determining the court's jurisdiction. *Id.*; *see also Ontario Power Gen., Inc. v. United States*, 369 F.3d 1298, 1303 (Fed. Cir. 2004). Here, Plaintiffs' claims for damages under the CARES Act plainly fail.

The record establishes, and Plaintiffs do not dispute, that the Parents are not entitled to the CARES Act Credit on their own behalf. *See id.*, ¶31. The Children, as dependents, are also

not eligible. It therefore is undisputed that the statute itself prohibits all of the Plaintiffs from receiving any amount of the CARES Act Credit or damages for the United States' failure to issue advance refunds of $500 per Child. *Id.* Plaintiffs' admitted ineligibility for the CARES Act Credit distinguishes this case from those where the Tucker Act's sovereign immunity waiver was applicable only because the plaintiffs were, themselves, mandated payment under the underlying statute. *See Maine Cmty. Health Options*, 140 S. Ct. at 1329 (petitioners were qualifying insurers); *Greenlee Cnty.*, 487 F.3d at 877 (plaintiffs were eligible units of local government); *Collins*, 101 Fed. Cl. at 458-59 (plaintiff was eligible service member entitled to separation pay). Accordingly, Plaintiffs cannot establish jurisdiction under the Little Tucker Act and their underlying claims for damages under the CARES Act are without merit.

**C. Judicial excision of the CARES Act still does not make Plaintiffs eligible for money damages.**

Plaintiffs' reliance on *Gentry v. United States*, 546 F.2d 343 (Ct. Cl. 1976) is unavailing. There, the Court of Claims found jurisdiction under the Tucker Act by determining that an "illegitimate" minor child would himself be mandated payment of survivor benefits under the Civil Service Retirement Act of 1930 but for an unconstitutional provision. 546 F.2d at 348. The court construed the child's eligibility "in light of the Fifth Amendment" and determined that he would be eligible under the statute if it did not improperly exclude him. *Id.* at 344. The claimant, however, was otherwise entitled to the benefits – without the unconstitutional provision, the money was mandated *to him*. *Id.* Moreover, a specific, severable provision of that statute prohibited payment to Gentry based on a violation of his own Fifth Amendment rights. *Id.* at 347.

Rather than identifying a specific provision of section 6428, Plaintiffs ask the Court to construe the statute with an unidentified "unconstitutional component" excised so they can

recover $500 in damages for each of the Children. Dkt. 59 at 36. They argue, once the unidentified provision is remove, the Children *would be* eligible for $500 advance refunds. *See* Dkt. 59 at 36. There is no provision that may be excised to render Plaintiffs eligible for the money damages they seek. *See* Dkt. 1 at 27. In other words, even if section 6428(g)(1)(A) is eliminated, the CARES Act still would not be money-mandating to the Children.

**D. Because Plaintiffs' requested relief is inherently equitable, damages under the Little Tucker Act are not available.**

At its core, Plaintiffs' action seeks equitable, not monetary, relief. Plaintiffs seek a declaration that a provision of section 6428 is unconstitutional in order to receive the "plus-$500" amount set forth in section 6428(d)(2). However, the Tucker Act "does not authorize claims that seek primarily equitable relief." *King v. Burwell*, 759 F.3d 358, 367 (4th Cir. 2014).

The Tucker Act authorizes a court to grant equitable relief only in narrow circumstances. *See Lee v. Thornton*, 420 U.S. 139, 140 (1975) ("The Tucker Act empowers district courts to award damages but not to grant injunctive or declaratory relief."); *see also Richardson v. Morris*, 409 U.S. 464, 465-66 (1973). Because the powers granted to district courts under 28 U.S.C. § 1346(a) do not exceed those of the Court of Federal Claims under 28 U.S.C. § 1491(a), equitable relief is permitted only where "incidental of and collateral to" the plaintiff's claim for money damages. 28 U.S.C. § 1491(a)(2) (conferring limited equitable powers to Court of Federal Claims if they are necessary for complete relief and "incidental of and collateral to" the judgment); *see also United States v. Sherwood*, 312 U.S. 584, 591 (1941) (The Little Tucker Act's jurisdictional grant to district courts "does not extend to any suit which could not be maintained in the Court of Claims").

Plaintiffs' lawsuit is substantively a request for equitable relief; Plaintiffs cannot prevail on any count of the complaint unless the Court declares a portion of 6428 unconstitutional. An

equitable remedy therefore is central – rather than collateral – to Plaintiffs' action. That a declaratory judgment also would result in the payment of damages does not convert Plaintiffs' claim into one for money damages. *See United States v. King*, 395 U.S. 1, 3 (1969) (jurisdiction was lacking because plaintiff sought "essentially equitable relief," rather than "actual, presently due money damages," through a declaration that his involuntary retirement was "legally wrong"). Thus, the Court does not have Tucker Act jurisdiction over Counts II and III of Plaintiffs' complaint.

**CONCLUSION**

Plaintiffs lack standing to bring this suit, there has been no constitutional violation, and Plaintiffs are not entitled to damages or equitable relief under the CARES Act. Accordingly, this Court should deny Plaintiffs' motion for summary judgment, grant the United States motion for summary judgment, and enter judgment in favor of Defendants.

Respectfully submitted,

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Certificate of Service

I certify that on January 15, 2021, I electronically filed a copy of the foregoing *United States' Memorandum in Support of Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment* was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

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