

1 BLAISE & NITSCHKE, P.C.
2 HEATHER L. BLAISE, ESQ. (SBN 261619)
3 123 N. Wacker Drive, Suite 250
4 Chicago, IL 60606
5 Telephone: 312-448-6602
6 Email: hblaise@blaisenitschkelaw.com

7 Attorneys for Plaintiffs,
8 JANE DOE and JOHN DOE, individually and
9 on behalf of others similarly situated

10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**
12 **SOUTHERN DIVISION**

13 JANE DOE and JOHN DOE, individually
14 and on behalf of others similarly situated,

15 Plaintiffs,

16 v.

17 DONALD J. TRUMP, in his individual
18 and official capacity as President of the
19 United States; MITCH MCCONNELL, in
20 his individual and official capacity as a
21 Senator and Sponsor of S. 3548 CARES
22 Act; and STEVEN MNUCHIN, in his
23 individual and official capacity as the
24 Acting Secretary of the U.S. Department
25 of Treasury; CHARLES RETTIG, in his
26 individual and official capacity as U.S.
27 Commissioner of Internal Revenue; U.S.
28 DEPARTMENT OF THE TREASURY;
the U.S. INTERNAL REVENUE
SERVICE; and the UNITED STATES OF
AMERICA,

Defendants.

CASE NO: 8:20-cv-00858-SVW-JEM
Assigned to the Hon. Stephen V. Wilson

**PLAINTIFFS' RESPONSE TO
DEFENDANTS' INITIAL BRIEF
PURSUANT TO JULY 13, 2020
ORDER (DKT. 50)**

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Plaintiffs JANE DOE and JOHN DOE hereby submit their response to The United States of America's brief in accordance with this Honorable Court's order dated July 13, 2020 (Dkt. 50).

1 DATED: July 27, 2020

Respectfully submitted,

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3 By: /s/ Heather L. Blaise
4 HEATHER L. BLAISE, ESQ. (SBN 261619)
5 123 N. Wacker Drive, Suite 250
6 Chicago, IL 60606
7 Telephone: 312-448-6602
8 Email: hblaise@blaisenitschkelaw.com
9 *Attorney for Plaintiffs*

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1 **PLAINTIFFS’ RESPONSE TO DEFENDANTS’ INITIAL BRIEF PURSUANT**
2 **TO JULY 13, 2020 ORDER (DKT. 50)**

3 **I. The CARES Act Impermissibly Inhibits Plaintiffs’ Fundamental Rights**
4 **under the First Amendment and the Fifth Amendment.**

5 In response to the greatest financial and health crisis this country has ever seen,
6 Congress passed the Coronavirus Aid, Relief, and Economic Security Act, Pub. L.
7 116-136 (March 27, 2020) (“CARES Act”), which, in part, provided emergency
8 financial relief to Americans. The CARES Act added Section 6428 to the Internal
9 Revenue Code, providing for a tax credit for the year 2020 to be issued immediately
10 in the form of an Advance Payment¹ to taxpayers if certain income and other
11 eligibility thresholds were met. But not everyone who met the income threshold could
12 or would receive an Advance Payment, no matter how dire their need. Congress
13 included a provision — the Exclusion Provision codified at 26 U.S.C. 6428(g)
14 (“Exclusion Provision”) — which prohibits United States citizens who are married
15 and file tax returns jointly with spouses who have an Individual Taxpayer
16 Identification Number (“ITIN”) instead of a Social Security Number (“SSN”) from
17 receiving the Advance Payment. The Exclusion Provision deprives over 1.2 million
18 United States citizens of a benefit over one hundred million other similarly situated
19 United States citizens have already received. The Exclusion Provision simply cannot
20 be squared with the United States Constitution.

21 The Exclusion Provision unconstitutionally restrains three fundamental rights.
22 First, the Exclusion Provision inhibits speech, a fundamental right protected by the
23 First Amendment. The Exclusion Provision also improperly burdens the benefits of
24 marriage, a fundamental right, also protected by due process embodied in the Fifth
25 Amendment. Finally, the Exclusion Provision improperly denies Plaintiffs equal

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27 ¹ Defined terms, including the Exclusion Provision, Advance Payment, ITIN, etc., are
28 defined in Plaintiffs’ Opposition to Defendants’ Motion to Dismiss. *See* Dkt. 32.

1 protection under the law promised by the Fifth Amendment. Any one of these
2 infringements of Plaintiffs' fundamental rights subjects the government to strict
3 scrutiny and demonstrates that the Exclusion Provision cannot stand.

4 Moreover, even if rational basis was the appropriate standard for judicial
5 review of Plaintiffs' Due Process and Equal Protection Claims, the Defendants (the
6 "Government") have failed to articulate any rational basis or legitimate government
7 interest for the Exclusion Provision. Defendants simply do not have a legitimate
8 interest in depriving Plaintiffs of the Advance Payment, much less one that outweighs
9 Plaintiffs' fundamental rights to be treated equally with their fellow United States
10 citizens, to have their marriages respected, and to speak freely about their marriages.
11 Accordingly, Plaintiffs are entitled to an injunction preventing enforcement of the
12 Exclusion Provision, and an order directing Defendants to treat them equally with
13 other United States citizens by immediately issuing the Advanced Payments for all
14 those who otherwise qualify.

15 **A. The CARES Act's Infringement on Plaintiffs' Fundamental Right to**
16 **Free Speech Under the First Amendment Warrants Strict Scrutiny**
17 **Review.**

18 In his prolific November 13, 1789, letter to Jean Baptiste Le Roy, Benjamin
19 Franklin observed: "Our new Constitution is now established, and has an appearance
20 that promises permanency; but in this world nothing can be said to be certain, except
21 death and taxes." That statement continues to profoundly resonate today. Few
22 sections of the United States Code intersect with the daily lives of Americans as does
23 Title 26, the Internal Revenue Code. Each year (except this year), on April 15,
24 hundreds of millions of Americans file their federal income tax returns, completing
25 one of the most maligned, but necessary, duties of United States personhood.

26 Plaintiffs, like all United States citizens whose income exceeds a certain
27 amount, are obligated to file federal income tax returns on an annual basis. I.R.C.
28 § 6012. Were Plaintiffs to willfully fail to file income tax returns, the government

1 could criminally prosecute the failure. I.R.C. § 7203. Accordingly, Plaintiffs are
2 required to engage in some degree of protected speech by informing the Internal
3 Revenue Service of information including their name, address, social security
4 number, and gross income. Plaintiffs, as married individuals, are entitled to file
5 jointly with their spouses, but also may file separately from their spouses. I.R.C.
6 §§ 1(a); 6012(a)(1)(A)(iv) (“who is entitled to make a joint return”); 6013 (“Joint
7 returns of income tax by husband and wife”); 7703 (“Determination of marital
8 status”). Marital status on a federal income tax return is determined by I.R.C. § 7703.
9 I.R.C. §§ 1(a)(1), (d). In general, individuals who are married on the last day of the
10 calendar year have two valid filing status options from which to choose: “married
11 filing jointly” or “married filing separately.” I.R.C. § 7703.

12 The First Amendment protects speech on tax forms. Of course, the right to
13 speech on a tax return is not absolute, and the government has a strong, legitimate
14 interest in encouraging lawful, truthful tax returns and may deter false or frivolous tax
15 returns through imposition of stiff civil penalties. *See, e.g.*, I.R.C. § 6702. *Khan v.*
16 *United States*, 753 F.2d 1208 (3d Cir. 1985) and *Franklet v. United States*, 578
17 F.Supp. 1552 (N.D. Cal. 1984) both acknowledged that tax returns constitute speech
18 that is afforded First Amendment protection. *Kahn*, 753 F.2d at 1217; *Franklet*, 578
19 F.Supp. at 1556. Those cases also illustrate the unfortunate way the First Amendment
20 has historically been raised in most tax cases: an attempt to defend protestor-type
21 arguments that undermine administration of this country’s voluntary, self-reporting
22 tax system. Not surprisingly, both the *Kahn* and *Franklet* courts held that the
23 government’s strong, legitimate interest in effective functioning of a massive revenue
24 system outweighed private citizens’ right to express protest through filing federal
25 income tax returns. The premise that speech contained on an income tax return is
26 protected by the First Amendment is applicable here, but unlike in *Kahn* and
27 *Franklet*, permitting the speech at issue will not undermine the administration of our
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1 revenue laws or system. And more importantly, unlike in *Kahn* and *Franklet*,
2 Plaintiffs only seek to file valid tax returns that accurately report their marital status,
3 which is protected under the First Amendment as speech and association.

4 By awarding an Advance Payment to United States Citizens who otherwise
5 meet income eligibility requirements and who are married to other United States
6 citizens, or who are unmarried, or who are married to ITIN holders but do not elect to
7 file income tax returns jointly with their spouses, Defendants have impermissibly
8 restricted Plaintiffs' fundamental First Amendment right to engage in free speech.
9 Denying the Advance Payment to Plaintiffs, who file jointly with their spouses,
10 places an unconstitutional condition on their First Amendment protected right to
11 speak freely about their marriages in the form of jointly filed federal income tax
12 returns. So long as Plaintiffs continue to exercise their First Amendment right to
13 express their marriages through jointly filed income tax returns – an “entitlement”
14 afforded by I.R.C. § 6012(a)(1)(A)(iv) – they will never be eligible for the Advance
15 Payment.

16 Over sixty years ago, the Supreme Court unequivocally rejected as
17 unconstitutional the type of conditions-based denial of benefits the Government tries
18 to defend here in *Speiser v. Randall*, 357 U.S. 513 (1958). In *Speiser*, the State of
19 California conditioned receipt of a tax exemption on signing a declaration stating that
20 the taxpayer did not support overthrowing the government. *Id.* at 516. The Supreme
21 Court emphatically rejected the offending provision of the statute conditioning receipt
22 of a benefit on engaging in speech as violative of the First Amendment. “It cannot be
23 gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a
24 limitation of free speech.” *Id.* at 518. This is so because “the denial of a tax
25 exemption for engaging in certain speech necessarily will have the effect of coercing
26 the claimants to refrain from the proscribed speech.” *Id.* at 519. Allowing such a
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1 statute to stand would “allow the government to produce a result which [it] could not
2 command directly.” *Id.* at 526.

3 Congress may not condition denial of the CARES Act benefit on prohibiting
4 Plaintiffs from engaging in speech in the form of filing tax returns as married filing
5 jointly with their ITIN-holder spouses or requiring Plaintiffs to engage in speech in
6 the form of filing tax returns as married filing separately apart from their ITIN-holder
7 spouses any more than the State of California could require World War II veterans to
8 affirm that they did not advocate overthrowing the government by use of force in
9 order to receive a tax exemption. *Id.* The Supreme Court has roundly rejected the
10 exact kind of conditions-based benefits that seek to influence speech at issue here.
11 *See, e.g., Perry v. Sinderman*, 408 U.S. 593; 597 (1972) (“[I]f the government could
12 deny a benefit to a person because of his constitutionally protected speech or
13 associations, his exercise of those freedoms would in effect be penalized and
14 inhibited.”); *Wooley v. Maynard*, 430 U.S. 705, 719 (1977) (“where ‘the State’s
15 interest is to disseminate an ideology, no matter how acceptable to some, such
16 interest cannot outweigh an individual’s First Amendment right to avoid becoming
17 the courier for such message.’”); *W. Va. State Bd. Of Educ. v. Barnette*, 319 U.S. 624,
18 633-34 (1943) (“[T]he right of freedom of thought protected by the First Amendment
19 against state action includes both the right to speak freely and the right to refrain from
20 speaking at all[.]”). While it is true that a legislative body’s decision not to subsidize
21 the exercise of a fundamental right does not infringe on that right, *withholding*
22 benefits from certain groups while affording those benefits to others who are
23 similarly situated with a “censorious” purpose violates the First Amendment. *Koala*
24 *v. Khosla*, 931 F.3d 887, 898 (9th Cir. 2019). In *Alliance for Open Society*
25 *International, Inc. v. United States Agency for International Development*, the Court
26 of Appeals for the Second Circuit affirmed a District Court order granting a
27 preliminary injunction enjoining enforcement of a statute requiring specific speech in
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1 exchange for funding. 651 F.3d 218 (2d Cir. 2011). Relying heavily on Supreme
2 Court cases *Wooley, Speiser, and Barnette*, the Second Circuit noted that in that case,
3 as with Plaintiffs here, silence was not an option. Here, Plaintiffs must file tax returns
4 and select a valid filing status. I.R.C. § 6012. Where, as in *Alliance for Open Society*
5 and in the case at bar, “the government seeks to affirmatively require government-
6 preferred speech, its efforts raise serious First Amendment concerns.” 651 F.3d at
7 234. At bottom, “[c]ompelling speech as a condition of receiving a government
8 benefit cannot be squared with the First Amendment.” *Id.*

9 Requiring Plaintiffs to file tax returns as “married filing separately” to a
10 receive a benefit they would not be entitled to if they file “married filing jointly” as
11 they are entitled to do under I.R.C. § 6012(a)(1)(A)(iv) cannot be interpreted as
12 anything but an impermissible condition on receiving a government benefit. The
13 Exclusion Provision seeks to compel speech that Congress could never directly
14 compel – requiring United States citizens who are married to ITIN holders to file
15 their income tax returns as “married filing separately” by depriving them of a benefit
16 absent conforming their speech to the desired government outcome. In doing so, the
17 government forces an SSN holder married to an ITIN holder to make a *Sophie’s*
18 *Choice*: allow their speech to be regulated by the government and file separately in an
19 attempt to gain the Advance Payment during this unprecedented time of need, thereby
20 jeopardizing the ITIN holder’s application for legal immigrant status, or file jointly
21 and forgo the Advance Payment. *See* Dkt. 11 at 20-21, and Exhibits C and D; *see also*
22 Dkt. 26 at 19-20, and Exhibits E-G. The government is prohibited from conditioning
23 Plaintiffs’ right to receive the benefit in the form of Advance Payment on their
24 agreement to alter their speech to conform to the government’s preferred speech.

25 The Exclusion Provision, therefore, restricts speech that Plaintiffs have a right
26 to engage in. The burden is therefore on the Government on the ultimate question of
27 constitutionality, as well as to demonstrate that curtailing Plaintiffs’ speech is the
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1 least restrictive means available to accomplish a legitimate legislative goal. *Ashcroft*
2 *v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004). The Government has
3 not and cannot meet this burden, and the injunction in favor of Plaintiffs should be
4 granted.

5 As Benjamin Franklin presciently articulated over two hundred years ago, our
6 Constitution, though seemingly permanent, was not as certain as death and taxes.
7 This Court must now elect its course: to either uphold, or curtail, the fundamental
8 protections of the First Amendment to the United States Constitution.

9 **B. The CARES Act’s Infringement on Plaintiffs’ Fundamental Right to**
10 **Due Process under the Fifth Amendment Warrants Strict Scrutiny**
11 **Review.**

12 “The Constitution promises liberty to all within its reach, a liberty that includes
13 certain specific rights that allow persons, within a lawful realm, to define and express
14 their identity.” *Obergefell v. Hodges*, 135 S.Ct. 2584, 2593 (2015). Plaintiffs seek to
15 find that liberty by defining and expressing their identity through their personal
16 choice of marriage and having their marriages treated as equal on the same terms and
17 conditions as marriages between two U.S. citizens. *Id.* The Exclusion Provision
18 denies Plaintiffs’ liberties without the due process protections afforded them by the
19 Fifth Amendment. In *Obergefell v. Hodges*, the Supreme Court recognized that “the
20 right to personal choice regarding marriage is inherent in the concept of individual
21 autonomy.” *Id.* at 2598. Through the “enduring bond” of marriage, couples can “find
22 other freedoms, such as expression, intimacy, and spirituality.” *Id.* at 2599. Marriage
23 “safeguards children and families,” and “the right to marry, establish a home and
24 bring up children is a central part of the liberty protected by the Due Process Clause.”
25 *Id.* at 2600 (citations omitted). Due process offers marriages “*recognition*, stability,
26 and predictability.” *Id.* (emphasis added). It is with these basic principles in mind that
27 we turn to the Exclusion Provision, which deprives Plaintiffs of the recognition,
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1 stability, and predictability that the Due Process protections of the Fifth Amendment
2 require.

3 Without question, the Defendants and this Court have correctly noted that the
4 Exclusion Provision does not deprive Plaintiffs of the right to marry the person of
5 their choice. It does not, unlike the Michigan Marriage Amendment at issue in
6 *Obergefell* or the Defense of Marriage Act at issue in *United States v. Windsor*, 570
7 U.S. 744 (2013), invalidate or refuse to recognize a marriage as valid. But death by a
8 thousand cuts is nevertheless still death, and a society that allows liberties that should
9 be protected to be chipped away one at a time is destined for despotism. *See, e.g.*,
10 *Den ex dem. Murray v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 276 (1855) (the Due
11 Process clause of the Fifth Amendment “is a restraint on the legislative as well as on
12 the executive and judicial powers of the government, and cannot be so construed as to
13 leave congress free to make any process ‘due process of law’ by its mere will.”). For
14 the Exclusion Provision may well be just as pernicious to Plaintiffs’ marriages as
15 DOMA was to Edith Windsor and as the Michigan Marriage Amendment was to
16 James Obergefell. By denying Plaintiffs’ marriages the *recognition* that Due Process
17 requires, the Exclusion provision deprives the marriage of the *stability* that the
18 CARES Act was designed to provide. Moreover, it may well result in Plaintiffs being
19 unable to reside in the same country as their chosen spouse. *See* Dkt. 11 at 20-21, and
20 Exhibits C and D; *see also* Dkt. 26 at 19-20, and Exhibits E-G.

21 In *Obergefell* and *Windsor*, the Supreme Court was concerned with not only
22 *recognition* of the marriages which those individuals sought to enter, but also with the
23 deprivation of the “constellation of benefits” accompanying marriage. *Obergefell*,
24 135 S. Ct. at 2601. The Exclusion Provision illustrates just how easily government
25 can denigrate a marriage and deprive individuals of the “constellation of benefits”
26 that accompany “favored” unions over those that are politically unpopular. Certainly
27 this Court would not countenance a provision that denied the Advance Payment to
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1 United States citizens in same sex marriages, in marriages to individuals from
2 specific countries, or in marriages to individuals of a difference race. Nor should this
3 Court countenance the Exclusion Provision, which deprives Plaintiffs of the
4 recognition and “constellation of benefits” conferred on United States citizens who
5 have chosen to marry someone who has a Social Security Number instead of an ITIN.

6 The Supreme Court’s jurisprudence on the importance and sanctity of the
7 institution of marriage has developed over one hundred years. Since 1888, the Court
8 has recognized that marriage is “the foundation of the family and of society, without
9 which there would be neither civilization nor progress.” *Maynard v. Hill*, 125 U.S.
10 190, 213 (1888). It is with this basic principle in mind that the *Obergefell* Court
11 explained, “just as a couple vows to support each other, so does society pledge to
12 support the couple, offering symbolic recognition and material benefits to protect and
13 nourish the union...” *Obergefell*, 135 S. Ct. at 2601. That pledge falls short here. The
14 purpose and effect of the Exclusion Provision is the same as the purpose and effect of
15 the Defense of Marriage Act and the Michigan Marriage Amendment: “to disparage
16 and to injure” the Plaintiffs. *Windsor*, 570 U.S. at 2696. Accordingly, it violates the
17 Due Process Clause of the Fifth Amendment and must be struck down.

18 Legislative classifications that burden fundamental rights are subject to strict
19 scrutiny review. Strict scrutiny applies when a legislative classification
20 “impermissibly interferes with the exercise of a fundamental right or operates to the
21 peculiar disadvantage of a suspect class.” *Mass. Bd. of Retirement v. Murgia*, 427
22 U.S. 307, 312(1976). Such classifications are presumed unconstitutional and will
23 survive strict scrutiny only when the government can show the law is narrowly
24 tailored to a compelling governmental interest. *See Zablocki v. Redhail*, 434 U.S. 374,
25 388 (1978). Clearly, the Exclusion Provision cannot survive such scrutiny as no bases
26 put forth by the Defendants demonstrate any compelling government interest, and
27 certainly are not narrowly tailored. Neither administrative ease, nor reconciliation of
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1 the payment are compelling government interests, and as detailed in Section III
2 below, are not narrowly tailored to serve any interests. Accordingly, the Exclusion
3 Provision must be found unconstitutional.

4 **C. The CARES Act’s Infringement on Plaintiffs’ Equal Protection of**
5 **the Laws under the Fifth Amendment Warrants Strict Scrutiny**
6 **Review.**

7 “[W]here fundamental rights and liberties are asserted under the Equal
8 Protection Clause, classifications which might invade or restrain them must be
9 closely scrutinized and carefully contained.” *Harper v. Va. State Bd. Of Elections*,
10 383 U.S. 663, 670 (1966). When a right is “too precious, too fundamental,” it may
11 not be conditioned, and must be struck down. *Id.* The Exclusion Provision in the
12 CARES Act violates Equal Protection in three ways. Each is sufficient to strike the
13 Exclusion Provision down, and taken together as a whole they compel this Court to
14 grant Plaintiffs’ motion for an injunction, at once.

15 Statutes that classify by race, alienage, or national origin are “so seldom
16 relevant to the achievement of any legitimate state interest that laws grounded in such
17 considerations are deemed to reflect prejudice and antipathy.” *City of Cleburne, Tex.*
18 *v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). Given that “such discrimination
19 is unlikely to be soon rectified by legislative means, these laws are subjected to strict
20 scrutiny and will be sustained only if they are suitably tailored to serve a compelling
21 state interest.” *Id.* As Plaintiffs demonstrate in Section II, *infra*, the Government does
22 not even have a rational basis for the Exclusion Provision, let alone a *compelling* state
23 interest. Defendants put forth three half-hearted attempts to surmise what Congress
24 “might have considered,” but the absence of legislative history on the Exclusion
25 Provision coupled with the absence of any attempt to argue that the state interest is
26 compelling renders this element satisfied in favor of Plaintiffs. The only remaining
27 question to consider is whether the Exclusion Provision classifies on a suspect class.
28 It does.

1 1. The Exclusion Provision Discriminates Against Plaintiffs on the
2 Basis of Alienage, and is Subject to Strict Scrutiny.

3 There is abundant jurisprudence invalidating statutes which sought to deny
4 aliens equal protection under the law. *See, e.g., Bernal v. Fainter*, 467 U.S. 216
5 (1984) (invalidating statute requiring that a notary public be a United States citizen
6 on equal protection grounds and applying strict scrutiny); *Sugarman v. Dougall*, 413
7 U.S. 634 (1973) (invalidating statute barring aliens from certain civil service
8 positions); *Nyquist v. Mauclet*, 432 U.S. 1 (1977) (holding exclusion of aliens from
9 loan program violated equal protection and applying strict scrutiny). In its Order
10 dated July 8, 2020 (Dkt. 44), the Court determined that the classification based on
11 alienage is subject to rational basis because Plaintiffs, unlike their spouses, are
12 citizens. However, there is ample precedent for applying strict scrutiny to the
13 Exclusion Provision based on alienage. In *Nyquist v. Mauclet*, the Supreme Court
14 encountered a similar argument in that the statute at issue “was not an absolute bar”
15 to the right at issue, but the statute was *directed* at aliens and aliens were harmed by
16 it. 432 U.S. at 9. Simply because the Government is harming both aliens and their
17 families (including United States citizens) through the Exclusion Provision does not
18 mean it can escape strict scrutiny. Similarly, in *Graham v. Richardson*, the Supreme
19 Court invalidated a state statute that denied benefits to a certain class of aliens. 403
20 U.S. 365 (1971). The Court held, “justification of limiting expenses is particularly
21 inappropriate and unreasonable when the discriminated class consists of aliens.” In
22 this case, the discriminated class consists of alien spouses. Congress cannot cure the
23 invidious exclusion of aliens by broadening it to include their families in an effort to
24 escape strict scrutiny judicial review, and this Court should reject the attempt to do
25 so. *Mathews v. Diaz*, 426 U.S. 67 (1976), which distinguished *Graham*, is inapposite.
26 In that case, the Supreme Court expressly held there was “no impairment of the
27 freedom of association of either citizens or aliens.” *Id.* at 87. Here, the Exclusion
28

1 Provision directly impairs the freedom of citizens to associate with aliens by
2 withholding a benefit from citizens if they choose to associate with aliens by
3 marrying them and expressing that association through joint tax returns.

4 2. The Exclusion Provision Discriminates Against Plaintiffs on the
5 Basis of National Origin, and is Subject to Strict Scrutiny.

6 Place of birth, which is an “immutable characteristic determined solely by the
7 accident of birth” forms the basis finding a suspect class. *Frontiero v. Richardson*,
8 411 U.S. 677, 686 (1973). In *Oyama v. California*, 332 U.S. 633 (1948), the Supreme
9 Court admonished that when reviewing statutes that result in deprivation of rights
10 based on national origin, “it is incumbent upon us to inquire not merely whether
11 [constitutional rights] have been denied in express terms, but also whether they have
12 been denied in substance and in effect.” In that case, Mr. Oyama had to jump through
13 multiple hoops to be able to own land in California, hoops that no other Californian
14 would have had to jump through to accomplish the same result. As with alienage, the
15 Government has chosen to cast its net of discrimination more broadly and deprives
16 both those who are ITIN holders and their United States citizen spouses of the
17 Advance Payment. But the discriminatory purpose is the same-national origin, and
18 the harm to Plaintiffs is equally as unconstitutional as it was in *Oyama*.

19 3. The Exclusion Provision Unconstitutionally “Taxes” Plaintiffs’
20 Marriage, and is Subject to Strict Scrutiny.

21 As Plaintiffs more fully explained in Section I(B), *supra*, the Exclusion
22 Provision burdens the “constellation of benefits” afforded to marriages. In *Harper v.*
23 *Virginia State Board of Elections*, 383 U.S. 663 (1966), the Supreme Court
24 considered whether a poll tax imposed in the State of Virginia withstood
25 constitutional scrutiny, and roundly rejected the premise. While the Court
26 acknowledged that States may impose reasonable requirements on voting, imposing
27 requirements “which invidiously discriminate” could not be squared with the equal
28 protection clause. *Id.* at 666.

1 By denying Plaintiffs the CARES Act tax credit, which is afforded to all other
2 similarly situated United States citizens, the Government has placed a penalty on
3 their marriage if they file tax returns jointly that is akin to a poll tax. The Exclusion
4 Provision has but one purpose – to disparage Plaintiffs’ marriages by refusing them a
5 benefit that is afforded to all other similarly situated individuals and married couples
6 when the marriage does not include an ITIN holder. Unless Plaintiffs file their tax
7 returns separately, risking not only future immigration proceeding outcomes but also
8 receipt of the CARES Act credit they seek to obtain, their marriages will be penalized
9 in the amount of the CARES Act credit that they would have otherwise obtained if
10 not married to and filing jointly with an ITIN holder. *See* Affidavit of Guinevere M.
11 Moore attached hereto and incorporated herein as Exhibit A, ¶¶ 7-8. Defendants will
12 protest and argue they are not refusing to acknowledge Plaintiffs’ marriages, and this
13 is true. No federal or state government is refusing to acknowledge that Plaintiffs’
14 marriages are valid. But surely the Government cannot side-step the constitutional
15 protections afforded in the Equal Protection Clause by acknowledging Plaintiffs’
16 marriages as valid and then charging them what amounts to an “immigrant marriage
17 penalty” to denigrate that marriage. Instead, what is warranted is invalidation of the
18 Exclusion Provision and an Injunction in Plaintiffs’ favor.

19 **II. Even if the CARES Act’s Infringement on Plaintiffs’ Fundamental Right**
20 **to Equal Protection under the Fifth Amendment Warranted Rational**
21 **Basis Review, there is no Rational Basis for the Exclusion Provision.**

22 Defendants attempt to distract this Court from the discriminatory purpose of
23 the Exclusion Provision by taking pages to describe the steps to determine how
24 taxable income is calculated and how the CARES Act works. Plaintiffs do not dispute
25 that computing an individual’s income tax liability is a multi-step endeavor, (Dkt. 54
26 at 5), that taxable income includes gross income, (*id.*) that tax benefits are often
27 directly tied to a taxpayer’s adjusted gross income (“AGI”) (*id.* at 6), or that tax
28 *deductions*, which are not at issue here, are a matter of legislative grace (*id.*). Of

1 course, the rule that deductions are a matter of legislative grace is in direct contrast to
2 tax *credits* like the CARES Act credit, which are considered property owned by the
3 taxpayer. *Sorenson v. Sec’y of Treasury of U.S.*, 752 F.2d 1433 (9th Cir. 1985)
4 (finding the earned income tax credit was “undisputedly owed to petitioner and
5 undisputedly not owed to the United States *as taxes*.”). None of this has any bearing
6 on whether the Government had or could have a rational basis for excluding Plaintiffs
7 from receiving a benefit to which over one hundred million similarly situated United
8 States citizens are entitled to and have received.

9 Plaintiffs also note that Defendants have accurately described the way the
10 CARES Act operates on pages 6-8 of their brief, including the description of the legal
11 fiction created by 26 U.S.C. § 6428(e)(2), which provides that in the case of a refund
12 or credit under subsection (f), half of each Advance Payment shall be treated as
13 having been made or allowed to each married individual. Or, more simply put, when
14 the Advance Payment is distributed to married individuals, each spouse is considered
15 to have received a one-half share in the other spouse’s payment. This legal fiction
16 provides the mechanism for each of the three purportedly rational bases on which
17 Defendants defend the Exclusion Provision, but falls far short of justifying the
18 deprivation of a benefit to Plaintiffs that all other similarly situated United States
19 citizens enjoy.

20 **A. Administrative Concerns Do Not Constitute a Valid Rational Basis**
21 **for Excluding Plaintiffs From Receipt of the Advance Payment or**
22 **the CARES Act Credit.**

23 First, Defendants contend that Congress may have excluded United States
24 citizens who file jointly with their ITIN-holder spouses for administrative ease. *See*
25 Dkt. 54 at 10-12. Given the record-breaking scope and magnitude of the CARES Act,
26 which implemented never-before seen government aid programs at record speed,
27 administrative ease of implementation seems to have been the last consideration
28 Congress had. Defendants surmise that the IRS could not possibly be expected to

1 compute a credit based on one spouse’s income and not the other, or know which
2 deductions would have been claimed by which spouse, and that Congress may
3 rationally have determined that it was just too much for the IRS to handle
4 administratively to compute the “theoretical eligibility of joint filers.” *Id.* at 11. This
5 argument displays a fundamental lack of understanding of the innerworkings of the
6 Internal Revenue Service, inappropriately seeks to downplay the difference between
7 treatment of Plaintiffs and all other citizens, including the military, and ignores what
8 the IRS is actually doing, which is to deprive even citizens who have filed separately
9 from ITIN-holder spouses of their Advance Payment.

10 The IRS has access to most taxpayers’ gross income through vast information
11 return reporting, such as IRS Form W-2, Wage and Tax Statement, IRS Form 1099-
12 Misc, Miscellaneous Income, etc. Employers face significant penalties for the failure
13 to gather and report information regarding wages paid to employees to the Internal
14 Revenue Service. I.R.C. §§ 6751, 6752. Plaintiffs do not dispute that Congress has
15 the authority to determine how best to implement revenue laws, but instead contend
16 that the IRS has the means and the information to easily determine which taxpayer
17 earned income and generated deductions. The notion that the IRS cannot “divine the
18 adjusted gross income a joint filer would have had if she had filed using the married
19 filing separately status” is patently false and insulting to the hard-working and highly
20 competent employees of the IRS. The IRS routinely prepares Substitute-For>Returns
21 for non-filers based on the very information Defendants contend cannot be “divined”
22 here. I.R.C. § 6020(b). The IRS also routinely audits complex partnerships and
23 corporations. Surely the IRS is up to the job of calculating whether an individual is
24 eligible for the Advance Payment.

25 The disparate treatment Plaintiffs receive as compared with all other United
26 States citizens and with United States Citizens who are married to ITIN holders but
27 are in the military is justified with the circular logic that the policy of treating

1 veterans differently has “always been deemed to be legitimate.” *See* Dkt. 54 at 12.
2 Plaintiffs do not dispute that those who sacrifice for our country should be afforded
3 special treatment, but instead contend that this is one more example in which
4 Plaintiffs are treated as an “other.” This argument offers nothing more than a
5 command to “Pay No Attention to that Man Behind the Curtain!”² and should be
6 disregarded as such.

7 Finally, Plaintiffs are aware of instances in which United States Citizens who
8 are married to ITIN holders and did file tax returns as “married filing separately,” but
9 nonetheless have been denied an Advance Payment and told either directly or through
10 an authorized representative that the IRS is unable to issue Advance Payments. *See*
11 Exhibit A³. On information and belief, these individuals are being told by IRS
12 employees that they must wait to file their 2020 income tax return and claim the
13 Advance Payment at that time. *Id.* If administrative ease were truly behind the
14 Exclusion Provision, then the IRS would be issuing Advance Payments to those
15 taxpayers who filed separately from their ITIN-holder spouses.

16 **B. The Legal Fiction Created by I.R.C. § 6428(e) is not a**
17 **“Reconciliation Procedure.”**

18 Defendants posit that the legal fiction contained in Section 6428(e), which
19 provides that when an Advance Payment is made, half of the Advance Payment “shall
20 be treated as having been made or allowed to each individual filing such return,”
21 justifies the Exclusionary Provision. *See* Dkt. 54 at 13. Otherwise, Defendants argue,
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23

24 ² This line is spoken by The Wizard of Oz, played by Frank Morgan, in the film *The*
25 *Wizard of Oz*, directed by Victor Fleming (1939).

26 ³ Plaintiffs include the Affidavit not as proof that the IRS is improperly denying
27 Advanced Payments to Citizens who are married filing separately from their spouses,
28 but as an offer of proof that at a minimum, Plaintiffs are entitled to discovery on how
the IRS is implementing the CARES Act.

1 ITIN holders would be deemed to have received a one-half interest in their spouse's
2 Advance Payment.

3 Standing alone, the legal fiction that each spouse owns half of another's
4 Advance Payment is not problematic, however, when taken together with the
5 Exclusion Provision it enables Defendants' circular, half-hearted argument about the
6 administrative difficulties of unwinding a jointly filed tax return to determine
7 individual eligibility for a tax credit. Even if it turns out that an individual who
8 received the Advance Payment was not entitled to receive it, it won't have to be
9 repaid. Section 6428(e)(1) expressly provides that the amount of credit *will not be*
10 *reduced below zero*. Put another way, the Advance Payment is a gift in the hands of
11 most Americans. To say that the Exclusion Provision was designed to ensure that
12 overpayments did not inadvertently flow to ITIN holders who file jointly with United
13 States Citizens ignores this nonrepayment rule. As with most things, the most obvious
14 and simple explanation is the right one: the Exclusion Provision is designed to punish
15 an unpopular group – ITIN holders and their spouses.

16 **C. The Exclusionary Provision is a Merely Vehicle to Punish an**
17 **Unpopular Group.**

18 The third and final purportedly rational basis Defendants contend may have
19 been behind the Exclusion Provision is a desire to prevent nonresident aliens from
20 receiving the Advance Payment. *See* Dkt. 54 at 13-14. This rationale gets to the heart
21 of what the Exclusion Provision is really about – excluding not only nonresident
22 aliens, but anyone who is associated with them. Congress' desire to deny a benefit to
23 nonresident aliens does not entitle it to deny that benefit to United States citizens who
24 are married to nonresident aliens. The Exclusion Provision seeks to do just that, by
25 forcing married couples to file separately in order to receive the same benefit already
26 distributed to over one hundred million similarly situated citizens.

1 In *Department of Agriculture v. Moreno*, the Supreme Court rejected as
2 unconstitutional a similarly hollow “rational basis” for excluding a politically
3 unpopular group from receiving benefits otherwise broadly distributed. 413 U.S. 528
4 (1973). In *Moreno*, the court considered whether provisions excluding “hippies” from
5 receiving food stamps was unconstitutional. *Id.* The Food Stamp Act was initially
6 enacted without any Exclusion Provision but was amended to define “households”
7 entitled to receive food stamps in a manner that excluded all households that included
8 unrelated individuals. *Id.* at 530, 531. In *Moreno*, as here, scant legislative history
9 provided insight as to the reason for excluding the persons at issue. *Id.* at 534. The
10 government in *Moreno* attempted to convince the Supreme Court that the law could
11 have had a rational basis, arguing that Congress may have rationally thought that the
12 Exclusion Provision in the Food Stamp Act would reduce fraud. *Id.* at 535. The
13 Supreme Court summarily rejected the post-hoc attempt to rationalize marginalizing a
14 politically unpopular group. “For if the constitutional conception of ‘equal protection
15 of the laws’ means anything, it must at the very least mean that a bare congressional
16 desire to harm a politically unpopular group cannot constitute a legitimate
17 government interest.” *Id.* at 534.

18 None of the supposedly rational bases advanced by Defendants outweigh the
19 harm to the Plaintiffs’ fundamental rights as articulated in Section I above. There is
20 simply no legitimate government interest that would outweigh Plaintiffs’ right to
21 equal treatment under the laws. It is an unpopular time to be married to a nonresident
22 alien — look no further than the two proposed Amicus Briefs filed in this case. *See*
23 Dkts. 37-3 and 39-2. That does not grant Congress license to exclude from the
24 CARES Act “persons who are so desperately in need of aid.” *Moreno*, 413 U.S. at
25 538.

26 Without a doubt, equal protection does not prevent the government from
27 treating different people in different ways. What it does prevent, however, is “the
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1 power to legislate that different treatment be accorded to persons placed by a statute
2 into different classes on the basis of criteria wholly unrelated to the objective of that
3 statute.” *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972). The different class in which
4 Defendants have placed Plaintiffs is wholly unrelated to the objective of the CARES
5 Act. In *Eisenstadt v. Baird*, the Supreme Court struck down a contraception law
6 under rational basis review, and patently refused to rely on post-hoc justifications for
7 the statute that the legislature never considered when enacting it. *Id.* at 450-52.
8 Indeed, negotiations on the second round of stimulus checks and the question of
9 whether Plaintiffs will once again be excluded from emergency relief only highlight
10 the political animus that prevented them from receiving the CARES Act Advance
11 Payment. *See, e.g.*, Rafeal Bernal, *GOP Senators push for stimulus checks to almost*
12 *2M excluded Americans*, THE HILL (July 25, 2020), [https://thehill.com/latino/508984-](https://thehill.com/latino/508984-gop-senators-push-for-stimulus-checks-to-almost-2m-excluded-americans)
13 [gop-senators-push-for-stimulus-checks-to-almost-2m-excluded-americans](https://thehill.com/latino/508984-gop-senators-push-for-stimulus-checks-to-almost-2m-excluded-americans) (last
14 visited July 27, 2020).

15 Former Florida Republican Party chairman, Al Cardenas, put it this way, “For
16 U.S. citizens to once again be treated in a disparate manner in trying times is mean-
17 spirited, and there’s no logic to it.” *Id.* One of the main arguments for including
18 Plaintiffs is basic fairness as they have SSNs, and pay taxes. “They need to redress it,
19 fix it, never repeat it again,” Daniel Garza, executive director of The Libre Initiative,
20 told The Hill. “It’s a question of flat-out fairness. *See id; see also* Shahar Ziv, *Rubio*
21 *Renews Stimulus Check Eligibility Push; 1.7 Million U.S. Citizens Currently*
22 *Excluded*, FORBES (July 26, 2020) [https://www.forbes.com/sites/shaharziv/](https://www.forbes.com/sites/shaharziv/2020/07/26/rubio-renews-second-stimulus-check-eligibility-push-coronavirus-stimulus-package/#7a62be0c3b4b)
23 [2020/07/26/rubio-renews-second-stimulus-check-eligibility-push-coronavirus-](https://www.forbes.com/sites/shaharziv/2020/07/26/rubio-renews-second-stimulus-check-eligibility-push-coronavirus-stimulus-package/#7a62be0c3b4b)
24 [stimulus-package/#7a62be0c3b4b](https://www.forbes.com/sites/shaharziv/2020/07/26/rubio-renews-second-stimulus-check-eligibility-push-coronavirus-stimulus-package/#7a62be0c3b4b) (last visited July 27, 2020).

25 The question for this Court to consider under rational basis is whether “there is
26 some ground of difference that rationally explains the different treatment accorded”
27 to persons who are married to ITIN holders and persons who are not. Here, as in
28

1 *Eisenstadt* and *Moreno*, “no such ground exists.” *Eisenstadt*, 405 U.S. at 447. The
2 rationales posited by the government ring hollow and there is no indication
3 whatsoever that they were actually considered by the legislature. Instead, what is
4 evident is a political animus towards Plaintiffs. *See*; Dkt. 37-3; Dkt. 39-2.

5 Desire to harm a politically unpopular group is never a rational basis for
6 disparate treatment. *Moreno*, 413 U.S. at 534. Desire to undermine a marriage is
7 never a rational basis for disparate treatment.

8 **III. Plaintiffs are Entitled to an Injunction Now and Plaintiffs are Entitled to** 9 **Discovery.**

10 Plaintiffs have demonstrated that the Exclusion Provision violates their
11 fundamental rights under the First Amendment, as well as their Due Process and
12 Equal Protection rights under the Fifth Amendment, and accordingly this Court
13 should grant Plaintiffs’ request for injunctive relief. Even under a rational basis
14 analysis of Plaintiffs’ equal protection claims, this Court should order an injunction to
15 issue in Plaintiffs’ favor or, at a minimum, order the parties to conduct discovery.

16 Acts of Congress are presumptively Constitutional, but a presumption must
17 never be confused with a *per se* rule. *Cf. INS v. Chada*, 462 U.S. 919 (1983); *Nat’l*
18 *Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). The presumption of
19 constitutionality is a “rebuttable presumption” “of fact.” *Borden’s Farm Prods. Co. v.*
20 *Baldwin*, 293 U.S. 194, 209 (1934). For every *FCC v. Beach Communications*, 508
21 U.S. 307 (1993), cited by the Government throughout its brief for the proposition that
22 Plaintiffs must refute every reason and *possible, hypothetical* rationale that the
23 Government may have had in enacting the Exclusion Provision, there is a
24 *Metropolitan Life Insurance Company v. Ward*, 470 U.S. 869 (1985), which applied a
25 more realistic approach to the question of whether the challenged law rationally
26 advanced a reasonable and identifiable governmental objective, and remanded to the
27 lower court for that determination. *See also, Romer v. Evans*, 517 U.S. 620 (1996)

1 (holding the rational basis test is not a formalistic ritual in which courts can conjure
2 up justifications for a law that are “divorced from any factual context” from which a
3 relationship to legitimate state interests can be discerned); *Village of Willowbrook v.*
4 *Olech*, 258 U.S. 562, 565 (2000) (affirming Seventh Circuit’s holding reversing
5 District Court order granting motion to dismiss complaint when “allegations, quite
6 apart from the [government’s] subjective motivation, are sufficient to state a claim for
7 relief under traditional equal protection analysis.”). Defendants make much of the
8 same type of Exclusion Provision in other laws. Plaintiffs are aware of no case
9 holding that provision is constitutional. And much like in *Windsor*, the prior practice
10 of discrimination does not render it acceptable or constitutional.

11 *Aleman v. Glickman*, 217 F.3d 1191 (9th Cir. 2000), stands for the proposition
12 that when the government creates classifications that distinguish among different
13 groups of aliens, the appropriate standard for review is rational basis. The Exclusion
14 Provision at issue here does not distinguish between different groups of aliens, but
15 instead distinguishes between those United States citizens who are married to, and
16 file tax returns jointly with, individuals who have an ITIN and those who are not
17 married to ITIN holders or do not file tax returns jointly with ITIN holders. Neither
18 *Aleman* nor any other case cited by Defendants⁴ stands for the proposition that
19 _____

20 ⁴ See generally *INS v. Chadha*, 462 U.S. 919 (1983) (considering the constitutionality
21 of a provision in the Immigration and Nationality Act allowing the House of
22 Representatives to invalidate a decision of the Executive Branch to allow the
23 respondent to remain in the United States); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567
24 U.S. 519 (2012) (evaluating the individual mandate provision of the Affordable Care
25 Act imposing a “shared responsibility payment” on individuals who failed to
26 maintain health insurance); *Heller v. Doe*, 509 U.S. 312 (1993) (evaluating
27 Kentucky’s statutes pertaining to involuntary commitment of disabled individuals
28 under the Equal Protection Clause as to standard of evidence and involvement of
guardians in the involuntary commitment process; *Krishna Lunch of S. Cal. v.*
Gordon (9th Cir. 2020) (evaluating a “neutral and generally applicable” policy
imposed by UCLA upon its student organizations).

1 Congress has ever articulated or could articulate a legitimate government interest that
2 outweighs an American citizen's right to receive the same benefit afforded all others
3 similarly situated during a crisis of devastating and as-yet unmeasurable proportions.

4 Throughout their brief, Defendants rely on cases like *Aleman v. Glickman*, 217
5 F.3d 1191 (9th Cir. 2000) and *Allied Concrete and Supply Company v. Baker*, 904
6 F.3d 1053 (9th Cir. 2018) to argue that, in essence, the government need not
7 articulate an actual rational basis, because it is enough that one could have been
8 conceived. Those cases have no bearing here. In *Allied Concrete*, the Ninth Circuit
9 thoroughly analyzed actual evidence of what the legislature did consider when
10 enacting the provision at issue. 904 F.3d at 1062. In *Aleman v. Glickman*, the Ninth
11 Circuit was persuaded by the Supreme Court's having considered and upheld the
12 classification regarding divorce at issue there on two separate prior occasions. 217
13 F.3d at 1201. Exhaustive research has not uncovered any case wherein any court has
14 upheld a statutory provision treating United States citizens differently than other
15 United States citizens based on whom they were married to and their marital status as
16 elected on a federal income tax return. If it appears from the face of a complaint that
17 the plaintiff could, if given the opportunity, prove that the challenged law is not
18 rationally related to a legitimate government interest, Rule 12(b)(6) entitles her to
19 gather and introduce evidence to do so. Plaintiffs have more than demonstrated the
20 need for an injunction to issue, at once. However, if this Court has any remaining
21 doubt regarding whether Plaintiffs are entitled to relief, the appropriate course of
22 action is to order discovery to commence, and not to dismiss the well-pleaded
23 complaint.

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25 DATED: July 27, 2020

Respectfully submitted,

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27 JANE DOE and JOHN DOE, individually and
28 on behalf of others similarly situated.

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By: /s/ Guinevere M. Moore
Guinevere M. Moore (admitted *pro hac vice*)
MOORE TAX LAW GROUP LLC
150 N. Wacker Drive, Suite 1250
Chicago, Illinois 60606
T: (312) 549-9992
F: (312) 549-9991
guinevere.moore@mooretaxlawgroup.com
Attorney for Plaintiffs

BLAISE & NITSCHKE, P.C.
Heather L. Blaise (SBN 261619)
Lana B. Nassar (admitted *pro hac vice*)
Thomas J. Nitschke (IL Bar No. 6225740) *
Elisabeth A. Gavin (admitted *pro hac vice*)
123 N. Wacker Drive, Suite 250
Chicago, IL 60606
T: (312) 448-6602
F: (312) 803-1940
lnassar@blaisenitschkelaw.com

MATERN LAW GROUP
Matthew J. Matern (SBN 159798)
Joshua D. Boxer (SBN 226712)
1230 Rosecrans Avenue, Suite 200
Manhattan Beach, CA 90266
T: (310) 531-1900
F: (310) 531-1901
mmatern@maternlawgroup.com

KHALAF & ABUZIR, LLC
Vivian Khalaf (IL Bar No. 6210668) *
Omar Abuzir (IL Bar No. 6257708) *
20 N. Clark, Suite 720
Chicago, IL 60602

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T: (708)-233-1122
F: (708)-233-1161
vkhalaf@immigrationjd.com

* Application for admission *pro hac vice*
forthcoming