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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

JANE DOE, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 8:20-cv-00858-SVW-JEM

Reply to Response Brief (ECF 57); Memorandum of Points and Authorities

Hearing Date: August 3, 2020
Time: 1:30 p.m.
Location: Conducted telephonically

Hon. Stephen V. Wilson

The United States of America (Government) hereby replies to the July 27, 2020, response brief (response, ECF 57) filed by plaintiffs Jane Doe and John Doe.

Dated: July 30, 2020

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Court determined that 26 U.S.C. § 6428(g) is subject to rational-basis review and ordered briefing on whether that provision survives rational-basis review and related issues of proof and discovery. As such, the Government does not respond to plaintiffs' arguments that rational-basis review should not apply. It replies to plaintiffs' remaining arguments as follows.

II. ARGUMENT

A. Plaintiffs ignore binding precedent regarding the burden of proof under rational-basis review

As the Government explained in its initial brief, under rational-basis review, "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Heller v. Doe,* 509 U.S. 312, 320 (1993) (internal quotations omitted). Plaintiffs completely fail to address their burden of proof under *Heller* even though the case remains binding law. *See, e.g., Krishna Lunch of S. Cal. v. Gordon*, 797 F. App'x 311, 314 (9th Cir. 2020) (citing *Heller*, 509 U.S. at 320-21).

As the Government also explained, no evidence is required regarding the intent of Congress, and no fact-finding by the Court is required to determine whether a rational basis exists for the classification. *See F.C.C. v. Beach Commc'ns, Inc. (Beach)*, 508 U.S. 307, 314-15 (1993). Plaintiffs suggest that the Supreme Court's holding in *Beach* is not

applicable here.[1] (*See* ECF 57 at 25-26.) But *Beach's* holdings that a legislature is not required to "articulate its reasons for enacting a statute," that "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature," and that "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data" remain binding authority. *Beach*, 508 U.S. at 314-15. *Beach*'s standard for rational-basis review was reiterated and upheld by the Supreme Court in *Armour*, where it held that a classification subject to rational-basis review will be upheld as long as "there is any reasonably conceivable state of facts that could provide a rational basis for [it]." *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 681 (2012) (quoting *Beach*, 508 U.S. at 313). And the Ninth Circuit continues to rely on the principles of rational-basis review set forth by *Beach* and *Armour*. *See, e.g., United States v. Mayea-Pulido*, 946 F.3d 1055, 1059 (9th Cir. 2020) (quoting *Beach*, 508 U.S. at 313); *Krishna Lunch of S. Cal. v. Gordon*, 797 F. App'x 311, 314 (9th Cir. 2020) (quoting *Beach*, 508 U.S. at 315); *Crawford v. Antonio B. Won Pat Int'l Airport Auth.,* 917 F.3d 1081, 1095 (9th Cir. 2019) (quoting *Armour*, 566 U.S. at 681).

Plaintiffs also suggest (ECF 57 at 23-24, 27) that any rational-basis review must consider the weight of the consequences resulting from a classification. The Ninth Circuit has explicitly rejected that approach. *See Aleman v. Glickman*, 217 F.3d 1191, 1201 (9th Cir. 2000); *Alcaraz v. Block*, 746 F.2d 593, 605 (9th Cir. 1984).

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[1] Plaintiffs rely on *Eisenstadt v. Baird*, 405 U.S. 438 (1972) and *Metropolitan Life Insurance Company v. Ward,* 470 U.S. 869 (1985) for the proposition that the Court should conduct a probing review of the classification that is the subject of this case. Both cases, however, predate *Beach*. Neither *Romer v. Evans*, 517 U.S. 620 (1996) nor *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), on which plaintiffs also rely, discuss or limit the standard of review set forth in *Beach*. In *Romer*, the Supreme Court determined the classification failed to survive an equal protection challenge because there was no legitimate purpose for the classification and it was based on animus. 517 U.S. at 635. And in considering an as-applied challenge in *Village of Willowbrook*, the Supreme Court determined that completely arbitrary action against an individual--"a class of one"--could violate equal protection guarantees. 528 U.S. at 565.

B. Plaintiffs fail to negate the rational bases posited by the Government

Plaintiffs do not challenge the exclusion of their spouses, who do not have Social Security numbers (SSNs) valid for employment, from the advance refund scheme. The issue, then, is whether Congress has a permissible reason for also excluding plaintiffs, who allegedly hold SSNs valid for employment, because they filed joint tax returns with ineligible individuals. Although it had no burden to do so, the Government has posited a number of plausible reasons why Congress could have included the provision. Plaintiffs have not met their burden to negative these bases, or any other conceivable bases which might support the legislative arrangement. As such, section 6428(g) withstands rational-basis review.

1. Administrative Considerations

The Government has posited that Congress may have excluded joint filers like plaintiffs from the advance refund scheme because the scheme is premised in large part on an individual's (or couple's, if filing jointly) adjusted gross income, which is defined as gross income less above-the-line deductions.[2] Because joint filers aggregate their income and deductions, the IRS would not know from a joint tax return whether plaintiffs would have qualified for an advance refund if they had filed separately. Plaintiffs respond that Congress could have required the IRS to painstakingly review various third-party reporting for each and every joint filer like plaintiffs in order to determine their theoretical eligibility for an advance refund.[3] That is beside the point.

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[2] Plaintiffs argue (ECF 57 at 13-14) that tax credits, unlike tax deductions, are not matters of legislative grace but "property owned by the taxpayer." Plaintiffs are mistaken. *See, e.g., Hokanson v. Commissioner*, 730 F.2d 1245, 1250 (9th Cir. 1984) ("any tax credit is purely a matter of legislative grace"). The case on which plaintiffs rely for this point, *Sorenson v. Sec'y of Treasury*, 752 F.3d 1433 (9th Cir. 1985), did not hold otherwise.

[3] Plaintiffs' argument in any event misstates the IRS's capacity to compute an individual's adjusted gross income without a tax return. For one thing, not all income is reported to the IRS by third parties. The same is true for items that result in above-the-line deductions. Moreover, joint deductions and joint income would have to be allocated between the filers.

Congress could have structured its advance refund scheme in myriad ways. It settled on a scheme that appears to be premised on administrative exigency--hence, its mandate that advance refunds be issued "as rapidly as possible." *See* 26 U.S.C. § 6428(f)(3)(A). Indeed, administrative exigency would explain why Congress directed the IRS to compute and issue advance refunds using tax information that was already available to it. *See* 26 U.S.C. § 6428(f)(3)(A). It would also explain why Congress declined to require that the IRS take additional steps beyond reviewing taxpayers' 2019 tax returns and why it granted the agency broad discretion to review other information (including taxpayers' 2018 tax returns or their Forms SSA-1009 or RRB-1099 for 2019). And it would explain why Congress required taxpayers who did not receive the entire advance refund to which they were entitled to claim the remaining amount as a CARES Act credit on their 2020 tax return. *See* 26 U.S.C. §§ 6428(a), (e).

Each of these decisions Congress made suggests that considerations of administrative exigency may have informed its decisionmaking. Although Congress could have theoretically required the IRS to attempt to ascertain whether a joint filer excluded from the scheme on account of her spouse's lack of an SSN valid for employment would have qualified for the credit by filing separately, Congress may have reasonably determined that such requirements would be too much of an administrative burden on the IRS, especially in light of its directive to issue millions of advance refunds during a global pandemic.[4] Under rational-basis review, such a determination is sufficient. And whether Congress could have selected a different method to achieve the same result is not a consideration. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 563 (2012).

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[4] Plaintiffs suggest that the "record-breaking scope and magnitude of the CARES Act, which implemented never-before seen government aid programs at record speed" demonstrates that Congress was not concerned with the administrative burdens its advance refund program would impose on the IRS. (ECF 57 at 19). How plaintiffs arrived at that conclusion is unclear. The size and magnitude of the scheme and the circumstances under which it was crafted suggest an *increased* concern for administrative burdens.

2. Section 6428(e)(2)

Plaintiffs next take umbrage with the Government's suggestion that the exclusion of SSN holders who filed joint tax returns with individuals without SSNs valid for employment was necessary to reconcile section 6428(e)(2)'s requirement that "in the case of a refund or credit made or allowed under subsection (f) with respect to a joint tax return, half of such refund or credit shall be treated has having been made or allowed to each individual filing such return." As the Government has explained, if any advance refund were issued with respect to a joint return for which one filer did not have an SSN valid for employment, that provision would treat half of the credit "as having been made or allowed" to a statutorily ineligible individual. *See* 26 U.S.C. §§ 6428(e)(2), (g)(1). Congress may have included the identifying number requirement in section 6428(g)(1) in order to prevent any portion of the credit from inuring (as an advance refund or otherwise) to an individual without work authorization.

Plaintiffs' response centers on the premise that section 6428(e)(1) does not require the repayment of an advance refund if the amount of the advance refund exceeds the CARES Act credit reported on the individual's 2020 tax return. Plaintiffs contend that "[e]ven if it turns out that an individual who received the Advance Payment was not entitled to receive it, it won't have to be repaid." (ECF 57 at 22). But that misstates the law. An advance refund may be issued only to an "eligible individual," as defined in subsection (d), and only if such an individual otherwise qualifies for the advance refund on account of her adjusted gross income and SSN valid for employment. *See* 26 U.S.C. § 6428(c), (g). That is why section 6428(f)(2), in defining "advance refund amount," refers to the "the amount that would have been allowed as a credit under this section for such taxable year." *See* 26 U.S.C. § 6428(f)(2). "Would have been allowed" confirms that the eligibility rules set forth in section 6428(c), (d), and (g) apply with respect to any advance refund that the IRS issues. Accordingly, if a statutorily ineligible individual such as a nonresident alien individual nevertheless receives an advance refund, the IRS

advises that the individual should return the advance refund to the IRS. *See Economic Impact Payment Information Center*, *https://www.irs.gov/coronavirus/economic-impact-payment-information-center*, Q&A 14 ("Aliens who received a Payment but are not qualifying resident aliens for 2020 should return the Payment to the IRS by following the instructions about repayments") (last accessed July 28, 2020).

3. Section 6428(d) and (g)

The Government explained that Congress may have rationally determined that section 6428(g)'s SSN requirement was necessary to effectuate section 6428(d)'s exclusion of nonresident aliens from the advance refund scheme. Plaintiffs do not dispute the proffered basis on its merits. Nor have they ever challenged subsection (d)'s exclusion of nonresident aliens from the advance refund scheme.

C. Proof of animus only defeats rational-basis review when a classification serves no legitimate interest

Plaintiffs spend much of their brief alleging, without citation to authority, that the SSN requirement in section 6428(g) was designed to punish the spouses of individuals without SSNs. Even if the provision were motivated in part by animus, however, plaintiffs' argument would fail because there are legitimate rational bases for the classification. Plaintiffs cite to *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) for the proposition that classifications based on animus fail rational-basis review. But they completely ignore more recent Supreme Court and Ninth Circuit precedent that holds that allegations of animus do not defeat a classification subject to rational-basis review as long as there is a legitimate rational basis for the classification.

In *Trump v. Hawaii*, the Supreme Court explained that statutes "hardly ever" fail rational-basis review, and only do so when it "is impossible to 'discern a relationship to legitimate state interests' or the policy is 'inexplicable by anything but animus.'" -- U.S. --, 138 S. Ct. 2392, 2420-21 (2018) (quoting *Romer v. Evans*, 517 U.S. 620, 632, 635 (1996)). Thus, the Supreme Court held that because a rational basis could be articulated

for the policy that fell within the powers delegated to the president, the policy must be upheld under rational-basis review, despite the concurrent presence of animus. Here, the Government has articulated multiple rational bases based on tax administration for the challenged language in section 6428(g). As such, it cannot be said that the provision is "inexplicable by anything but animus," and section 6428(g) survives rational-basis review.

Likewise, the Ninth Circuit has held that proof of animus is only relevant where there is no legitimate government interest that is served by the classification. In *Gallinger v. Baccera*, 898 F.3d 1012 (9th Cir. 2018), the plaintiffs, like the ones here, relied on *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) to allege that the classification failed rational-basis review because it was motivated by animus. The Ninth Circuit explained that whether the provision was actually based on animus was of no import. Because "the classification at issue serves legitimate state interests . . . [t]hat conclusion, on its own, prevents Plaintiffs from succeeding on their Equal Protection claim." *Gallinger*, 898 F.3d at 1021 (*citing Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1200 (9th Cir. 2018)).[5]

In short, rational-basis review requires plaintiffs to prove that there was no legitimate interest served by a classification *and* the presence of animus. Because there are legitimate Governmental interests served by the classifications in this case, plaintiffs' allegations of animus, even if they could be proven, are irrelevant.

D. Plaintiffs ignore the use of similar language in other Code provisions and cases cited by the Government

The Government relied on the legislative history of Internal Revenue Code provisions with similar language for a fourth rational basis for section 6428(g): that

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[5] *Gallinger* did not cite *Trump v. Hawaii* for this proposition. It therefore represents an independent line of case law confirming that animus is irrelevant if a legitimate reason can be proffered for the classification.

Congress could have reasonably chosen to utilize longstanding statutory language from other Code provisions to implement the Act. (ECF 54 at 21-25.) As the Government explained and plaintiffs acknowledge (ECF 57 at 15, 23), current section 6428(g) was unanimously adopted without any contemporaneous legislative history, and a lone floor statement--from a legislator who voted for the Act--states displeasure with the provision.[6] The legislative history of prior provisions with similar language demonstrates that the statutory language was adopted to prevent individuals who are not authorized to work in the United States from receiving tax credits. The legislative history of those provisions indicates that the denial of credits to the SSN-holding spouses of individuals without work authorization was a byproduct of Congress's intent to deny credits to individuals without an SSN valid for employment. It was not the result of animus toward individuals like the plaintiffs.

In their response, plaintiffs do not and cannot cite to anything in the extensive legislative history of the previous tax credit provisions as evidence of animus against persons married to individuals without SSNs valid for employment. Congress has the power of the purse and can constitutionally exclude individuals without an SSN valid for employment from the tax credits at issue here, and plaintiffs do not contend otherwise. *See Mathews v. Diaz*, 426 U.S. 67, 83 n. 22 (1976); *see also Aleman*, 217 F.3d at 1203; *Alcaraz*, 746 F.2d at 606. Even if section 6428(g) were overexclusive (and it is not clear that it is) with respect to SSN holders who are married to and filed joint income tax returns with non SSN-holders, that would not make it constitutionally infirm. *See Aleman*, 217 F.3d at 1201 (quoting *Heller*, 509 US at 321); *see also Vance v. Bradley*, 440 U.S. 93, 108 (1979).

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[6] *See* Joint Comm. on Taxation, Description of the Tax Provisions of Public Law 116-136, The Coronavirus Aid, Relief, and Economic Security ("CARES") Act, JCX-12R-20 (April 2020);166 Cong. Rec. 61, H1840-41 (daily ed. March 27, 2020) (statement of Rep. TJ Cox); *see also NLRB v. SW General, Inc.*, -- U.S. --, 137 S.Ct. 929, 943 (2017) ("[F]loor statements by individual legislators rank among the least illuminating forms of legislative history.").

Plaintiffs argue that Congress's longstanding use of similar statutory language does not make 6428(g) constitutional. (ECF 57 at 26.) That is true. But plaintiffs misunderstand the Government's point, which is that Congress's inclusion of tried-and-true statutory language in the CARES Act could be a reasonable, legitimate choice by Congress to implement the Act's prohibition of payments to individuals without an SSN valid for employment, which in and of itself would allow section 6428(g) to withstand rational-basis review.

Plaintiffs rely on news soundbites and post-hoc political statements expressing disapproval of section 6428(g) as proof of Congress's alleged animus. (ECF 57 at 24.) But these statements are not germane to whether section 6428(g) has a legitimate purpose. Indeed, these arguments suggest that plaintiffs should seek relief through Congress, rather than the courts. *See Nordlinger v. Hahn*, 505 U.S. 1, 17-18 (1992).

Finally, plaintiffs state (ECF 57 at 27) that "[e]xhaustive research has not uncovered any case wherein any court has upheld a statutory provision treating United States citizens differently than other United States citizens based on whom they were married to and their marital status as elected on a federal income tax return." (ECF 57 at 27.) The Government, however, has cited a number of such cases in its filings. *See* ECF 30 at 27-28 and ECF 36 at 9-10 (citing *Hofstetter v. Commissioner*, 98 T.C. 695, 701-02 (1992) and *Schinasi v. Commissioner*, 53 T.C. 382, 384 (1969)).

E. Plaintiffs should not be allowed to conduct discovery

The Government has posited plausible reasons why Congress might have excluded individuals like plaintiffs from the advance refund scheme in section 6428(g). Because under rational-basis review a justification must only be plausible, not factual, discovery is not warranted. *See Beach*, 508 U.S. at 314-15.

Plaintiffs insist on discovery but cite no case law in support of that proposition or state what discovery would be required to inform this Court's determination of whether

section 6428(g) withstands rational-basis review.[7] This Court has determined that plaintiffs can facially challenge 6428(g) under the theory unconstitutional actions by Government officials can be challenged by plaintiffs seeking solely declaratory and injunctive relief. (*See* ECF 44 at 8.) But as a facial constitutional challenge, even if actual evidence of Congress's intent were required--which *Beach* and its progeny make clear it is not--the only evidence of Congress's intent would be the legislative history of section 6428(g) (of which there is none) and similar Code provisions (which is already available to plaintiffs and which was cited extensively in the Government's brief). In sum, because the Government has demonstrated plausible rational bases for the challenged classification in section 6428(g), discovery is not warranted.

III. CONCLUSION

Plaintiffs' action should be dismissed because the first amended complaint fails to state a claim upon which relief can be granted.

Dated: July 30, 2020

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[7] Citing anecdotal evidence, plaintiffs allege (ECF 57 at 21 n.3) that they require information as to how the IRS is processing advance refunds for individuals married filing separately. How the IRS is processing advance refunds for those individuals, however, is not relevant to plaintiffs' facial equal protection challenge to section 6428(g), which the Court has determined is the only viable cause of action here. (*See* ECF 44.)