

1 NICOLA T. HANNA
 United States Attorney
 2 THOMAS D. COKER
 Assistant United States Attorney
 3 Chief, Tax Division
 MELISSA BRIGGS (Cal. Bar No. 320697)
 4 JOHN D. ELLIS (Cal. Bar No. 322922)
 Assistant United States Attorneys
 5 Federal Building, Suite 7211
 300 North Los Angeles Street
 6 Los Angeles, California 90012
 Telephone: (213) 894-6165
 7 (213) 894-2740
 Facsimile: (213) 894-0115
 8 E-mail: melissa.briggs2@usdoj.gov
 john.ellis3@usdoj.gov

9 Attorneys for the
 10 United States of America

11 UNITED STATES DISTRICT COURT
 12 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 13 SOUTHERN DIVISION

14 JANE DOE, et al.,
 15 Plaintiffs,
 16 v.
 17 DONALD J. TRUMP, et al.,
 18 Defendants.

No. 8:20-cv-00858-SVW-JEM
 Motion to Dismiss; Memorandum of Points
 and Authorities; Proposed Order
 Hearing Date: July 13, 2020
 Time: 1:30 p.m.
 Courtroom: 10A
 Location: 350 W. 1st Street
 Los Angeles, CA 90012
 Hon. Stephen V. Wilson

21
 22 PLEASE TAKE NOTICE that on the above date, or as soon thereafter as counsel
 23 can be heard, the United States of America¹ (United States) will move to dismiss this
 24 action pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6). This motion is

25
 26
 27 ¹ The first amended complaint (amended complaint, ECF 28) names as defendants
 28 various government officials and agencies. The only proper party defendant is the
 United States of America. See *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir.
 1985).

1 based upon this notice, the attached memorandum, and such further evidence and
2 argument as the Court may permit. The conference of counsel pursuant to Local Rule 7-
3 3 took place on June 1, 2020.

4
5 Dated: June 15, 2020

Respectfully submitted,

6 NICOLA T. HANNA
United States Attorney
7 THOMAS D. COKER
Assistant United States Attorney
8 Chief, Tax Division

9 /s/ John D. Ellis
10 MELISSA BRIGGS
JOHN D. ELLIS
Assistant United States Attorneys
11
12 Attorneys for the
United States of America
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

1

2

3 I. INTRODUCTION 1

4 II. THE CARES ACT..... 2

5 III. PLAINTIFFS’ AMENDED COMPLAINT 4

6 IV. ARGUMENT..... 5

7 A. This action should be dismissed for lack of jurisdiction..... 5

8 1. 26 U.S.C. § 7422 provides plaintiffs’ remedy 6

9 2. Plaintiffs lack standing and their claims are not yet ripe..... 8

10 3. Plaintiffs cannot rely on the APA as the basis of this Court’s

11 jurisdiction 11

12 4. Plaintiffs cannot avoid the bar of sovereign immunity by naming

13 individual government officials 14

14 B. This action should be dismissed for failure to state a claim 14

15 1. Section 6428(g) does not violate due process or equal protection

16 principles by implicating the right to marry 15

17 2. Section 6428(g) does not make distinctions based on alienage,

18 and even assuming *arguendo* it does, federal distinctions based

19 on alienage are subject to rational-basis review 18

20 3. Plaintiffs have not pleaded a cognizable legal theory 20

21 V. CONCLUSION..... 22

22

23

24

25

26

27

28

TABLE OF AUTHORITIES

CASES

1

2

3 *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) 9

4 *Alcaraz v. Block*, 746 F.2d 593 (9th Cir. 1984) 19

5 *Aleman v. Glickman*, 217 F.3d 1191 (9th Cir. 2000) 16, 18, 20-21

6 *Apache Bend Apts., Ltd. v. United States*, 987 F.2d 1174 (5th Cir. 1993) 6

7 *Arizona v. United States*, 567 U.S. 387 (2012)..... 20

8 *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) 8

9 *Armstrong & Armstrong, Inc. v. United States*, 356 F. Supp. 514 (E.D. Wash. 1973) .. 12

10 *Barr v. Commissioner*, 51 T.C. 693 (1969) 20

11 *Barter v. United States*, 550 F.2d 1239 (7th Cir. 1977) 17

12 *Bennett v. Spear*, 520 U.S. 154 (1997) 13

13 *Bowen v. Massachusetts*, 487 U.S. 879 (1988) 12-13

14 *Brushaber v. Union P.R. Co.*, 240 U.S. 1 (1916) 21

15 *Califano v. Jobst*, 434 U.S. 47 (1977) 16-17

16 *City of Oakland v. Lynch*, 798 F.3d 1159 (9th Cir. 2015) 12-13

17 *Conservation Force v. Salazar*, 646 F.3d 1240 (9th Cir. 2011) 14

18 *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*,

19 596 F.3d 1036 (9th Cir. 2010) 1

20 *Droz v. Commissioner*, 48 F.3d 1120 (9th Cir. 1995) 8

21 *Druker v. Commissioner*, 697 F.2d 46 (2d Cir. 1982) 16-17

22 *Dunn & Black P.S. v. United States*, 492 F.3d 1084 (9th Cir. 2007) 6

23 *FCC v. Beach Communications*, 508 U.S. 307 (1993) 21

24 *Fournier v. Sebelius*, 718 F.3d 1110 (9th Cir. 2013) 21

25 *Franklin v. Massachusetts*, 505 U.S. 788 (1992) 11

26 *Freedom from Religion Found., Inc. v. Lew*, 773 F.3d 815 (7th Cir. 2014) 6

27 *Gaylor v. Mnuchin*, 919 F.3d 420 (7th Cir. 2019) 8

28

1 *Graham v. Richardson*, 403 U.S. 365 (1971) 20

2 *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) 12

3 *Hansen v. Dep’t of Treasury*, 528 F.3d 598 (9th Cir. 2007) 19

4 *Heller v. Doe*, 509 U.S. 312 (1993) 20-21

5 *Hinck v. United States*, 550 U.S. 501 (2007) 12

6 *Hofstetter v. Commissioner*, 98 T.C. 695 (1992) 20

7 *Holloman v. Watt*, 708 F.2d 1399 (9th Cir. 1983) 6

8 *Hooper v. California*, 155 U.S. 648 (1895) 14

9 *Hutchinson v. United States*, 677 F.2d 1322 (9th Cir. 1982) 14

10 *INS v. Chadha*, 462 U.S. 919 (1983) 14

11 *Lane v. Pena*, 518 U.S. 187 (1996) 6

12 *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) 14

13 *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) 8

14 *Mapes v. United States*, 576 F.2d 896 (Ct. Cl. 1978) 17

15 *Mathews v. Diaz*, 426 U.S. 67 (1976) 20

16 *McGuire v. United States*, 550 F.3d 903 (9th Cir. 2008) 5-6

17 *Moritz v. Commissioner*, 469 F.2d 466 (10th Cir. 1972) 8-9

18 *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) 14, 21

19 *Nat’l Park Hospitality Ass’n v. Dep’t of Interior*, 538 U.S. 803 (2003) 9

20 *Navajo Nation v. Dep’t of the Interior*, 876 F.3d 1144 (9th Cir. 2017) 11

21 *Oatman v. Dep’t of Treasury*, 34 F.3d 787 (9th Cir. 1994) 7

22 *Pareto v. FDIC*, 139 F.3d 696 (9th Cir. 1998) 14

23 *Preiser v. Newkirk*, 422 U.S. 395 (1975) 8

24 *Quarty v. United States*, 170 F.3d 961 (9th Cir. 1999) 6, 8-9

25 *Rand v. United States*, 249 U.S. 503 (1918) 8

26 *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983) 14

27 *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43 (1993) 9

28

1 *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) 14-15

2 *Sarmiento v. United States*, 678 F.3d 147 (2d Cir. 2012) 7

3 *Schinasi v. Commissioner*, 53 T.C. 382 (1969) 17, 20

4 *Sorenson v. Sec’y of Treasury*, 752 F.2d 1433 (9th Cir. 1985) 7

5 *Sorenson v. Sec’y of Treasury*, 475 U.S. 851 (1986) 7

6 *In re Talmadge*, 832 F.2d 1120 (9th Cir. 1987) 16, 18

7 *Toll v. Moreno*, 458 U.S. 1 (1982) 20

8 *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994) 10

9 *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016) 11, 13-14

10 *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1 (2008) 6-7, 13

11 *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269 (1931) 8

12 *United States v. Kim*, 806 F.3d 1161 (9th Cir. 2015) 5

13 *United States v. Md. Savings-Share Ins. Corp.*, 400 U.S. 4 (1970) 15

14 *Vermont Agency of Natural Res. v. United States*, 529 U.S. 765 (2000) 8

15 *Warnke v. United States*, 641 F. Supp. 1083 (E.D. Ky. 1986) 9

16 *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024 (9th Cir. 2005) 11

17 *Zablocki v. Redhail*, 434 U.S. 374 (1978) 16-17

18 **PUBLIC LAWS**

19 Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. 116-136

20 (March 27, 2020) 2

21 The Economic Stimulus Act of 2008, Pub. L. No. 110-185, 122 Stat. 613

22 (Feb. 13, 2008) 18

23

24 **STATUTES**

25 **Internal Revenue Code, 26 U.S.C.**

26 § 1 17-18

27 § 24 2, 7, 18

1 § 32 7, 18
 2 § 107 8, 9
 3 § 152 2
 4 § 1402 8
 5 § 6013 17
 6 § 6401 7
 7 § 6428 passim
 8 § 6511 7
 9 § 6532 7
 10 § 7422 6-8, 12

11 **Other Statutes**

12 5 U.S.C. § 701 1
 13 5 U.S.C. § 702 11
 14 5 U.S.C. § 704 11-13
 15 28 U.S.C. § 1331 6
 16 28 U.S.C. § 1346 6-8
 17 28 U.S.C. § 1491 7-8
 18 31 U.S.C. § 3727 5
 19 42 U.S.C. § 405 18

21 **IRS PUBLICATIONS AND WEBSITES**

22 *Economic Impact Payment Information Center*, available at

23 <https://www.irs.gov/coronavirus/economic-impact-payment-information-center>

24 2-4, 10, 13

25 IRS Publication 519, available at <https://www.irs.gov/pub/irs-pdf/p519.pdf> 19

26
 27
 28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

OTHER AUTHORITIES

20 C.F.R. § 422.104 18

26 C.F.R. § 301.6109-1..... 19

Congressional Research Service, Report R43840, “Federal Income Taxes and
Noncitizens: Frequently Asked Questions” 19

Congressional Research Service, Report R46339, “Unauthorized Immigrants’ Eligibility
for COVID-19 Relief Benefits: In Brief” 19

Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act,
H.R. 6800, 116th Cong. (2020) 10

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Jane Doe and John Doe, proceeding pseudonymously,² contend that the
4 Internal Revenue Service (IRS) failed to issue each of them an advance refund of a 2020
5 tax credit because they are each married to and have filed joint federal income tax
6 returns with individuals without social security numbers (SSNs). Assuming the
7 allegations in the amended complaint are true, each plaintiff could qualify for the credit
8 by selecting the “married filing separately” status when filing a 2020 income tax return.
9 Plaintiffs, however, request injunctive and declaratory relief, including a declaration that
10 section 6428(g) of the Internal Revenue Code (Title 26, U.S.C.) is unconstitutional.

11 This action should be dismissed for lack of jurisdiction and for failure to state a
12 claim upon which relief can be granted. Plaintiffs lack standing, and their claims are not
13 yet ripe for review. Congress did not create a justiciable right to an advance refund, and
14 plaintiffs’ eligibilities for a tax credit cannot be determined until the 2020 tax year ends
15 and each selects a filing status when filing a 2020 tax return. Plaintiffs cannot rely on
16 the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*, as the jurisdictional
17 basis for their claims because Congress has provided them a specific remedy under the
18 tax refund provisions. In addition, plaintiffs fail to state a cognizable constitutional
19 claim. Accordingly, plaintiffs’ action should be dismissed.

20
21
22
23 ² Plaintiffs filed this case using pseudonyms. To determine whether to allow a
24 party to proceed anonymously, the district court must balance (1) the severity of the
25 threatened harm; (2) the reasonableness of the anonymous party’s fears; (3) the
26 anonymous party’s vulnerability to [] retaliation; (4) the prejudice to the opposing party;
27 and (5) the public interest. *See Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*,
28 596 F.3d 1036, 1042 (9th Cir. 2010). Plaintiffs have not sought this Court’s permission
to proceed pseudonymously or alleged any circumstances that would allow them to do
so. Moreover, not knowing plaintiffs’ identities prevents the United States from
evaluating plaintiffs’ contentions that each of them would have received an advance
refund if his or her spouse had an SSN. (*See* ECF 28 ¶¶ 42, 45.)

1 **II. THE CARES ACT**

2 On March 27, 2020, the President of the United States of America signed into law
3 the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. 116-136.
4 The CARES Act added section 6428 to the Internal Revenue Code. Pub. L. 116-136,
5 sec. 2201(a). Section 6428 authorizes an eligible individual to claim a tax credit
6 (CARES Act credit) for the 2020 tax year. The amount of the credit is based on the
7 individual's filing status, her adjusted gross income, and the number of qualifying
8 children (within the meaning of 26 U.S.C. § 24(c)) claimed on her return. *See* 26 U.S.C.
9 § 6428(a) and (c). Nonresident aliens, dependents (as defined in 26 U.S.C. § 152), and
10 estates and trusts are ineligible for the credit. 26 U.S.C. § 6428(d).

11 As relevant to the amended complaint, no CARES Act credit will be allowed to an
12 individual who fails to provide a valid identification number for herself, any qualifying
13 children, or her spouse, if filing a joint return.³ 26 U.S.C. § 6428(g)(1). A valid
14 identification number means an SSN valid for employment (*see* 26 U.S.C. § 24(h)(7)) or
15 in the case of a qualifying child who is legally adopted or placed for adoption, the
16 adoption taxpayer identification number of such child. 26 U.S.C. § 6428(g)(2).

17 If a married individual may not claim a CARES Act credit on a joint return
18 because her spouse lacks an SSN valid for employment, she may claim the credit for
19 herself and any qualifying children (assuming that they also have valid identification
20 numbers) by using the married filing separately filing status. *See Economic Impact*
21 *Payment Information Center*, [https://www.irs.gov/coronavirus/economic-impact-](https://www.irs.gov/coronavirus/economic-impact-payment-information-center)
22 [payment-information-center](https://www.irs.gov/coronavirus/economic-impact-payment-information-center) Q&A 26 (“when spouses file jointly, both spouses must
23 have valid SSNs to receive a Payment with one exception . . . If spouses file separately,
24

25 _____
26 ³ A married couple may provide only one spouse's SSN to claim a CARES Act
27 credit on a joint return if at least one of the spouses was a member of the Armed Forces
28 of the United States at any time during the taxable year. 26 U.S.C. § 6428(g)(3).

1 the spouse who has an SSN may qualify for a Payment; the other spouse without a valid
2 SSN will not qualify.”) (last accessed June 12, 2020).⁴

3 In accordance with section 6428(f), the IRS has begun issuing advance refunds of
4 the CARES Act credit. *See generally* [https://www.irs.gov/coronavirus/economic-](https://www.irs.gov/coronavirus/economic-impact-payment-information-center)
5 [impact-payment-information-center](https://www.irs.gov/coronavirus/economic-impact-payment-information-center) (last visited June 10, 2020). The advance refunds
6 are computed based on the information available to the IRS. The IRS will first use
7 information from an individual’s 2019 tax return. 26 U.S.C. § 6428(f)(1). If no 2019
8 tax return was filed, the IRS may use information from the individual’s 2018 tax return.
9 26 U.S.C. § 6428(f)(5). If no 2018 or 2019 tax return was filed, the IRS may use
10 information provided to it on a 2019 Form SSA-1099, Social Security Benefit Statement,
11 or Form RRB-1099, Social Security Equivalent Benefit Statement. *Id.* By statute, the
12 IRS is directed to “refund or credit any overpayment attributable to [] section [6428] as
13 rapidly as possible,” but the IRS is authorized to issue advance refunds through
14 December 31, 2020. 26 U.S.C. § 6428(f)(3)(A).

15 Section 6428 does not confer upon an eligible individual any justiciable right to an
16 advance refund. Nor does it confer any right to receive an advance refund at a particular
17 time or in a particular manner. Section 6428(a) provides that an individual’s CARES
18 Act credit “shall be allowed as a credit against the tax imposed by subtitle A for the first
19 taxable year beginning in 2020.” There is no corresponding mandate that the IRS
20 immediately issue a CARES Act credit in the form of an advance refund. If the IRS
21 does not issue an advance refund to an individual who will eventually qualify for a
22 CARES Act credit, there is no mechanism in section 6428 by which the individual can
23 compel it to do so. Instead, the statute contemplates that any advance refund an
24 individual receives will be reconciled with the CARES Act credit reported on her 2020
25 tax return. *See* 26 U.S.C. § 6428(e) (providing that the amount of any CARES Act credit
26

27 ⁴ A printout of this webpage as of June 12, 2020, with the questions and answers
28 referenced in this motion is attached for the Court’s convenience.

1 will be reduced (but not below zero) by the aggregate amount of any advance refunds
2 and credits made or allowed) and 26 U.S.C. § 6428(f)(3)(A) (providing that any advance
3 refunds and credits will be made by December 31, 2020). Thus, an eligible individual
4 who qualifies for a tax benefit under section 6428 will receive it in one of three ways: (1)
5 as an advance refund in 2020, (2) as a CARES Act credit upon filing her 2020 tax return,
6 or (3) as an advance refund and a CARES Act credit.⁵

7 Some individuals who believe they will be eligible for a CARES Act credit have
8 received a smaller advance refund than they expected or no advance refund at all. These
9 individuals will have to wait until the 2021 filing season to claim and receive the
10 CARES Act credit on their 2020 tax return. *See Economic Impact Payment Information*
11 *Center*, <https://www.irs.gov/coronavirus/economic-impact-payment-information-center>
12 Q&A 32 (“If you did not receive the full amount to which you believe you are entitled,
13 you will be able to claim the additional amount when you file your 2020 tax return.”)
14 (last accessed June 12, 2020).

15 **III. PLAINTIFFS’ AMENDED COMPLAINT**

16 Plaintiffs’ amended complaint, filed June 3, 2020, alleges that plaintiffs are
17 excluded from receiving advance refunds of the CARES Act credit because they have
18 each filed tax returns for prior tax years using the married filing jointly status with their
19 respective spouses, who have individual taxpayer identification numbers (ITINs) rather
20 than SSNs. (ECF 28 ¶¶ 40, 41, 43, 44.) Plaintiffs contend that they cannot and will not
21 receive an advance refund of the CARES Act credit and that the IRS’s determination of
22 an individual’s eligibility for such a refund is “final agency action” within the meaning
23 of 5 U.S.C. § 704. (*Id.* ¶¶ 22, 35, 36.)

24 In Count I of the amended complaint, plaintiffs allege that the CARES Act
25 violates the United States Constitution. (ECF 28 ¶¶ 55-85.) Their constitutional
26

27 ⁵ The third scenario would occur when the IRS issues an individual an advance
28 refund that is less than the CARES Act credit reported on her return.

1 arguments are twofold. First, they allege discrimination based on the fundamental right
2 to marry arising under the First Amendment, the Due Process Clause of the Fifth
3 Amendment, and the Equal Protection and Privileges and Immunities clauses of the
4 Fourteenth Amendment. (*Id.* ¶¶ 64-77.) They specifically contend that section 6428(g)
5 unconstitutionally discriminates based on whom they have chosen to marry and should
6 be stricken because it is “not narrowly tailored to advance a compelling government
7 interest, nor is it rationally related to any legitimate government interest.” (*Id.* ¶ 76.)
8 Second, plaintiffs allege that they have been discriminated against based on the alienage
9 of their spouses and that such discrimination is “presumptively unconstitutional and
10 subject to strict scrutiny.” (*Id.* ¶¶ 78-85.)

11 In Count II of the amended complaint, plaintiffs seek a “temporary, preliminary
12 and permanent injunction” and a declaratory judgment that section 6428(g) violates their
13 constitutional and statutory rights and “denies plaintiffs the privileges and immunities to
14 which they would otherwise be entitled.”⁶ (ECF 28 ¶ 87.) Plaintiffs allege that not
15 receiving an advance refund has caused harm, “including the ability to put food on the
16 table, paying rent, insurance, health insurance, and loss of privacy, reputation in the
17 community, and dignity.” (*Id.* ¶ 90.) Although the amended complaint does not
18 explicitly demand payment of the advance refunds, it requests an order compelling
19 defendants to “treat Plaintiffs and the Putative Class equally in extending disbursement
20 of the Advance [Refunds]” to them. (*Id.* at 20, ¶ h.)

21 **IV. ARGUMENT**

22 **A. This action should be dismissed for lack of jurisdiction**

23 It is fundamental that the United States cannot be sued without an “unequivocally
24 expressed waiver of sovereign immunity by Congress.” *McGuire v. United States*, 550

25
26 ⁶ The amended complaint (ECF 28 at 21) asserts that “[a]ll rights relating to
27 attorneys’ fees have been assigned to counsel.” However, the Anti-Assignment Act, 31
28 U.S.C. § 3727, prohibits assignment of such claims against the United States without the
consent of the United States. *See United States v. Kim*, 806 F.3d 1161, 1169-70 (9th Cir.
2015).

1 F.3d 903, 910 (9th Cir. 2008) (quoting *Dunn & Black P.S. v. United States*, 492 F.3d
2 1084, 1088 (9th Cir. 2007)). “A waiver of the Federal Government’s sovereign
3 immunity must be unequivocally expressed in statutory text.” *Lane v. Pena*, 518 U.S.
4 187, 192 (1996). Indeed, without “clarity of expression” of consent to the waiver of
5 immunity in the text of a statute, this Court lacks jurisdiction, and the claim must be
6 dismissed. *Id.* Thus, unless plaintiffs identify a waiver of sovereign immunity on which
7 their claims are based, this Court must dismiss the action for lack of jurisdiction. *See id.*

8 In the tax context, Congress has expressly limited the circumstances under which
9 suits can be brought against the government through a carefully articulated scheme. As
10 the Supreme Court has repeatedly emphasized, a refund suit is the only way a taxpayer
11 can litigate her taxes in district court, and such a suit can be brought only if certain
12 jurisdictional prerequisites have been satisfied. *United States v. Clintwood Elkhorn*
13 *Mining Co.*, 553 U.S. 1, 5-8 (2008). This limitation applies to constitutional challenges
14 to the Internal Revenue Code like the challenge before this Court. *See id.* at 9 (Code’s
15 administrative exhaustion requirements apply to constitutional claims); *Quarty v. United*
16 *States*, 170 F.3d 961, 973 (9th Cir. 1999) (same); *see also Freedom from Religion*
17 *Found., Inc. v. Lew*, 773 F.3d 815, 825 (7th Cir. 2014); *Apache Bend Apts., Ltd. v.*
18 *United States*, 987 F.2d 1174, 1177-79 & n.4 (5th Cir. 1993) (en banc).

19 1. 26 U.S.C. § 7422 provides plaintiffs’ remedy

20 Plaintiffs seek declaratory and injunctive relief which, if granted, would require
21 the United States to issue tax refunds. Plaintiffs contend that this Court can assume
22 jurisdiction over their claims pursuant to 28 U.S.C. § 1331. (ECF 28 ¶ 12.) However,
23 section 1331 is a general jurisdictional statute which cannot by itself be construed as a
24 waiver of sovereign immunity. *See, e.g., Holloman v. Watt*, 708 F.2d 1399, 1401 (9th
25 Cir. 1983). The district courts’ jurisdiction (concurrent with the United States Court of
26 Federal Claims) over tax refund suits is set forth in 28 U.S.C. § 1346(a)(1). The specific
27 waiver of sovereign immunity that would allow the refund of a tax credit, including the
28

1 credit that is the subject of this case, is contained in 26 U.S.C. § 7422(a). *Clintwood*,
2 553 U.S. at 5-8; *see also Sarmiento v. United States*, 678 F.3d 147, 151 (2d Cir. 2012)
3 (addressing the taxpayers’ claim for a payment of a tax refund under former section
4 6428, another advance refund “stimulus check” program, after the taxpayers “filed an
5 administrative claim with the IRS under 26 U.S.C. § 7422 seeking to recover the
6 withheld” refund payments).

7 Refundable tax credits such as the Earned Income Credit (EIC), 26 U.S.C. § 32,
8 the Additional Child Tax Credit (CTC), 26 U.S.C. § 24(d), and the CARES Act credit,
9 26 U.S.C. § 6428, create a legal fiction that the recipient has overpaid her taxes, thereby
10 entitling her to a tax refund as a mechanism for achieving policy goals. *See Sorenson v.*
11 *Sec’y of Treasury*, 475 U.S. 851, 864 (1986) (discussing the EIC). If an individual’s
12 refundable credits exceed her tax liability (after first reducing that liability by other
13 credits), the excess amount “shall be considered an overpayment,” and she is eligible for
14 a refund in an amount corresponding to that constructive overpayment. *See* 26 U.S.C. §
15 6401(b)(1). An individual can seek such a credit by submitting to the IRS an
16 administrative refund claim pursuant to section 7422. *See Sorenson v. Sec’y of Treasury*,
17 752 F.2d 1433, 1439 (9th Cir. 1985). Assuming the claim is timely, *see* 26 U.S.C. §
18 6511(a), and the IRS denies the claim or fails to act upon it within six months, *see* 26
19 U.S.C. § 6532(a)(1), the individual may then sue for a refund of the credit pursuant to
20 section 7422(a). *See* 28 U.S.C. §§ 1346(a)(1), 1491; *see also Sorenson*, 752 F.2d at
21 1439; *Oatman v. Dep’t of Treasury*, 34 F.3d 787, 789 (9th Cir. 1994).

22 There is no exception set forth in section 6428 to these basic jurisdictional
23 requirements. Thus, to challenge the constitutionality of section 6428(g), plaintiffs must
24 each file a joint income tax return for 2020 after the filing season begins in 2021, then
25 each file a timely administrative refund claim with the IRS requesting a CARES Act
26 credit because section 6428(g) is unconstitutional. Until their administrative refund
27 claims are denied or six months pass, plaintiffs cannot maintain a refund suit. *See* 28
28

1 U.S.C. §§ 1346(a)(1), 1491; *Quarty*, 170 F.3d at 973 (dismissing constitutional claim for
2 lack of jurisdiction because plaintiff was required to comply with requirements of
3 section 7422 to raise constitutional claim despite “possible futility”) (citing *United States*
4 *v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 273 (1931)); *Rand v. United States*, 249 U.S.
5 503, 510 (1918).

6 2. Plaintiffs lack standing and their claims are not yet ripe

7 Article III standing requires that a plaintiff establish (1) a concrete and
8 particularized injury that is actual and imminent, as opposed to conjectural or
9 hypothetical, (2) a fairly traceable causal connection between the injury and the alleged
10 conduct, and (3) a substantial likelihood that the injury will be redressed by a favorable
11 decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Vermont Agency*
12 *of Natural Res. v. United States*, 529 U.S. 765, 771 (2000). The elements of standing
13 “are not mere pleading requirements but rather an indispensable part of the plaintiff’s
14 case,” and the plaintiff bears the burden of proof with respect to each element. *Lujan*,
15 504 U.S. at 561. If at any point an element of standing is not met, the case should be
16 dismissed. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)
17 (citing *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)).

18 In order to have standing to challenge a tax benefit as unconstitutional, a plaintiff
19 must (among other requirements) actually seek the tax benefit herself. *See Droz v.*
20 *Commissioner*, 48 F.3d 1120, 1122 & n.1 (9th Cir. 1995) (recognizing that taxpayer had
21 standing to raise an Establishment Clause challenge to a religious exemption from the
22 self-employment tax under 26 U.S.C. § 1402(g) for sects opposed to certain insurance,
23 where he claimed, and was denied, the exemption); *see also Gaylor v. Mnuchin*, 919
24 F.3d 420, 425-26 (7th Cir. 2019) (taxpayers had standing to challenge 26 U.S.C. § 107
25 because the IRS took longer than six months to act on their refund requests claiming
26 exemptions under that section); *Moritz v. Commissioner*, 469 F.2d 466, 467 (10th Cir.
27 1972) (addressing an Equal Protection challenge brought by a single male who claimed a
28

1 dependent-care expense deduction that the statute limited to married or widowed men,
2 but allowed to women regardless of marital status); *Warnke v. United States*, 641 F.
3 Supp. 1083, 1089 (E.D. Ky. 1986) (addressing an Establishment Clause challenge to
4 regulations under 26 U.S.C. § 107 by a taxpayer who claimed, and was denied, the
5 exclusion). In these cases, the individuals actually sought the tax benefit from the taxing
6 authority and then litigated their own tax liability, either by way of a deficiency
7 proceeding in Tax Court (as in *Droz* and *Moritz*) or by filing a refund suit (as in *Gaylor*
8 and *Warnke*).

9 To have standing to challenge the constitutionality of section 6428(g), plaintiffs
10 must have first sought and been denied a CARES Act credit. Thus, as we have
11 previously explained, each plaintiff must file a joint tax return for 2020, submit an
12 administrative claim for refund, and wait until the IRS denies (or does not act upon
13 within six months) that claim. These requirements apply even if plaintiffs believe that
14 performing them would be an exercise in futility. *See Quarty*, 170 F.3d at 973. Until
15 plaintiffs have followed the administrative procedures for claiming a credit, their injuries
16 are merely hypothetical, and they lack standing to bring their claims.

17 Finally, plaintiffs' challenge to section 6428(g) fails as a jurisdictional matter
18 under the ripeness doctrine. The ripeness doctrine is intended to avoid "premature
19 adjudication" over "abstract disagreements" and to postpone judicial review until "an
20 administrative decision has been formalized and its effects felt in a concrete way by the
21 challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967).
22 Where agency action offers a benefit or establishes criteria for dispensing benefits,
23 courts generally have concluded that the plaintiff's application for benefits must be
24 denied before a claim is ripe for review. *See Nat'l Park Hospitality Ass'n v. Dep't of*
25 *Interior*, 538 U.S. 803, 809 (2003); *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57-
26 59 (1993). Courts have been particularly reluctant to find a specific pre-enforcement
27 challenge ripe where (as in the tax refund context) a statutory scheme creates a separate
28

1 process for review. *See, e.g., Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207-209
2 (1994).

3 As explained above, section 6428 does not guarantee any individual an advance
4 refund. Rather, the statutory scheme that Congress selected provides that the IRS will
5 issue a CARES Act credit to an eligible individual in one of three ways: (1) as an
6 advance refund in 2020; (2) as a refundable tax credit upon the filing of her 2020 tax
7 return; or (3) as a combination of the two. Individuals like plaintiffs who have not
8 received an advance refund must therefore claim a CARES Act credit on their 2020 tax
9 return in order to obtain it. But the amount (if any) of the CARES Act credit to which
10 plaintiffs will be entitled cannot yet be determined. The amount of the credit will be
11 determined by factors set forth in section 6428, including plaintiffs' respective filing
12 statuses, adjusted gross incomes, and number of qualifying children, if any, they will
13 claim on their 2020 tax returns. *See* 26 U.S.C. §§ 6428(a), (c). These factors cannot be
14 determined because the 2020 tax year will not end until December 31, 2020. Indeed,
15 even under plaintiffs' incorrect view that the statute entitles them to an advance refund,
16 the harm has not yet occurred because section 6428 authorizes the IRS to make advance
17 refunds through December 31, 2020. 26 U.S.C. § 6428(f)(3)(A); *See Economic Impact*
18 *Payment Information Center*, [https://www.irs.gov/coronavirus/economic-impact-](https://www.irs.gov/coronavirus/economic-impact-payment-information-center)
19 [payment-information-center](https://www.irs.gov/coronavirus/economic-impact-payment-information-center) Q&A 21 ("Payments will be made throughout the rest of
20 2020.") (last accessed June 12, 2020).

21 Although plaintiffs believe they will not qualify for a CARES Act credit or
22 advance refund, their circumstances may change. For instance, there are legislative
23 efforts to amend section 6428(g) which, if enacted, may result in plaintiffs receiving an
24 advance refund or CARES Act credit even if they elect to file joint returns. *See* Health
25 and Economic Recovery Omnibus Emergency Solutions (HEROES) Act, H.R. 6800,
26 116th Cong. (2020) § 20102. Additionally, plaintiffs may elect to file their 2020 tax
27 returns using the married filing separately filing status and thus be eligible for the
28

1 CARES Act credit under the current version of section 6428(g). Or their respective
2 spouses may qualify for SSNs or join the military before the year ends. *See* 26 U.S.C.
3 §§ 6428(g)(1) and (3). Lastly, plaintiffs’ financial circumstances may improve,
4 completely eliminating their eligibility for the credit based on their respective adjusted
5 gross incomes. *See* 26 U.S.C. § 6428(c). In short, plaintiffs’ eligibility for CARES Act
6 credits and the amounts of the credits will be uncertain until the end of the year.

7 3. Plaintiffs cannot rely on the APA as the basis of this Court’s
8 jurisdiction

9 Plaintiffs’ amended complaint relies on the APA, specifically 5 U.S.C. § 702,
10 implying that it provides the required waiver of sovereign immunity for their claims.
11 (ECF 28 ¶ 35.) Although section 702 contains a broad waiver of sovereign immunity,
12 section 704 contains express limits on this Court’s jurisdiction for claims brought under
13 the APA. *See Navajo Nation v. Dep’t of the Interior*, 876 F.3d 1144, 1171 (9th Cir.
14 2017).

15 Section 704 provides that: “[a]gency action made reviewable by statute and final
16 agency action for which there is no other adequate remedy in a court are subject to
17 judicial review.” Thus, determining whether jurisdiction exists under section 704
18 requires inquiries into whether the agency’s action is “final,” *see Franklin v.*
19 *Massachusetts*, 505 U.S. 788, 796-97 (1992), and whether other provisions could
20 provide plaintiffs with a remedy. *See U.S. Army Corps of Engineers v. Hawkes Co.*, 136
21 S. Ct. 1807, 1815 (2016) (“[A]gency action is reviewable under the APA only if there
22 are no adequate alternatives to APA review in court.”). If an agency’s action is not final
23 or another avenue of relief exists, there is no jurisdiction under section 704, and the APA
24 claims must be dismissed. *See id.* at 1813-14; *Wash. Toxics Coal. v. EPA*, 413 F.3d
25 1024, 1034 (9th Cir. 2005) (“Because this substantive statute independently authorizes a
26 private right of action, the APA does not govern the plaintiffs’ claims.”).

1 Here, there is no jurisdiction pursuant to section 704 because, as we have
2 discussed, Congress has designated section 7422 as the exclusive vehicle to recover tax
3 credits, including the CARES Act credit that is the subject of this case. “It is a ‘well-
4 established principle that, in most contexts, a precisely drawn, detailed statute pre-empts
5 more general remedies.’” *City of Oakland v. Lynch*, 798 F.3d 1159, 1165 (9th Cir. 2015)
6 (quoting *Hinck v. United States*, 550 U.S. 501, 506 (2007)). This is particularly true
7 with respect to the “general grant of review in the APA,” which “Congress did not intend
8 . . . to duplicate existing procedures for review of agency actions.” *Bowen v.*
9 *Massachusetts*, 487 U.S. 879, 903 (1988); *see also City of Oakland*, 798 F.3d at 1165
10 (quoting *Bowen*). Thus, the specific remedy set forth in section 7422 forecloses the
11 availability of general relief under section 704. *See City of Oakland*, 798 F.3d at 1165
12 (“Permitting parties to file under the APA and circumvent the short deadlines Congress
13 established . . . would make mush of the law.”); *see also Hinck*, 550 U.S. at 506 (holding
14 a “precisely drawn, detailed statute” in the Internal Revenue Code provided the
15 taxpayer’s “exclusive” and “specific” remedy); *Armstrong & Armstrong, Inc. v. United*
16 *States*, 356 F. Supp. 514, 521 (E.D. Wash. 1973) (where “relief is at least available . . .
17 judicial review may not be predicated on the [APA]”), *aff’d*, 514 F.2d 402 (9th Cir.
18 1975).

19 As we have explained, Congress has created a statutory scheme in section 7422
20 that allows plaintiffs, like all other taxpayers who seek tax credits, to obtain relief.
21 Plaintiffs cannot escape this conclusion through artful pleading. Although plaintiffs’
22 amended complaint purports to seek declaratory and injunctive relief, plaintiffs’ alleged
23 injury is the denial of a tax credit, and the relief they seek is issuance of the credit. This
24 Court is not required to accept plaintiffs’ characterization of the relief sought, *see Great-*
25 *West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002), and should not do
26 so here. Because plaintiffs have an adequate remedy to seek the credit and challenge the
27 constitutionality of section 6428 via section 7422, section 704 precludes jurisdiction
28

1 under the APA. *See Bowen*, 487 U.S. at 903; *Clintwood*, 553 U.S. at 8-12; *City of*
2 *Oakland*, 798 F.3d at 1165.

3 In addition, plaintiffs are mistaken that the IRS's determination of an individual's
4 eligibility for an advance refund and the amount of the advance refund "constitutes 'final
5 agency action'" within the meaning of section 704. (*See* ECF 28 ¶ 35.) "[T]wo
6 conditions [must] generally [] be satisfied for agency action to be 'final' under the APA.
7 'First, the action must mark the consummation of the agency's decisionmaking process--
8 it must not be of a merely tentative or interlocutory nature. And second, the action must
9 be one by which rights or obligations have been determined, or from which legal
10 consequences will flow.'" *U.S. Army Corps of Engineers*, 136 S. Ct. at 1813 (quoting
11 *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997)).

12 As we have explained, the CARES Act created a tax credit that can be issued as an
13 advance refund, as a refundable tax credit, or as an advance refund and a refundable tax
14 credit. If the IRS issues an otherwise eligible individual an advance refund that is
15 smaller than the credit for which she eventually qualifies, the individual may claim the
16 additional amount as a refundable credit on her 2020 tax return.⁷ *See* 26 U.S.C. §
17 6428(e)(1). The issuance of an advance refund, then, is more accurately characterized as
18 an approximation (based on 2018 or 2019 tax information) of the CARES Act credit an
19 individual might receive. But the final amount of the credit cannot be determined until
20

21 ⁷ There are a number of scenarios that would produce this outcome. Assume, for
22 instance, that an otherwise eligible individual gives birth to or adopts a child in 2020.
23 The child would not appear on the individual's 2019 and 2018 tax returns, and the
24 individual would therefore receive no advance refund relating to that child. If she claims
25 the child as a qualifying child on her 2020 tax return, however, she would qualify for an
26 additional CARES Act credit. 26 U.S.C. § 6428(a)(2); *see Economic Impact Payment*
27 *Information Center*, [https://www.irs.gov/coronavirus/economic-impact-payment-](https://www.irs.gov/coronavirus/economic-impact-payment-information-center)
28 [information-center](https://www.irs.gov/coronavirus/economic-impact-payment-information-center) Q&A 28 (last accessed June 12, 2020). Alternatively, the IRS may
be unable to compute an advance refund for an individual who will qualify for a CARES
Act credit in 2020 because it does not have any of the information set forth in section
6428 for that individual. The individual, assuming she otherwise qualifies, could claim
and receive a CARES Act credit upon the filing of her 2020 tax return. Lastly, an
individual might be eligible for a CARES Act credit based on her 2020 adjusted gross
income but no advance refund based on her 2019 or 2018 adjusted gross income.

1 the tax year ends and the IRS receives and reviews the individual’s 2020 tax return. As
2 such, the IRS’s issuance--or non-issuance--of an advance refund is not the action from
3 which the right to a CARES Act credit flows and thus is not a “final agency action” in
4 any sense. *See U.S. Army Corps of Engineers*, 136 S. Ct. at 1813.

5 4. Plaintiffs cannot avoid the bar of sovereign immunity by naming
6 individual government officials

7 Finally, it is well-settled that plaintiffs’ naming of individual government officials
8 as defendants does not allow them to avoid the jurisdictional bar of sovereign immunity.
9 *See, e.g., Hutchinson v. United States*, 677 F.2d 1322, 1327 (9th Cir. 1982); *Larson v.*
10 *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949).

11 **B. This action should be dismissed for failure to state a claim**

12 The amended complaint fails to state a claim upon which relief can be granted. As
13 such, this action should be dismissed. A district court properly dismisses an action for
14 failure to state a claim “if there is a lack of a cognizable legal theory or the absence of
15 sufficient facts alleged under a cognizable legal theory.” *Conservation Force v. Salazar*,
16 646 F.3d 1240, 1242 (9th Cir. 2011) (internal quotations omitted). In considering a
17 12(b)(6) motion, the district court must accept as true all material allegations of fact in
18 the complaint, as well as all reasonable inferences to be drawn from them. *Pareto v.*
19 *FDIC*, 139 F.3d 696, 699 (9th Cir. 1998).

20 Acts of Congress, including the CARES Act, are presumed to be
21 constitutional. *See INS v. Chadha*, 462 U.S. 919, 944 (1983); *Nat’l Fed’n of Indep. Bus.*
22 *v. Sebelius*, 567 U.S. 519, 563 (2012) (“[E]very reasonable construction must be resorted
23 to, in order to save a statute from unconstitutionality.”) (quoting *Hooper v. California*,
24 155 U.S. 648, 657 (1895)). “Legislatures have especially broad latitude in creating
25 classifications and distinctions in tax statutes.” *Regan v. Taxation With Representation*
26 *of Washington*, 461 U.S. 540, 547 (1983) (rejecting an equal protection challenge to a
27 federal tax classification). Indeed, “[n]o scheme of taxation, whether the tax is imposed
28

1 on property, income, or purchases of goods and services, has yet been devised which is
 2 free of all discriminatory impact.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S.
 3 1, 41 (1973). Thus, “[i]n such a complex arena in which no perfect alternatives exist,”
 4 courts cannot “impose too rigorous a standard of scrutiny lest all [] fiscal schemes
 5 become subjects of criticism under the Equal Protection Clause.” *Id.* Rather, “within the
 6 limits of rationality, the legislature’s efforts to tackle problems should be entitled to
 7 respect.” *Id.* at 42 (internal quotations omitted); see *United States v. Md. Savings-Share*
 8 *Ins. Corp.*, 400 U.S. 4, 6 (1970) (tax classifications are generally presumed to be
 9 constitutional if a rational basis is demonstrated to or perceived by a court).

10 1. Section 6428(g) does not violate due process or equal protection
 11 principles by implicating the right to marry

12 Plaintiffs assert that section 6428(g) violates their fundamental right to marry by
 13 denying them an advance refund because they are married to individuals without SSNs.⁸
 14 (ECF 28 ¶¶ 64-77.) They contend that the section is “not narrowly tailored to advance a
 15 compelling government interest” or “related to any legitimate governmental interest” and
 16 should therefore be deemed unconstitutional. (*Id.* ¶ 76.)

17 However, even if the factual allegations in the amended complaint are accepted as
 18 true, section 6428(g) does not implicate plaintiffs’ fundamental right to marry. Plaintiffs
 19 allege that they are each married and thus cannot contend that the CARES Act prevented
 20 them from marrying an individual of their choosing. Nor can they deny that they could
 21 each qualify for a CARES Act credit by electing to file a married filing separately tax
 22 return for the 2020 tax year. Plaintiffs’ claim, then, is that section 6428(g)
 23 impermissibly distinguishes between groups of married people, specifically, between
 24 couples in which only one spouse has an SSN and couples in which both spouses have
 25 SSNs. Such a distinction does not warrant any sort of heightened scrutiny: the Supreme
 26

27 ⁸ Plaintiffs describe the fundamental right to marry as arising under the First
 28 Amendment, the Due Process Clause of the Fifth Amendment, and the Equal Protection
 and Privileges and Immunities Clauses of the Fourteenth Amendment. (ECF 28 ¶ 71.)

1 Court has long distinguished between statutes that implicate the fundamental right to
2 marry and statutes that differentiate between groups of married people. Thus, the
3 Supreme Court has held that laws which “interfere directly and substantially with the
4 right to marry” are constitutionally infirm, but “reasonable regulations that do not
5 significantly interfere with decisions to enter into the marital relationship may be
6 legitimately imposed.” *Zablocki v. Redhail*, 434 U.S. 374, 386-87 (1978). As such,
7 distinctions based on marital status are subject only to rational-basis review. *Id.*; *see*
8 *also Califano v. Jobst*, 434 U.S. 47, 53-54 (1977).

9 In *Aleman v. Glickman*, 217 F.3d 1191, 1201 (9th Cir. 2000), for example, the
10 Ninth Circuit determined that a federal food stamps provision that distinguished between
11 noncitizen spouses of citizens whose marriages ended in divorce and noncitizen spouses
12 of citizens whose marriages ended in death did not interfere directly and substantially
13 with the right to marry and was therefore subject to rational-basis review. Likewise, in
14 *In re Talmadge*, 832 F.2d 1120, 1126 & n.3 (9th Cir. 1987) the Ninth Circuit upheld a
15 California statute that limited married debtors to one exemption in bankruptcy where, if
16 the debtors were not married, they would have been entitled to two. The court
17 determined that the distinction did not implicate a fundamental right, was subject only to
18 rational-basis review, and was permissible because the California legislature may have
19 had a reasonable explanation for making it. *Id.* at 1125-26.

20 *Talmadge* cited the Second Circuit’s decision in *Druker v. Commissioner*, 697
21 F.2d 46, 50 (2d Cir. 1982). There, the Second Circuit considered a challenge under the
22 Fourteenth Amendment’s Equal Protection clause to the so-called “marriage penalty”,
23 which causes certain married individuals to pay more taxes than they would if they were
24 unmarried. The court held that the mere fact that tax rates have differently affected
25 particular groups did not make tax rate structure set forth in the Internal Revenue Code
26 unconstitutional. *Id.* The court acknowledged that the “marriage penalty” has “some
27 adverse effect on marriage.” *Id.* Nevertheless, the “adverse effect of the ‘marriage
28

1 penalty' . . . is merely 'indirect'; while it may to some extent weight the choice whether
2 to marry, it leaves the ultimate decision to the individual." *Id.* (citation omitted).
3 Because the Second Circuit determined that the tax rate structure set forth in the Internal
4 Revenue Code places "no direct legal obstacle in the path of persons desiring to get
5 married," and "the 'marriage penalty' is most certainly not 'an attempt to interfere with
6 the individual's freedom [to marry]," it concluded that Congress was entitled to enact a
7 policy that penalizes some dual-income couples and that such a choice would even
8 survive strict scrutiny were it to apply. *Id.* (quoting *Zablocki*, 434 U.S. at 387 n.12 &
9 *Jobst*, 434 U.S. at 54).

10 Numerous tax benefits and obligations distinguish based on marital status. For
11 example, the Internal Revenue Code permits several filing statuses, each subject to
12 different tax rates and other provisions, based on marital status. *See* 26 U.S.C. §§ 1(a)
13 (married individuals filing joint returns and surviving spouses); 1(b) (heads of
14 household); 1(c) (unmarried individuals); 1(d) (married individuals filing separate
15 returns). Federal courts have consistently rejected constitutional claims where, for
16 federal tax purposes, married couples are treated differently than unmarried couples or
17 certain married couples are treated differently than other married couples. *See Druker*,
18 697 F.2d at 50; *Mapes v. United States*, 576 F.2d 896, 900 (Ct. Cl. 1978) (applying
19 rational-basis review and holding that differential tax effect between married couples
20 was constitutionally permissible); *Schinasi v. Commissioner*, 53 T.C. 382, 384 (1969)
21 (holding that 26 U.S.C. § 6013(a)(1) was reasonable and did not violate the Constitution
22 in precluding individuals married to individuals who were nonresident aliens for any part
23 of the taxable year from filing joint federal tax returns); *see also Barter v. United States*,
24 550 F.2d 1239, 1240 (7th Cir. 1977) ("We agree with the district court that the inequities
25 asserted to inhere in the 'marriage penalty,' whatever may be their persuasiveness as
26 arguments for legislative change, do not rise to the level of constitutional violations of
27 appellants' rights.") (footnote omitted).

1 Assuming they otherwise qualify, there is no dispute that plaintiffs would each be
2 eligible to claim a CARES Act credit by filing a 2020 tax return using the married filing
3 separately filing status. Thus, plaintiffs' constitutional claim is that in order to receive
4 the credit, they must each select a filing status that they would not have otherwise
5 chosen. But all married individuals must evaluate the benefits and burdens of whether to
6 file a joint or a separate tax return. *See* 26 U.S.C. §§ 1(a) and (d).

7 As described above, section 6428(g) does not implicate plaintiffs' fundamental
8 right to marry; it merely distinguishes, like other provisions in the Internal Revenue
9 Code, between categories of married couples. As such, it is subject to rational-basis
10 review. *See Aleman*, 217 F.3d at 1201; *In re Talmadge*, 832 F.2d 1120, 1126 & n.3.

11 2. Section 6428(g) does not make distinctions based on alienage, and
12 even assuming *arguendo* it does, federal distinctions based on
13 alienage are subject to rational-basis review

14 Plaintiffs argue that section 6428(g) is constitutionally infirm because it
15 discriminates on the basis of their spouses' alienage. (ECF 28 ¶¶ 78-85.) As a threshold
16 matter, section 6428(g) does not distinguish based on alienage; rather, it provides that
17 married couples who elect to file a joint income tax return cannot claim a CARES Act
18 credit unless both spouses have SSNs valid for employment.⁹ But SSNs valid for
19 employment are not issued exclusively to U.S. citizens. Instead, they are assigned to
20 U.S. citizens, lawful permanent residents, and other noncitizens with authorization to
21 work in the United States. *See* 42 U.S.C. § 405(c)(2)(B)(i)(I) and (III); 20 C.F.R.
22 § 422.104 ("Who can be assigned a social security number"). As such, lawful permanent
23
24

25 ⁹ The CARES Act's SSN restrictions are not unique in the Internal Revenue
26 Code. The Economic Stimulus Act of 2008, Pub. L. No. 110-185, 122 Stat. 613 (Feb.
27 13, 2008), and 1996 amendments to the EIC, 26 U.S.C. § 32, use substantially similar
28 language to bar tax credits to those who fail to provide SSNs on their income tax return.
And since 2017, the CTC, like the EIC and the CARES Act credit, has distinguished
between children with and without SSNs. From 2018 through 2025, the Code allows a
individual to claim a larger CTC for a child with an SSN. *See* 26 U.S.C. § 24(h)(7).

1 residents and other noncitizens with SSNs valid for employment can qualify for a
2 CARES Act credit or receive an advance refund.

3 In contrast, ITINs are identifying numbers issued by the IRS to nonresident and
4 resident aliens (as well as their alien spouses and alien dependents) who have a reporting
5 requirement under the Internal Revenue Code but do not qualify for an SSN. 26 C.F.R.
6 § 301.6109-1(d)(3); *see Hansen v. Dep't of Treasury*, 528 F.3d 597, 599 (9th Cir. 2007).
7 ITINs are held by noncitizens, some of whom live outside the United States but are
8 required to have an identification number for tax purposes, such as individuals with
9 U.S.-source investment income. Many other ITIN-holders live and work in the United
10 States even though they are not so authorized. *See* Congressional Research Service,
11 Report R43840, “Federal Income Taxes and Noncitizens: Frequently Asked Questions”
12 at 3-5 (updated December 31, 2014). Holding an SSN valid for employment, then,
13 tracks work authorization in the United States more closely than it does United States
14 citizenship. *See* Congressional Research Service, Report R46339, “Unauthorized
15 Immigrants’ Eligibility for COVID-19 Relief Benefits: In Brief” (updated May 7, 2020)
16 at 5-6 (SSNs are “typically issued to U.S. citizens, lawful permanent residents, and
17 noncitizens with work authorization”). And the Ninth Circuit has previously upheld a
18 federal program that distinguished between SSN and non-SSN holders in allocating
19 federal benefits in the face of an equal protection challenge. *See Alcaraz v. Block*, 746
20 F.2d 593, 605 (9th Cir. 1984).

21 Plaintiffs’ amended complaint does not challenge section 6428(d)(1)’s exclusion
22 of nonresident aliens¹⁰ from receiving a CARES Act credit. And, in any event, to the
23

24 ¹⁰ “[F]or federal tax purposes, a noncitizen is classified as a resident or
25 nonresident alien, regardless of whether he or she is in the United States as an immigrant
26 or nonimmigrant, or is in the United States unlawfully. This classification is for federal
27 tax purposes only and does not affect the individual’s immigration status.”
28 Congressional Research Service, Report R43840, “Federal Income Taxes and
Noncitizens: Frequently Asked Questions” at 1-2 (updated December 31, 2014); *see* IRS
Publication 519, available at <https://www.irs.gov/pub/irs-pdf/p519.pdf> (last accessed
June 11, 2020.).

1 extent that the SSN requirement in section 6428(g) distinguishes between resident aliens
2 and nonresident aliens, distinctions between individuals in those categories in the Tax
3 Code have been consistently upheld. *See Hofstetter v. Commissioner*, 98 T.C. 695, 702
4 (1992); *Schinasi*, 53 T.C. at 384; *see also Barr v. Commissioner*, 51 T.C. 693, 695
5 (1969).

6 As we have explained, the CARES Act’s SSN requirement is not a distinction
7 based on alienage, since lawful permanent residents and other noncitizens with work
8 authorization can obtain an SSN and qualify for a CARES Act credit. Even assuming
9 *arguendo* the requirement is a distinction based on alienage, the Supreme Court
10 recognizes that the federal government has “broad, undoubted power over the subject of
11 immigration and the status of aliens.” *Arizona v. United States*, 567 U.S. 387, 394
12 (2012) (citing *Toll v. Moreno*, 458 U.S. 1, 10 (1982)). When federal law classifies
13 individuals on the basis of alienage, rational-basis review applies.¹¹ *See Mathews v.*
14 *Diaz*, 426 U.S. 67, 81-85 (1976). Thus, in considering the food stamps provision in
15 *Aleman*, 217 F.3d at 1201, the Ninth Circuit held that Congress had differentiated
16 between groups of aliens and that the provision was subject to rational-basis review.

17 In sum, section 6428(g) is not a classification based on alienage. Even assuming
18 *arguendo* that it is, it would be subject to rational-basis review. *See Aleman*, 217 F.3d at
19 1201.

20 3. Plaintiffs have not pleaded a cognizable legal theory

21 As we have explained, section 6428(g) is subject to rational-basis review.
22 Plaintiffs cannot prevail under that standard. “[R]ational-basis review in equal
23 protection analysis ‘is not a license for courts to judge the wisdom, fairness, or logic of
24 legislative choices.’” *Aleman*, 217 F.3d at 1200 (quoting *Heller v. Doe*, 509 U.S. 312,
25 319 (1993)) (internal quotations omitted). When reviewing a provision under rational-
26

27 ¹¹ Plaintiffs cite *Graham v. Richardson*, 403 U.S. 365, 372 (1971) for the
28 proposition that that the federal tax provision at issue is subject to strict scrutiny. That
case, however, dealt with a state classification based on alienage. *See id.* at 376-377.

1 basis review “a statutory classification . . . must be upheld against equal protection
2 challenge if there is any reasonably conceivable state of facts that could provide a
3 rational basis for the classification.” *Id.* at 1201 (quoting *FCC v. Beach*
4 *Communications*, 508 U.S. 307, 313 (1993)). The government “has no obligation to
5 produce evidence to sustain the rationality of a statutory classification”; rather, “[t]he
6 burden is on the one attacking the legislative arrangement to negative every conceivable
7 basis which might support it.” *Heller*, 509 U.S. at 320 (internal quotations omitted); *see*
8 *also Fournier v. Sebelius*, 718 F.3d 1110, 1123 (9th Cir. 2013).

9 Plaintiffs cannot “negative every conceivable basis which might support” section
10 6428(g) and thereby overcome its presumption of constitutionality. *See Aleman*, 217
11 F.3d at 1201 (quoting *Heller*, 509 U.S. at 320). Indeed, Congress could have reasonably
12 used the prohibition on joint filing in section 6428(g) as a means to reconcile section
13 6428(a)(1)’s provision of \$2,400 credits to eligible joint filers with section 6428(d)(1)’s
14 exclusion of nonresident aliens.¹² Whether Congress could have selected a different
15 method to achieve the same result is not at issue. *See Nat’l Fed’n of Indep. Bus.*, 567
16 U.S. at 563; *Brushaber v. Union P.R. Co.*, 240 U.S. 1, 26 (1916). As such, plaintiffs’
17 action should be dismissed.

18
19
20
21
22
23
24
25
26
27
28 ¹² Plaintiffs do not challenge either of these provisions.

1 **V. CONCLUSION**

2 This action should be dismissed because this Court lacks jurisdiction over
3 plaintiffs' claims and because the amended complaint fails to state a claim upon which
4 relief can be granted.

5 Dated: June 15, 2020

Respectfully submitted,

6 NICOLA T. HANNA
United States Attorney
7 THOMAS D. COKER
Assistant United States Attorney
8 Chief, Tax Division

9 /s/ John D. Ellis
10 MELISSA BRIGGS
JOHN D. ELLIS
Assistant United States Attorneys

11 Attorneys for the United States of America
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



Economic Impact Payment Information Center

Mailed Check Payments May Be Sent As Debit Cards



If the Get My Payment application says you're receiving a check, your Payment may come as a debit card. Debit card Payments come in a plain envelope from "Money Network Cardholder Services."

For more information, see [Prepaid Debit Cards](#).

For additional questions regarding the Get My Payment application check out our [Get My Payment FAQs](#).

Millions of Americans have already received their Economic Impact Payments (Payments) authorized by the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The Internal Revenue Service (IRS) continues to calculate and automatically send the Payments to most eligible individuals, however some may have to provide additional information to the IRS to get their Payments. Below are answers to frequently asked questions related to these Payments. These questions and answers will be updated periodically. Please DO NOT call the IRS.

- [EIP Eligibility and General Information](#)
- [Requesting My Economic Impact Payment](#)
- [Calculating My Economic Impact Payment](#)
- [Receiving My Payment](#)
- [Prepaid Debit Cards](#)
- [Payment Issued but Lost, Stolen, Destroyed or Not Received](#)
- [Non-Filer Tool](#)
- [Social Security, Railroad Retirement and Department of Veteran Affairs benefit recipients](#)
- [Returning the Economic Impact Payment](#)

EIP Eligibility and General Information

> [Q1. Who is eligible? \(updated June 5, 2020\)](#)

> [Q2. Who is not eligible? \(updated June 5, 2020\)](#)

> **Q3. How much is it worth? (updated May 29, 2020)**

> **Q4. Do I need to take action?**

> **Q5. Will I receive notification from the IRS about my Payment?**

> **Q6. How do I avoid scams related to Economic Impact Payments or COVID-19?**

> **Q7. Should I use Get My Payment or Non-Filers: Enter Payment Info Here?**

> **Q8. As a U.S. citizen living abroad, am I entitled to a Payment?**

> **Q9. If I live in Puerto Rico, the U.S. Virgin Islands, American Samoa, Guam, or the Commonwealth of the Northern Mariana Islands, will I get a Payment if I'm eligible?**

> **Q10. I am a citizen or resident of one of the Freely Associated States (Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau). Can I be eligible to receive a Payment? (added June 8, 2020)**

> **Q11. What does it mean if I received a Payment from both the IRS and a U.S. territory tax agency? (added June 8, 2020)**

> **Q12. Does someone who has died qualify for the Payment? (updated May 26, 2020)**

> **Q13. Does someone who is a resident alien qualify for the Payment? (added May 6, 2020)**

> **Q14. Does someone who is incarcerated qualify for the Payment? (added May 6, 2020)**

Requesting My Economic Impact Payment

> **Q15. I recently filed a tax return. What do I need to do to get a Payment?**

> **Q16. I haven't filed a tax return for 2018 or 2019 and don't need to file tax returns for those years. I receive Social Security, SSI, Railroad Retirement, or Department of Veterans Affairs (VA) benefits.**

What do I need to do to get a Payment? (updated April 24, 2020)

➤ **Q17. I haven't filed a federal tax return for 2018 or 2019 because I'm not required to file. I don't receive Social Security retirement or any other federal benefits. What do I need to do to get a Payment? (Updated June 10, 2020)**

➤ **Q18. I did not file a tax return for 2018 or 2019. How do I know if I am required to file a tax return?**

➤ **Q19. I haven't filed my 2019 tax return but filed my 2018 return and already received an Economic Impact Payment. Will filing a 2019 return affect my Economic Impact Payment? (added June 10, 2020)**

➤ **Q20. Who should NOT use Non-Filers: Enter Payment Info Here? (updated June 10, 2020)**

✓ **Q21. I need to file a tax return but am concerned about visiting a tax professional or local community organization in person right now to get help with my tax return. How long is the Payment available?**

A21. Payments will be made throughout the rest of 2020. If you don't receive a Payment this year, you can also claim it by filing a tax return for 2020 next year.

➤ **Q22. Will the IRS contact me about my Payment? (updated May 8, 2020)**

Calculating My Economic Impact Payment

➤ **Q23. What is the amount of the Payment I will receive? Who is a qualifying child? (updated May 8, 2020)**

➤ **Q24. How do I calculate my Economic Impact Payment? (added April 27, 2020)**

➤ **Q25. Will my Payment be reduced if my income is too little or too much?**

✓ **Q26. I filed a joint return with my spouse. Will we receive a Payment if I have a valid SSN and my spouse has an IRS Individual Taxpayer Identification Number (ITIN)?**

A26. No, when spouses file jointly, both spouses must have valid SSNs to receive a Payment with one exception. If either spouse is a member of the U.S. Armed Forces at any time during the taxable year, only one spouse needs to have a valid SSN.

If spouses file separately, the spouse who has an SSN may qualify for a Payment; the other spouse without a valid SSN will not qualify.

✓ **Q27. What is meant by a valid SSN required for a Payment?**

A27. A valid SSN for a Payment is one that is [valid for employment](#) and is issued by the SSA before the due date of your 2019 tax return (including the filing deadline postponement to July 15 and an extension to October 15 if you request it) or your 2018 tax return (including extensions) if you haven't filed your 2019 tax return.

If the individual was a U.S. citizen when they received the SSN, then it is valid for employment. If "Not Valid for Employment" is printed on the individual's Social Security card and the individual's immigration status has changed so that they are now a U.S. citizen or permanent resident, ask the SSA for a [new Social Security card](#). However, if "Valid for Work Only With DHS Authorization" is printed on the individual's Social Security card, the individual has the required SSN only as long as the Department of Homeland Security authorization is valid.

✓ **Q28. Is a child born, adopted, or placed into foster care in 2020 a qualifying child for the Payment?**

A28. The Payment in 2020 will not include an additional amount for these children because the Payment in 2020 is based only on information from your 2019 or 2018 tax return. You may claim the child next year for an additional credit on your 2020 tax return.

➤ **Q29. I received an additional \$500 Payment in 2020 for my qualifying child. However, he just turned 17. Will I have to pay back the \$500 next year when I file my 2020 tax return?**

➤ **Q30. I claimed my child as a dependent on my 2019 tax return. She is graduating from school in 2020. Will she receive her own Payment?**

➤ **Q31. I claimed my mom as a dependent on my 2019 tax return. Will I receive an additional Payment for her or will she receive her own Payment?**

✓ **Q32. I think the amount of my Economic Impact Payment is incorrect. What can I do? (updated June 10, 2020)**

A32. Payment amounts vary based on income, filing status and family size. If you filed a 2019 tax return, the IRS used information from it about you, your spouse, your income, filing status and qualifying children to calculate the amount and issue your Payment. If you haven't filed your 2019 return or it has not been processed yet, the IRS used the information from your 2018 return to calculate the amount and issue your Payment. The IRS is not able to correct or issue additional payments at this time and will provide further details on IRS.gov on the action people may need to take in the future.

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. This is particularly important for individuals who may be entitled to the additional \$500 per qualifying child payments. We encourage everyone to review our "How do I calculate my EIP" question and answer ([See question 23](#)).

Keep the Notice 1444, Your Economic Impact Payment, you will receive regarding your Economic Stimulus Payment with your records. This notice will be mailed to each recipient's last known address within a few weeks after the Payment is made. When you file your 2020 tax return next year, you can refer to Notice 1444 and claim additional credits on your 2020 tax return if you are eligible for them. The IRS will provide further details on IRS.gov on the action they may need to take.

- **Q33. What if a child's parents who are not married to each other both got the \$500 for a child - will one of them have to pay that back? (updated May 15, 2020)**

Receiving My Payment

- **Q34. Is the Payment includible in my gross income? (updated April 24, 2020)**

- **Q35. If I owe tax, or have a payment agreement with the IRS, or owe other federal or state debts or past-due child support, will my Payment be reduced or offset? (updated May 8, 2020)**

- **Q36. How will the IRS know where to send my Payment? (updated May 15, 2020)**

- **Q37. What if the bank account number I used on my recent tax return is closed or no longer active? Can I switch and be mailed a Payment? (updated May 20, 2020)**

- **Q38. I already filed my 2019 tax return and owed tax. I scheduled a payment (electronic funds withdrawal, Direct Pay, or Electronic Federal Tax Payment System (EFTPS)) from my bank account. Will the IRS send my Payment to the account I used? (updated May, 14, 2020)**

- **Q39. I already filed my 2019 tax return, but I didn't provide bank information. Can I use the Non-Filers: Enter Payment Info Here tool to provide my banking information? (updated May, 14, 2020)**

➤ **Q40. How do I find the bank account information the IRS needs?**

➤ **Q41. What if I don't have a bank account? (updated May 20, 2020)**

➤ **Q42. My address is different from the last tax return I filed. How can I change my address? (updated June 9, 2020)**

➤ **Q43. Where did you get the bank information for me, and what if I need to change it? (updated May 14, 2020)**

➤ **Q44. I requested a direct deposit of my Payment. Why are you mailing it to me as a check?**

➤ **Q45. I heard that past-due child support can be taken from the EIP, but can other debt collectors get access to this money? (updated May 15, 2020)**

➤ **Q46. Will I need to provide information or reconcile the Economic Impact Payment on my 2020 taxes when I file next year? (added May 14, 2020)**

Prepaid Debit Cards

➤ **Q47. Can I have my economic impact payment sent to my prepaid debit card? (added May 14, 2020)**

➤ **Q48. Will IRS be sending prepaid debit cards? (added May 20, 2020)**

➤ **Q49. Can I transfer money from my debit card to my bank account? (added June 5, 2020)**

➤ **Q50. Can I specifically ask the IRS to send the Economic Impact Payment to me as a debit card? (added May 20, 2020)**

➤ **Q51. What do I do if my prepaid debit card was lost or destroyed? (added June 4, 2020)**

➤ **Q52. I received the prepaid debit EIP Card as my Payment, but my name is incorrect. What should I do? (added June 9, 2020)**

Payment Issued but Lost, Stolen, Destroyed or Not Received

➤ **Q53. I received my Payment by check but it was lost, stolen or destroyed. How do I get a new one? (added June 9, 2020)**

➤ **Q54. I received Notice 1444 in the mail saying my Payment was issued, but I have not received my Payment. What should I do? (added June 9, 2020)**

Non-Filer Tool

➤ **Q55. Do I need to use the Non-Filers: Enter Payment Info Here tool if I am not required to file a federal income tax return for 2019 or 2018 and I do not receive Social Security retirement, disability (SSDI), Supplemental Security Income (SSI) or survivor benefits, Veteran's benefits or Railroad Retirement benefits? (added May 14, 2020)**

➤ **Q56. Do I need to use the Non-Filers: Enter Payment Info Here tool if I am not required to file a federal income tax return for 2019 or 2018 and I do receive federal benefits for Social Security retirement, disability (SSDI), Supplemental Security Income (SSI) or survivor benefits, Veteran's benefits, or Railroad Retirement benefits? (added May 14, 2020)**

➤ **Q57. Do I need to use the Non-Filers: Enter Payment Info Here tool if I filed a return for 2019 or 2018? (updated May 14, 2020)**

Social Security, Railroad Retirement and Department of Veteran Affairs benefit recipients

➤ **Q58. Do Social Security, Railroad Retirement and Department of Veteran Affairs benefit recipients need to take any action? (added May 15, 2020)**

➤ **Q59. When will eligible Social Security, Railroad Retirement and Department of Veteran Affairs benefit recipients who are not required to file a tax return receive their Economic Impact Payment? (added May 15, 2020)**

➤ **Q60. How much will Social Security, Railroad Retirement and Department of Veteran Affairs benefit recipients receive? (added May 15, 2020)**

> **Q61. Do I need to do anything if I am the spouse of an SSA, SSI, RRB, or VA recipient? (added May 15, 2020)**

> **Q62. How will the IRS send my Economic Impact Payment if I have a representative payee or I am a representative payee? (added June 10, 2020)**

Returning the Economic Impact Payment

> **Q63. What should I do to return an Economic Impact Payment (EIP) that was received as a direct deposit or a paper check? (updated June 9, 2020)**

> **Q64. How do I return an Economic Impact Payment (EIP) that was received as an EIP Card (debit card) if I don't want the payment re-issued? (added June 9, 2020)**

Page Last Reviewed or Updated: 11-Jun-2020

1 NICOLA T. HANNA
 United States Attorney
 2 THOMAS D. COKER
 Assistant United States Attorney
 3 Chief, Tax Division
 MELISSA BRIGGS (Cal. Bar No. 320697)
 4 JOHN D. ELLIS (Cal. Bar No. 322922)
 Assistant United States Attorneys
 5 Federal Building, Suite 7211
 300 North Los Angeles Street
 6 Los Angeles, California 90012
 Telephone: (213) 894-6165
 7 (213) 894-2740
 Facsimile: (213) 894-0115
 8 E-mail: melissa.briggs2@usdoj.gov
 john.ellis3@usdoj.gov

9 Attorneys for the United States of America

10
 11 UNITED STATES DISTRICT COURT
 12 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 13 SOUTHERN DIVISION

<p>14 JANE DOE, et al., 15 Plaintiffs, 16 v. 17 DONALD J. TRUMP, et al., 18 Defendants.</p>	<p>No. 8:20-cv-00858-SVW-JEM [Proposed] Order Granting Motion to Dismiss</p>
---	---

19
 20 The Court, having read and considered the United States of America’s Motion to
 21 Dismiss (motion, ECF No. 30) and any responses thereto, holds that the United States of
 22 America is the only proper party defendant with respect to the claims asserted by
 23 plaintiffs. It accordingly DISMISSES Donald J. Trump, Mitch McConnell, Steven
 24 Mnuchin, Charles Rettig, the U.S. Department of the Treasury, and the U.S. Internal
 25 Revenue Service as defendants.

26 The Court further holds that it lacks subject-matter jurisdiction over the claims
 27 asserted by plaintiffs pursuant to Federal Rule of Civil Procedure 12(b)(1) and that
 28 plaintiffs have failed to state a claim upon which relief can be granted pursuant to

1 Federal Rule of Civil Procedure 12(b)(6). The Court accordingly GRANTS the motion
2 for the reasons stated therein and DISMISSES this action with prejudice.

3 **IT IS SO ORDERED.**

4

5 Dated: _____

6 HON. STEPHEN V. WILSON
United States District Judge

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28