UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	8:20-cv-00858-SVW-JEM	Date	7/8/2020
Title	*Jane Doe v. Donald J. Trump et al*		

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: ORDER DENYING PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER [9]

I. Introduction

Before the Court is an *ex parte* application for a temporary restraining order filed by a pseudonymous Jane Doe Plaintiff seeking declaratory and injunctive relief against the United States, the Internal Revenue Service ("IRS"), the U.S. Department of the Treasury, President Donald Trump, Senate Majority Leader Mitch McConnell, Treasury Secretary Steven Mnuchin, and IRS Commissioner Charles Rettig (collectively "the Government"). For the reasons articulated below, the Court DENIES the temporary restraining order.

II. Factual and Procedural Background

a. *The CARES Act*

In response to the COVID-19 pandemic, Congress passed the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"). The CARES Act provided financial assistance to individuals and businesses facing economic challenges as a result of the widespread shutdown of business and economic activity in the United States, initiated in an attempt to slow the spread of COVID-19.

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The CARES Act provides "Advance Credits" of up to $1,200 for eligible individuals and $500 for each of an eligible individual's qualifying children under age 17. 26 U.S.C. § 6428(a). "Eligible individuals," as defined in the Act, excludes nonresident aliens, individuals who are claimed as dependents by another taxpayer for the last taxable year, and any estate or trust. 26 U.S.C. § 6428(d). The amount of the credit allocated to eligible individuals is limited based on an eligible individual's adjusted gross income ("AGI") for their prior year tax return (either 2018 or 2019, depending on whether they filed a 2019 tax return before the IRS processed their Advance Credit), with phase-outs beginning at $75,000 for individual filers, and $150,000 for joint filers. 26 U.S.C. § 6428(c). The Act requires each recipient of an Advance Credit to have a Social Security number ("SSN"), which excludes undocumented immigrants without a work authorization who file taxes with an Individual Taxpayer Identification Number ("ITIN"). 26 U.S.C. § 6428(g); 20 C.F.R. §422.104(a). As a result, U.S. citizens who would otherwise qualify for the Advance Credit based on their income do not receive the Advance Credit if they file a joint tax return with a non-citizen spouse, who does not have a SSN and instead uses an ITIN (the "Exclusion Provision") to file their taxes. 26 U.S.C. § 6428(g)(1)(B).

The Act directs the Secretary of the Treasury to distribute these payments "as rapidly as possible." 26 U.S.C. § 6428(f)(3)(A). The Act also states that "[n]o refund or credit shall be made or allowed under this subsection after December 31, 2020." *Id.* The Secretary is empowered to disburse refunds payable immediately to any account authorized for delivery of a refund after January 1, 2018. 26 U.S.C. § 6428(f). Individuals who are not eligible for the Advance Credit based on their 2018 or 2019 tax returns, but who become eligible based on their final 2020 AGI, will not receive the Advance Credit until they file a tax return in 2021. *See* 26 U.S.C. §§ 6428(e), 6428(f)(3)(A).

b. *Plaintiff's Treatment under the CARES Act*

In her Complaint[1] Plaintiff alleges that she is a U.S. citizen with an AGI below $75,000, and that she has five minor children who are also U.S. citizens. Dkt. 1 at 8. She alleges that she is excluded from

[1] Plaintiff filed her first Amended Complaint on June 3, 2020, approximately one month after filing her TRO, which was based on her then-operative initial Complaint. *See* Dkt. 28; Dkt. 1. For convenience, the Court references the FAC in its following analysis, because it is currently operative in this lawsuit and asserts essentially the same claims, although it adds a John Doe defendant who asserts that he is identically situated to the Jane Doe defendant with regard to his eligibility for the Advance Credit. *Compare* Dkt. 1 *with* Dkt. 28.

access to the Advance Credit because she has filed a tax return jointly with her spouse, an immigrant who pays taxes and files tax returns with an ITIN. *Id.* Plaintiff states that, except for her spouse's lack of a SSN, she would otherwise be eligible for and receive an Advance Credit from the IRS, both for herself and each of her dependent US. citizen children. *Id.* at 8–9. Plaintiff also generally alleges that the alternative route to accessing the Advance Credit, which would require filing an amended return separately from an alien spouse without a SSN, would result in a higher tax rate and reduced access to credits and deductions when compared to filing jointly for similarly situated individuals. *Id.* at 11. However, Plaintiff does not expressly state that this is true for her personal tax filing circumstances.

In essence, Plaintiff's claim is that by specifically denying the Advance Credit to otherwise eligible individuals like herself because they filed joint tax returns with a spouse who lacks a SSN, the Government has denied her an immediate benefit that other similarly situated tax filers have received. She argues that the denial of this immediate benefit is unconstitutional because it infringes on both her fundamental right to marry and her right to equal protection under the law.

c. *Procedural Background and Relief Requested*

Plaintiff's lawsuit seeks declaratory and injunctive relief on behalf of herself and a class[2] consisting of all U.S. citizens who are married to, and file joint tax returns with, immigrants who use an ITIN and would otherwise qualify for an Advance Credit absent the Exclusion Provision in the CARES Act. Dkt. 1. Plaintiff alleges that her constitutional rights have been violated under the Due Process Clause, the Equal Protection Clause, and the First Amendment. *Id.* at 15–22. Plaintiff seeks an injunction prohibiting enforcement of the Exclusion Provision, a declaration stating that it is unconstitutional, and an Order instructing the Government to hold in escrow or earmark sufficient funds to issue Advance Credits to the class she seeks to represent. *Id.* at 24–25.

Plaintiff filed her Complaint on May 6, 2020, and an *ex parte* temporary restraining order ("TRO") on May 8, 2020. Dkt. 1; Dkt. 11. Plaintiff also filed a motion for provisional class certification Dkt. 11-1. The Court then set a briefing schedule for an Opposition by the Government and a Reply brief filed by Plaintiff. Dkt. 12.

[2] Plaintiff's motion for provisional class certification is discussed in Part 2 of this Order.

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III. Legal Standard

The purpose of a temporary restraining order is to preserve the status quo and prevent irreparable harm until a hearing may be held on the propriety of a preliminary injunction. *See Reno Air Racing Ass'n, Inc. v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006). The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction. *Lockheed Missile & Space Co. v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323 (N.D. Cal. 1995); *see Stuhlbarg Intern. Sales Co., Inc. v. John D. Brushy and Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2011).

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) ("*Winter*"). The Ninth Circuit employs the "serious questions" test, which states "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *All. for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). "A preliminary injunction is an 'extraordinary and drastic remedy.' It should never be awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 690 (2008) (citation omitted). The propriety of a temporary restraining order, in particular, hinges on a significant threat of irreparable injury, *Simula, Inc. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999), that must be imminent in nature. *Caribbean Marine Serv. Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988).

IV. Analysis

a. *Likelihood of Success on the Merits*

The Ninth Circuit considers the likelihood of success on the merits "the most important *Winter* factor; if a movant fails to meet this threshold inquiry, the court need not consider the other factors." *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017) (internal quotation marks omitted). However, even if likelihood of success is not established, "[a] preliminary injunction may also be appropriate if a movant raises 'serious questions going to the merits' and the 'balance of hardships

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. . . tips sharply towards' it, as long as the second and third *Winter* factors are satisfied." *Id.* (quoting *Cottrell*, 632 F.3d at 1134–35).

i. *The Government's Procedural Arguments*

In its Opposition brief, the Government raises three separate threshold arguments that it asserts prevent the Court from considering the merits of Plaintiff's constitutional arguments. *See* Dkt. 23 at 7–13. The Court will address each in turn.

1. *Plaintiff's Standing and the Ripeness of Plaintiff's Claim*

The Government asserts that Plaintiff lacks standing to bring this lawsuit under Article III of the Constitution, asserting that Plaintiff has not established her standing to bring this lawsuit based on the allegations in her Complaint. Dkt. 23 at 10–12. The Government first argues that in order to challenge a tax benefit as unconstitutional, Plaintiff is first required to seek that tax benefit herself by filing a refund claim with the IRS. *Id.* The Government cites to appellate cases where taxpayers seeking to challenge portions of Title 26 on constitutional grounds established standing by filing refund suits following submission of their claims to the IRS. *Id* (citing *Droz v. Commissioner*, 48 F.3d 1120, 1122 n.1 (9th Cir. 1995)); *Gaylor v. Mnuchin*, 919 F.3d 420, 425–426 (7th Cir. 2019); *Moritz v. Commissioner*, 469 F.2d 466, 467 (10th Cir. 1972).[3] The Government argues that these cases establish that despite the constitutional nature of her claims, Plaintiff lacks standing at this point in time. In the Government's view, until Plaintiff files a joint tax return for the year 2020, submits an administrative claim for a refund in which she raises her constitutional arguments, and the claim is then either denied by the IRS or not acted upon within six months, she has no standing to assert her constitutional claims in federal court.

To establish Article III standing, Plaintiff "has the burden of demonstrating that "(1) [she has] suffered an injury-in-fact, meaning an injury that is 'concrete and particularized' and 'actual and imminent,' (2) the alleged injury is 'fairly traceable' to the defendants' conduct, and (3) it is 'more than

[3] The cases cited by the Government are inapposite here— *Droz* addresses a classic refund dispute and simply indicates that the plaintiff's standing was undisputed. *Gaylor* involved a tax exemption that the plaintiffs had to affirmatively seek through their refund claim before they could be denied it (causing injury in fact), and *Moritz* addresses an Equal Protection challenge following denial of a deduction by the IRS.

speculative' that the injury is judicially redressable." *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1265 (9th Cir. 2020) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

The essence of Plaintiff's argument is that but for the Exclusion Provision, she would have already received a benefit from the Government, and that the decision to enact a statute that denies her immediate access to that benefit by singling her out on this basis (allegedly) violates her constitutional rights. Accepting for this analysis the substantive merits of Plaintiff's constitutional claims, she has suffered a "concrete and particularized" injury because she has been treated differently from other citizens otherwise similarly situated and has been denied a government benefit (in the form of an immediate advance payment) that she would otherwise be eligible for. *See, e.g. Heckler v. Matthews*, 465 U.S. 728, 738 (1984) (unequal treatment under Social Security benefit scheme based on gender constitutes a "judicially cognizable" injury). Moreover, because Plaintiff's claims are best analyzed through an equal protection lens, the fact that the Exclusion Provision creates an additional barrier to her access to benefits gives Plaintiff standing under Article III. *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993) ("the 'injury in fact' in an equal protection case of this variety . . . is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit"); *see also Braunstein v. Arizona Dep't of Transp.*, 683 F.3d 1177, 1184 (9th Cir. 2012) (recognizing the "broad conception" of Article III standing applied to equal protection challenges).

The other necessary elements to satisfy Article III's standing requirements are readily apparent from the face of the Complaint. The Government has disbursed the Advance Credits to other citizens but not to Plaintiff, making the injury "traceable" to the Government, and in the event this Court ultimately grants the injunctive and declaratory relief Plaintiff seeks, it would redress Plaintiff's injury. The Court concludes that Plaintiff has adequately established her standing to bring this lawsuit.

The Government also contends that Plaintiff's claim fails jurisdictionally under the ripeness doctrine. Dkt. 23 at 12. The ripeness doctrine is intended to avoid "premature adjudication" over "abstract disagreements" and to postpone judicial review until "an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–49 (1967). Where agency action offers a benefit or establishes criteria for dispensing benefits, courts generally have concluded that the plaintiff's application for benefits must be

denied before a claim is ripe for review. *See Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 809 (2003).

Because the statutory scheme enacted by Congress via the CARES Act extends a credit to eligible individuals either (1) as an advance refund, (2) as a refundable tax credit following the filing of a 2020 tax return[4], or (3) a combination of the two, the Government argues that Plaintiff's constitutional claims are not yet ripe. Dkt. 23 at 10–12.

The fact that in practice, some individuals will have to wait until 2021 to seek their Advance Credit does not mean Plaintiff's claims are not ripe. Plaintiff's allegations state that she is not within this category of individuals, and her constitutional claims require the Court to consider her position relative to other similarly situated individuals, not a separate sub-category of individuals who have their access to the Advance Credit delayed based on other requirements in the CARES Act. The statute is in effect, and Plaintiff has been denied a benefit based on a statutory classification that she alleges to be unconstitutional. The Government's ripeness argument is essentially no different from its standing argument and does not bar Plaintiff's lawsuit.

2. *Sovereign Immunity*

The Government argues in the alternative that because the United States as a defendant is entitled to sovereign immunity, and that Plaintiff cannot rely on the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, to waive sovereign immunity with regard to her claims. Dkt. 23 at 7, 9–10. The Government also argues that the fact that Plaintiff has additionally named individual government officials in their official capacity does not permit her to avoid this restriction on her ability to bring this lawsuit against the United States. *Id.* at 10.

[4] For illustrative purposes, if an eligible individual had an AGI above $75k (single) or $150k (joint) on their most recent tax return (2018 or 2019), they would not receive the Advance Credit now, but if they ultimately fell below those thresholds for the 2020 tax year, they could seek an Advance Credit in Spring 2021 when filing their 2020 return. As explained below, Plaintiff does not allege that she falls within this category, so this feature of the CARES Act does not affect the ripeness of her claim.

Plaintiff seeks only injunctive and declaratory relief in her FAC.[5] *See* Dkt. 28 at 16 ("Plaintiffs seek the entry of a temporary restraining order, preliminary and permanent injunction, and Declaratory Relief"). "The Supreme Court has 'long held that federal courts may in some circumstances grant injunctive relief against' federal officials violating federal law." *Sierra Club v. Trump*, 929 F.3d 670, 694 (9th Cir. 2019) (citing *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015)); *see also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) ("[I]njunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally."). Plaintiff's FAC names a number of officers of the federal government, including Treasury Secretary Steven Mnuchin, IRS Commissioner Charles Rettig, Senator Mitch McConnell[6], and President Donald Trump. Dkt. 28. Because Plaintiff's claims for injunctive and declaratory relief arise under the Constitution and are asserted against a federal officer, this Court has jurisdiction[7] to hear them, and they are not barred by sovereign immunity.[8]

3. *Whether 26 U.S.C. § 7422 provides Plaintiff's sole remedy in these circumstances.*

[5] The Court makes this observation without addressing the question of which specific form of injunctive and declaratory relief would be appropriate in the event Plaintiff prevails on the merits of her claim.

[6] To the extent that Senator McConnell's inclusion in this lawsuit is premised on his sponsorship of the CARES Act, any claims are barred by legislative immunity. *Gravel v. United States*, 408 U.S. 606, 615–16 (1972)

[7] The Government does not dispute Plaintiff's claim that subject matter jurisdiction exists under 28 U.S.C. §§ 1331. Dkt. 28 at 4. It is unclear why Plaintiff has referenced supplemental jurisdiction as well, given that her claims appear to solely arise under the Constitution. *Id.*

[8] The parties center their briefing on the question of whether 5 U.S.C. § 702 applies as a waiver for sovereign immunity. While the Court does not find that extended additional analysis on this issue is necessary, it notes that Section 702 also offers a basis for finding that sovereign immunity does not bar Plaintiff's lawsuit. *See The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 n.9 (9th Cir. 1989) ("This court has previously held that the 1976 amendment to § 702 waives sovereign immunity not only for suits brought under § 702 itself, but for constitutional claims brought under the general federal-question jurisdiction statute, 28 U.S.C. § 1331."); *see also Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1169–72 (9th Cir. 2017) (noting that § 702 evinces Congress' intent to eliminate the sovereign immunity defense in all equitable actions for specific relief, and concluding that § 702 waives sovereign immunity broadly for all causes of action that meet its terms).

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The Government also argues that the only waiver of sovereign immunity that would permit a refund of a tax credit to Plaintiff is contained in 26 U.S.C. § 7422(a). Section 7422(a) states in its entirety that:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

Id. Plaintiff is not seeking "the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected . . . ." *Id.* Plaintiff is not seeking a refund of any kind, simply injunctive and declaratory relief declaring the Exclusion Provision unconstitutional, and that the Court instruct the IRS to apply the provision in a manner that Plaintiff argues would be constitutional. *See* Dkt. 28 at 18–20.

The Government argues that Plaintiff's constitutional claims are foreclosed by *United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1 (2008). That case held that petitioners who failed to file a refund claim pursuant to § 7422(a) within the three-year administrative time limit required by 26 U.S.C. § 6511 could not assert that claim beyond that statutory period on the theory that the assessed tax violated the Export Clause of the Constitution.[9] *Id.* at 7–9. But those petitioners raised a constitutional argument in order to seek the refund of taxes they had previously paid on coal exports pursuant to the relevant section of the Tax Code. *See* 553 U.S. at 6. Similarly, the Ninth Circuit case the Government cites as additional support for this theory of Plaintiff's proper remedy only addressed a failure to exhaust the claims process articulated in § 7422(a) for constitutional claims seeking a refund of a previously

[9] The Export Clause of the Constitution states that "No Tax or Duty shall be laid on Articles exported from any State." Art. I, § 9, cl. 5.

imposed estate tax. *See Quarty v. United States*, 170 F.3d 961, 964, 972–73 (9th Cir. 1999) (refusing to reach an ex post facto challenge to estate tax on the basis that this claim was not administratively exhausted).[10]

Because Plaintiff is seeking a benefit that has been denied to her by what she alleges to be unconstitutionally unequal treatment, rather than a refund of a tax imposed upon her, the constitutional claims raised here do not constitute a refund suit subject to § 7422(a)'s restrictions.[11]

The Court also notes, as a practical matter, that Plaintiff's claim is simply that the plain language of the Exclusion Provision, and its immediate impact on her access to benefits provided by the CARES Act is unconstitutional. The merits of her claim (discussed below) do not implicate the Government's "exceedingly strong interest" in the orderly collection of revenue, because no revenue is being collected by the CARES Act. *See Clintwood*, 553 U.S. at 11–12 (justifying its holding regarding § 7422(a) in part with reference to the "detailed refund scheme" necessary to assess, collect, and adjudicate taxes and disputes).

[10] *United States v. Windsor*, 570 U.S. 744, 769 (2013), which the Court will address the substance of below, is similarly distinguishable because the widowed plaintiff was challenging a tax imposed unconstitutionally pursuant to DOMA after submitting a refund claim to the IRS. Because Plaintiff's claim arises from a Government-imposed barrier to receipt of a benefit, and she is not seeking any refund of tax imposed, § 7422(a) does not bar her claim.

[11] The Government cites *Sarmiento v. United States*, 678 F.3d 147 (2d Cir. 2012), which addressed an "advance refund" tax credit provided in the Economic Stimulus Act of 2008. That Act "grant[ed] eligible individuals a tax credit for the 2008 tax year in an 'amount equal to the lesser of— (1) net income tax liability, or (2) $600,' with a minimum rebate of $300." *Sarmiento*, 678 F.3d at 151. But the substance of that case addressed only the narrow question of whether those advance refund tax credits were properly withheld from plaintiff's tax refund under the terms of an Offer-in-Compromise ("OIC") made by the IRS to settle an outstanding tax liability. The lawsuit in *Sarmiento* arose only because plaintiffs disputed how the IRS applied the terms of the OIC during the refund process and does not offer persuasive guidance given the facts of the case before the Court.

ii. *Plaintiff's Constitutional Claims*

The Court first notes that in portions of Plaintiff's motion, she asserts that the Government's conduct has "discriminated against [her] on the basis of her fundamental right of marriage, a right guaranteed to her under the Constitution of the United States." Dkt. 11 at 14–15. This argument conflates two separate forms of constitutional protections she is entitled to— the protection against government infringement on her fundamental rights under the Due Process Clause of the Fifth Amendment, and her right to Equal Protection under the Fourteenth Amendment. *Compare Ball v. Massanari*, 254 F.3d 817, 823–24 (9th Cir. 2001) (outlining Equal Protection analysis with regard to a federal statute) *with Witt v. Dep't of Air Force*, 527 F.3d 806, 817 (9th Cir. 2008) ("When a fundamental right is recognized, substantive due process forbids the infringement of that right at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.") (citing *Reno v. Flores,* 507 U.S. 292, 301–02 (1993)) (internal quotation marks omitted).

Accordingly, the Court will evaluate her constitutional claims to determine at this preliminary stage whether she has established a likelihood of success on the merits with regard to (1) violation of her First Amendment rights, (2) violation of her fundamental rights protected by the Due Process Clause of the Fifth Amendment, and (3) violation of the Equal Protection Clause of the Fourteenth Amendment, as it is reverse incorporated into the Fifth Amendment with regard to the federal government. *See Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."); *see also United States v. Navarro*, 800 F.3d 1104, 1113 (9th Cir. 2015) ("Technically, the Commission's Guidelines are not governed by the Equal Protection Clause of the Fourteenth Amendment, which applies only to the states, not to the federal government or federal entities.").

1. *First Amendment*

Plaintiff argues that the First Amendment's "right of association" renders the Exclusion Provision of the CARES Act unconstitutional. She argues that because she is excluded from eligibility for the Advance Credit solely on the basis of her choice to marry a non-citizen without a SSN, the Exclusion Provision unduly infringes on associational rights protected by the First Amendment. Dkt. 11

at 15, 19.

Plaintiff's choice of spouse is an "intimate association," but recent Ninth Circuit and Supreme Court caselaw holds that such associations are not protected by the First Amendment, which protects only "freedom of expressive association" under the Freedom of Speech Clause of the First Amendment. *See Erotic Serv. Provider Legal Educ. & Research Project v. Gascon*, 880 F.3d 450, 458 (9th Cir. 2018) (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984)); *see also IDK, Inc. v. Clark Cty.*, 836 F.2d 1185, 1192 (9th Cir. 1988). The intimate association Plaintiff alleges the Exclusion Provision unduly infringes upon is instead protected by the Fifth Amendment's Due Process Clause.[12] Accordingly, the Court finds that Plaintiff has not established any likelihood of success on the merits of her First Amendment claim.

2. *Due Process*

Plaintiff also argues that the Government's conduct violates the Fifth Amendment's Due Process Clause because it infringes on her fundamental right to marry who she chooses, in this case a non-citizen who lacks a SSN. Dkt. 11 at 14–18. The Supreme Court has recognized that a fundamental right to marry exists, and in some circumstances has found federal laws infringing on benefits extended to same-sex relationships or refusing to recognize them entirely violates this fundamental right. *See, e.g. Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) ("*Obergefell*") (finding that the fundamental right to marry prohibits laws preventing same-sex couples from exercising that fundamental right); *United States v. Windsor*, 570 U.S. 744, 769 (2013) ("*Windsor*") (finding federal law "interfer[ing] with the equal dignity of same-sex marriages" to be unconstitutional under both the Due Process Clause and Equal Protection Clause). If the Exclusion Provision infringes on a fundamental right, it would require strict scrutiny by this Court, which requires the Government to show that it has been "narrowly tailored to serve a compelling state interest." *See Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780 (9th Cir. 2014) (describing this "familiar" standard in the context of state rather than federal action).

In *Obergefell*, the Supreme Court specifically considered state laws denying same-sex couples defining marriage as a union between a man and a woman. 135 S. Ct. at 2593. After considering a

[12] The Court notes that this right arises under the Fifth Amendment rather than the Fourteenth (as discussed in the cases cited above) because Plaintiff is asserting these claims against the federal government.

number of prior Supreme Court cases striking down laws restricting marriage rights on the basis of race, gender, and incarcerated status, the Court concluded that this line of caselaw "compel[led] the conclusion that same-sex couples may exercise the right to marry." *Id.* at 2598–99. Accordingly, the Supreme Court concluded that state laws expressly prohibiting marriage by same-sex couples were not constitutional. *Id.* at 2607–08.

Windsor addressed the Defense of Marriage Act ("DOMA"), a federal law which expressly excluded same-sex partners from the definition of "spouse" as used in federal statutes. 570 U.S. at 750–51. As a result of this law, petitioner was denied a marital exemption from the estate tax after the death of her spouse, because the IRS applied DOMA to find that her same-sex marriage did not make her a "surviving spouse" for federal tax purposes. *Id.* at 753. In its analysis of DOMA, the Supreme Court considered the "design, purpose, and effect of DOMA" in determining its constitutional validity, and found that it represented an "unusual deviation from the usual tradition" of accepting state definitions of marriage in order to "deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages." *Id.* at 770. Finding that the legislative history and statutory text also supported an inference that DOMA was intended to expressly disapprove of same-sex marriage and subjected such relationships to substantial financial consequences, the Supreme Court determined that it violated the Due Process Clause. *Id.* at 771–74.

The allegations in Plaintiff's motion do not support the conclusion that the Exclusion Provision infringes on Plaintiff's fundamental right to marry. First, the Exclusion Provision has no direct effect on Plaintiff's ability to marry who she wishes, and, although Plaintiff argues that the effect of the Exclusion Provision should be deemed equivalent to that of DOMA, the Court cannot ignore the obvious distinction between a single exclusionary provision in a law passed expressly to distribute COVID-19 relief during the middle of a pandemic and a federal law passed to expressly target and "demean" the marriage status of same-sex couples. *Windsor*, 570 U.S. at 774. Second, to the extent that it does distinguish between benefits conferred on the basis of who Plaintiff marries, it focuses this distinction on the filing of a joint tax return, rather than expressly targeting individuals like Plaintiff, who are married to non-Citizens without SSNs. Finally, to the extent that it does make distinctions between types of marriages, these distinctions focus on alienage, which (as the Court will discuss below) is an area where courts afford Congress substantial deference.

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As the Supreme Court recognized in *Windsor*, "Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges." 570 U.S. at 764. Pre-*Windsor*/*Obergefell* Ninth Circuit cases considering the right to marry in the context of government benefits and aliens (while an imperfect fit for the facts of Plaintiff's lawsuit) also suggest that only a federal statute that "directly and substantially" interferes with the fundamental right to marry would be subject to heightened scrutiny. *See Aleman v. Glickman*, 217 F.3d 1191, 1200 (9th Cir. 2000) (finding that distinction in eligibility for food stamps based on divorce versus death of a U.S. citizen spouse did not "interfere directly and substantially with the right to marry."). Although the Exclusion Provision treats Plaintiff differently than similarly situated individuals who have chosen to marry U.S. citizens or non-citizens who do possess a SSN, the`er`````````````````````` Court cannot say that the additional burden this imposes on Plaintiff substantially or directly curtails her fundamental right to marry.[13]

3. *Equal Protection*

Plaintiff also argues that she has a likelihood of success on the merits based on her argument that the Exclusion Provision violates the Equal Protection Clause. Dkt. 11 at 15–16, 18. Plaintiff argues that denying her the Advance Credit on the basis of her joint tax filing with a spouse who lacks a SSN constitutes unequal treatment in violation of the Equal Protection Clause. Dkt. 11 at 15–16. Plaintiff argues that such unequal treatment requires a "compelling interest" to justify this unequal treatment, impliedly asserting that this Court should apply strict scrutiny to the Exclusion Provision on that basis. *Id.* Plaintiff also later asserts that the Exclusion Provision constitutes an "invidious classification" because it is based on the alienage status of her spouse. *Id.* at 18.

[13] Recent decisions by appellate courts, including the Ninth Circuit, also support a narrower reading of the breadth of the fundamental right to marriage than urged by Plaintiff. *See Latta v. Otter*, 771 F.3d 456, 477 (9th Cir. 2014) (Reinhardt, J., concurring in opinion by Reinhardt, J.) (describing process for determining the scope of the fundamental right to marry based on the principles set forth by the Supreme Court in its prior cases); *Becker v. Office of Pers. Mgmt.*, 853 F.3d 1311, 1315 (Fed. Cir. 2017) (concluding that "[n]othing in *Obergefell* changes the required approach to evaluating the kind of line-drawing for eligibility for public funds" when a widow challenged a federal statute denying her access to survivor benefits based on the length of her marriage); *Franceschi v. Yee*, 887 F.3d 927, 937 (9th Cir. 2018) ("[t]he range of liberty interests that substantive due process protects is narrow"); *Bakran v. Sec'y, United States Dep't of Homeland Sec.*, 894 F.3d 557, 564–66 (3d Cir. 2018) (finding that a statute barring appellant from adjusting his foreign spouse's immigration status did not infringe on his fundamental right to marry post-*Obergefell*).

To determine the standard of review applicable to an equal protection challenge to a statutory classification like the Exclusion Provision, the Court must first consider whether the classification implicates a protected class. *United States v. Mayea-Pulido*, 946 F.3d 1055, 1059 (9th Cir. 2020). If the statutory classification implicates a protected class, the Court will apply heightened scrutiny and require the government to "satisfy a more exacting burden for the classification to pass constitutional muster." *Id.* If it does not, rational basis review applies. *Id.* The traditional "suspect classifications" encompassed by the Equal Protection Clause include race, gender, alienage, and national origin. *See Short v. Brown*, 893 F.3d 671, 679 (9th Cir. 2018). Classifications based on religion and legitimacy also receive heightened scrutiny. *See Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 804 (9th Cir. 2011); *Mayea-Pulido*, 946 F.3d at 1064–65.

The only suspect classification that the Exclusion Provision might plausibly be construed as distinguishing upon is alienage— there is no reference or argument that any of the other generally recognized suspect classifications might apply. Plaintiff is a U.S. citizen, not an alien, but the express operation of the Exclusion Provision does hinge on the "alien" status of her spouse, because if her spouse was a U.S. citizen (or an alien with a SSN), she would be eligible to receive the Advance Credit. But even assuming that heightened scrutiny based on the alienage status of Plaintiff's husband applies to the classification contained in the Exclusion Provision with regard to its impact on Plaintiff, in the specific context of *federal* classifications based on alienage, such distinctions are subject to rational basis review. *See Mathews v. Diaz*, 426 U.S. 67, 83 (1976); *Korab v. Fink*, 797 F.3d 572, 580 (9th Cir. 2014) (stating that the federal government's constitutional authority over immigration and the status of aliens must be read broadly). Plaintiff's citation to *Graham v. Richardson*, 403 U.S. 365, 372 (1971) concerns state regulation of aliens, and was expressly distinguished by the Supreme Court in *Diaz*. *See* 426 U.S. at 84–85 (finding that the equal protection analysis "involves significantly different considerations because it concerns the relationship between aliens and the States rather than between aliens and the Federal Government").

The classification in the Exclusion Provision also arguably distinguishes between types of aliens, because the Exclusion Provision affects Plaintiff differently on the basis of her marriage to a non-citizen without a SSN, as opposed to a non-citizen who is authorized to work in the U.S. and has a SSN. But again, such a classification by the federal government would be reviewed for a rational basis. *See Aleman*, 217 F.3d at 1197–98 (finding that *Diaz* requires that legislation which "discriminat[ed] within

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the class of aliens [,] allowing benefits to some aliens but not to others" requires rational basis review).

The Court finds that Plaintiff has not established that the Exclusion Provision subjects Plaintiff to unequal treatment on the basis of a "suspect classification" that justifies heightened scrutiny under the Equal Protection Clause. The Court concludes that the Exclusion Provision is subject to rational basis review with regard to the equal protection challenge asserted by Plaintiff.

4. *Rational basis scrutiny does not create a likelihood of success on the merits.*

As the Court concluded above, Plaintiff's constitutional claims are likely subject to rational basis review. Rational basis review is highly deferential to the Government. *See, e.g. Mayea-Pulido*, 946 F.3d at 1059 (under rational basis review, a Court must uphold the classification "if there is any reasonably conceivable state of facts that could provide a rational basis" for it). Plaintiff's motion and her Reply brief each include a single conclusory assertion that the Exclusion Provision lacks a rational basis. Dkt. 11 at 15; Dkt. 26 at 16. Plaintiff has not established that the Exclusion Provision is not rationally related to a legitimate government interest through her briefing on this motion, as is her burden under rational basis review. *See Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 681 (2012). Accordingly, the Court concludes that Plaintiff has not established a likelihood of success on the merits.

b. *The Remaining Winter Factors*

"Likelihood of success on the merits is the most important *Winter* factor; if a movant fails to meet this threshold inquiry, the court need not consider the other factors, in the absence of serious questions going to the merits." *VidAngel*, 869 F.3d at 857 (internal quotations and citations omitted). Because the Court finds that Plaintiff has not met this threshold inquiry, the Court will not consider the remaining *Winter* factors.

V. Conclusion

The Court determines that the Exclusion Provision is likely subject to rational basis review based on the record and arguments before the Court. Because such review is deferential, and Plaintiff has made

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no substantial argument in her motion that the Exclusion Provision is not rational, the Court finds that Plaintiff has not met her threshold burden of establishing a likelihood of success on the merits. The Court DENIES Plaintiff's motion.

2. Plaintiff's Motion for Class Certification

Given the denial of Plaintiff's TRO, and the early stage of these proceedings, the Court does not find it appropriate to consider a motion for provisional class certification. Plaintiff's motion is DENIED.

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