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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
 Reply to Response Brief (ECF 57);
 Memorandum of Points and Authorities
 Hearing Date: August 3, 2020
 Time: 1:30 p.m.
 Location: Conducted telephonically
 Hon. Stephen V. Wilson

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

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4 Dated: July 30, 2020

Respectfully submitted,

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

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

8 **II. ARGUMENT**

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

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

17 As the Government also explained, no evidence is required regarding the intent of
18 Congress, and no fact-finding by the Court is required to determine whether a rational
19 basis exists for the classification. *See F.C.C. v. Beach Commc’ns, Inc. (Beach)*, 508 U.S.
20 307, 314-15 (1993). Plaintiffs suggest that the Supreme Court’s holding in *Beach* is not
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1 applicable here.¹ (See ECF 57 at 25-26.) But *Beach*'s holdings that a legislature is not
2 required to "articulate its reasons for enacting a statute," that "it is entirely irrelevant for
3 constitutional purposes whether the conceived reason for the challenged distinction
4 actually motivated the legislature," and that "a legislative choice is not subject to
5 courtroom fact-finding and may be based on rational speculation unsupported by
6 evidence or empirical data" remain binding authority. *Beach*, 508 U.S. at 314-15.
7 *Beach*'s standard for rational-basis review was reiterated and upheld by the Supreme
8 Court in *Armour*, where it held that a classification subject to rational-basis review will
9 be upheld as long as "there is any reasonably conceivable state of facts that could
10 provide a rational basis for [it]." *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 681
11 (2012) (quoting *Beach*, 508 U.S. at 313). And the Ninth Circuit continues to rely on the
12 principles of rational-basis review set forth by *Beach* and *Armour*. See, e.g., *United*
13 *States v. Mayea-Pulido*, 946 F.3d 1055, 1059 (9th Cir. 2020) (quoting *Beach*, 508 U.S. at
14 313); *Krishna Lunch of S. Cal. v. Gordon*, 797 F. App'x 311, 314 (9th Cir. 2020)
15 (quoting *Beach*, 508 U.S. at 315); *Crawford v. Antonio B. Won Pat Int'l Airport Auth.*,
16 917 F.3d 1081, 1095 (9th Cir. 2019) (quoting *Armour*, 566 U.S. at 681).

17 Plaintiffs also suggest (ECF 57 at 23-24, 27) that any rational-basis review must
18 consider the weight of the consequences resulting from a classification. The Ninth
19 Circuit has explicitly rejected that approach. See *Aleman v. Glickman*, 217 F.3d 1191,
20 1201 (9th Cir. 2000); *Alcaraz v. Block*, 746 F.2d 593, 605 (9th Cir. 1984).

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

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

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

11 1. Administrative Considerations

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

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

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

1 Congress could have structured its advance refund scheme in myriad ways. It settled on
2 a scheme that appears to be premised on administrative exigency--hence, its mandate
3 that advance refunds be issued “as rapidly as possible.” *See* 26 U.S.C. § 6428(f)(3)(A).
4 Indeed, administrative exigency would explain why Congress directed the IRS to
5 compute and issue advance refunds using tax information that was already available to it.
6 *See* 26 U.S.C. § 6428(f)(3)(A). It would also explain why Congress declined to require
7 that the IRS take additional steps beyond reviewing taxpayers’ 2019 tax returns and why
8 it granted the agency broad discretion to review other information (including taxpayers’
9 2018 tax returns or their Forms SSA-1009 or RRB-1099 for 2019). And it would
10 explain why Congress required taxpayers who did not receive the entire advance refund
11 to which they were entitled to claim the remaining amount as a CARES Act credit on
12 their 2020 tax return. *See* 26 U.S.C. §§ 6428(a), (e).

13 Each of these decisions Congress made suggests that considerations of
14 administrative exigency may have informed its decisionmaking. Although Congress
15 could have theoretically required the IRS to attempt to ascertain whether a joint filer
16 excluded from the scheme on account of her spouse’s lack of an SSN valid for
17 employment would have qualified for the credit by filing separately, Congress may have
18 reasonably determined that such requirements would be too much of an administrative
19 burden on the IRS, especially in light of its directive to issue millions of advance refunds
20 during a global pandemic.⁴ Under rational-basis review, such a determination is
21 sufficient. And whether Congress could have selected a different method to achieve the
22 same result is not a consideration. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519,
23 563 (2012).

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

1 2. Section 6428(e)(2)

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

14 Plaintiffs' response centers on the premise that section 6428(e)(1) does not require
15 the repayment of an advance refund if the amount of the advance refund exceeds the
16 CARES Act credit reported on the individual's 2020 tax return. Plaintiffs contend that
17 "[e]ven if it turns out that an individual who received the Advance Payment was not
18 entitled to receive it, it won't have to be repaid." (ECF 57 at 22). But that misstates the
19 law. An advance refund may be issued only to an "eligible individual," as defined in
20 subsection (d), and only if such an individual otherwise qualifies for the advance refund
21 on account of her adjusted gross income and SSN valid for employment. *See* 26 U.S.C.
22 § 6428(c), (g). That is why section 6428(f)(2), in defining "advance refund amount,"
23 refers to the "the amount that would have been allowed as a credit under this section for
24 such taxable year." *See* 26 U.S.C. § 6428(f)(2). "Would have been allowed" confirms
25 that the eligibility rules set forth in section 6428(c), (d), and (g) apply with respect to any
26 advance refund that the IRS issues. Accordingly, if a statutorily ineligible individual
27 such as a nonresident alien individual nevertheless receives an advance refund, the IRS
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1 advises that the individual should return the advance refund to the IRS. *See Economic*
2 *Impact Payment Information Center*, [https://www.irs.gov/coronavirus/economic-impact-](https://www.irs.gov/coronavirus/economic-impact-payment-information-center)
3 *payment-information-center*, Q&A 14 (“Aliens who received a Payment but are not
4 qualifying resident aliens for 2020 should return the Payment to the IRS by following the
5 instructions about repayments”) (last accessed July 28, 2020).

6 3. Section 6428(d) and (g)

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

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

14 Plaintiffs spend much of their brief alleging, without citation to authority, that the
15 SSN requirement in section 6428(g) was designed to punish the spouses of individuals
16 without SSNs. Even if the provision were motivated in part by animus, however,
17 plaintiffs’ argument would fail because there are legitimate rational bases for the
18 classification. Plaintiffs cite to *Department of Agriculture v. Moreno*, 413 U.S. 528
19 (1973) for the proposition that classifications based on animus fail rational-basis review.
20 But they completely ignore more recent Supreme Court and Ninth Circuit precedent that
21 holds that allegations of animus do not defeat a classification subject to rational-basis
22 review as long as there is a legitimate rational basis for the classification.

23 In *Trump v. Hawaii*, the Supreme Court explained that statutes “hardly ever” fail
24 rational-basis review, and only do so when it “is impossible to ‘discern a relationship to
25 legitimate state interests’ or the policy is ‘inexplicable by anything but animus.’” -- U.S.
26 --, 138 S. Ct. 2392, 2420-21 (2018) (quoting *Romer v. Evans*, 517 U.S. 620, 632, 635
27 (1996)). Thus, the Supreme Court held that because a rational basis could be articulated
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1 for the policy that fell within the powers delegated to the president, the policy must be
2 upheld under rational-basis review, despite the concurrent presence of animus. Here, the
3 Government has articulated multiple rational bases based on tax administration for the
4 challenged language in section 6428(g). As such, it cannot be said that the provision is
5 “inexplicable by anything but animus,” and section 6428(g) survives rational-basis
6 review.

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

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

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

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

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

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

13 In their response, plaintiffs do not and cannot cite to anything in the extensive
14 legislative history of the previous tax credit provisions as evidence of animus against
15 persons married to individuals without SSNs valid for employment. Congress has the
16 power of the purse and can constitutionally exclude individuals without an SSN valid for
17 employment from the tax credits at issue here, and plaintiffs do not contend otherwise.
18 *See Mathews v. Diaz*, 426 U.S. 67, 83 n. 22 (1976); *see also Aleman*, 217 F.3d at 1203;
19 *Alcaraz*, 746 F.2d at 606. Even if section 6428(g) were overexclusive (and it is not clear
20 that it is) with respect to SSN holders who are married to and filed joint income tax
21 returns with non SSN-holders, that would not make it constitutionally infirm. *See*
22 *Aleman*, 217 F.3d at 1201 (quoting *Heller*, 509 US at 321); *see also Vance v. Bradley*,
23 440 U.S. 93, 108 (1979).

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25 ⁶ *See* Joint Comm. on Taxation, Description of the Tax Provisions of Public Law
26 116-136, The Coronavirus Aid, Relief, and Economic Security ("CARES") Act, JCX-
27 12R-20 (April 2020); 166 Cong. Rec. 61, H1840-41 (daily ed. March 27, 2020)
28 (statement of Rep. TJ Cox); *see also NLRB v. SW General, Inc.*, -- U.S. --, 137 S.Ct. 929,
943 (2017) ("[F]loor statements by individual legislators rank among the least
illuminating forms of legislative history.").

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

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

13 Finally, plaintiffs state (ECF 57 at 27) that “[e]xhaustive research has not
14 uncovered any case wherein any court has upheld a statutory provision treating United
15 States citizens differently than other United States citizens based on whom they were
16 married to and their marital status as elected on a federal income tax return.” (ECF 57 at
17 27.) The Government, however, has cited a number of such cases in its filings. *See* ECF
18 30 at 27-28 and ECF 36 at 9-10 (citing *Hofstetter v. Commissioner*, 98 T.C. 695, 701-02
19 (1992) and *Schinasi v. Commissioner*, 53 T.C. 382, 384 (1969)).

20 **E. Plaintiffs should not be allowed to conduct discovery**

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

25 Plaintiffs insist on discovery but cite no case law in support of that proposition or
26 state what discovery would be required to inform this Court’s determination of whether
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1 section 6428(g) withstands rational-basis review.⁷ This Court has determined that
2 plaintiffs can facially challenge 6428(g) under the theory unconstitutional actions by
3 Government officials can be challenged by plaintiffs seeking solely declaratory and
4 injunctive relief. (*See* ECF 44 at 8.) But as a facial constitutional challenge, even if
5 actual evidence of Congress’s intent were required--which *Beach* and its progeny make
6 clear it is not--the only evidence of Congress’s intent would be the legislative history of
7 section 6428(g) (of which there is none) and similar Code provisions (which is already
8 available to plaintiffs and which was cited extensively in the Government’s brief). In
9 sum, because the Government has demonstrated plausible rational bases for the
10 challenged classification in section 6428(g), discovery is not warranted.

11 **III. CONCLUSION**

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

14 Dated: July 30, 2020

Respectfully submitted,

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