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IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

JANE DOE, *et al.*,

Plaintiff,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

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

Notice of Motion and Motion for Leave to File Memorandum of Law as *Amicus* Brief in Support of Defendants' Motion to Dismiss

Hearing on Motion to Dismiss

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

PLEASE TAKE NOTICE that movant Federation for American Immigration Reform ("FAIR") respectfully moves this Court for leave to file the accompanying memorandum of law as an *amicus curiae* brief in support of the federal defendants' motion to dismiss. Although FAIR's motion does not warrant a hearing, FAIR's *amicus* brief concerns the matter being heard on July 13, 2020, at 1:30 p.m., before Judge Stephen V. Wilson in Los Angeles, Courtroom 10A.

At the hearing on July 13, 2020, the federal defendants will move this Court to dismiss this action under FED. R. CIV. P. 12(b)(1) for lack of jurisdiction and under FED. R. CIV. P.

12(b)(6) for failure to state a claim. The *amicus* brief that is the subject of this motion supplements the jurisdictional and merits arguments raised by the defendants. The parties neither consented to FAIR's motion nor indicated whether they intended to oppose it.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae Federation for American Immigration Reform ("FAIR") is a nonprofit organization incorporated in the District of Columbia and classified as an educational charity under I.R.C. § 501(c)(3). FAIR is American's largest and oldest public interest group advocating for the control of illegal immigration and the reduction in legal migration to levels more consistent with the national interest and sound public policy. FAIR has members in all fifty states, and nearly one million members in total.

REASONS TO GRANT LEAVE TO FILE

District courts have broad discretion to accept *amicus curiae* submissions. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995). Accordingly, this Court accepts *amicus* briefs and memoranda in appropriate cases. *See*, *e.g.*, *Valentini v. Shinseki*, 860 F. Supp. 2d 1079, 1088 (C.D. Cal. 2012). Unlike the corresponding appellate rules, the federal and local rules applicable here do not address *amicus* submissions. Nonetheless, movant FAIR respectfully submits that the appellate rules' criteria for granting leave to file *amicus* briefs support FAIR's motion here.[2]

The Advisory Committee Note to the 1998 amendments to Appellate Rule 29 explains

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[1] Movant FAIR sought the parties' positions by email on June 19, 2020. The defendants indicated only that they do not consent; the plaintiffs did not respond.

[2] Consistent with FED. R. APP. P. 29(a)(4)(E), counsel for movant authored the motion and brief in whole, and no counsel for a party authored the motion or brief in whole or in part, nor did any person or entity, other than the movant and its counsel, make a monetary contribution to preparation or submission of the motion or brief.

that "[t]he amended rule … requires that the motion state the relevance of the matters asserted to the disposition of the case" as "ordinarily the most compelling reason for granting leave to file." FED. R. APP. P. 29, Advisory Committee Notes, 1998 Amendment. As now-Justice Samuel Alito wrote while serving on the U.S. Court of Appeals for the Third Circuit, "I think that our court would be well advised to grant motions for leave to file *amicus* briefs unless it is obvious that the proposed briefs do not meet Rule 29's criteria as broadly interpreted. I believe that this is consistent with the predominant practice in the courts of appeals." *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 133 (3d Cir. 2002) (citing Michael E. Tigar and Jane B. Tigar, *Federal Appeals – Jurisdiction and Practice* 181 (3d ed. 1999) and Robert L. Stern, *Appellate Practice in the United States* 306, 307-08 (2d ed. 1989)). With that background, movant FAIR explains the relevance and value of its brief to this Court's consideration of the important issues raised here.

Movant respectfully submit that their proffered memorandum of law will bring several relevant matters to the Court's attention:

- Because Article III standing is a precondition to this Court's consideration of either the merits or injunctive relief, movant FAIR supplements the federal defendants' discussion of standing with respect to the reason *why* a class member's spouse lacks a Social Security Number ("SSN"). *Amicus* Memo. at 3-4. In particular, movant FAIR argues that this Court should consider two distinct subclasses, based on whether the spouses without SSNs could have petitioned for no-quota work-authorized immigrant visas (and SSNs) under the "immediate relative" classification. 8 U.S.C. § 1151(b)(2)(A)(i). The subclasses should be: (1) those with spouses who are illegal aliens ineligible for SSNs; and (2) those with spouses who are other types of aliens who have chosen not to apply for an SSN.

Movant FAIR argues that the standing analysis differs for these two distinct subclasses. *Id*.

- For the first subclass, movant FAIR argues that such plaintiffs lack a legally cognizable interest, which standing requires for an injury in fact. *Amicus* Memo. at 4-6 For the second subclass, movant FAIR argues that the injuries are self-inflicted, which cannot support Article III standing. *Amicus* Memo. at 4.
- Movant FAIR argues that the Speech or Debate Clause shields defendant McConnell from civil litigation for actions undertaken to enact the challenged legislation. *Amicus* Memo. at 8-9. Movant FAIR also respectfully submits that the plaintiffs' counsel lack a good-faith basis for including Senator McConnell as a defendant. *Id.*
- With respect to the *Ex parte Young* exception to sovereign immunity (namely, a suit in equity against an officer to enjoin ongoing *ultra vires* conduct), movant FAIR argues that the availability of an adequate alternate remedy bars equitable relief – analogously to the adequate-remedy bar of 5 U.S.C. § 704 – and that, in any event, injunctive relief is discretionary in suits against the government; further, movant argues that the self-inflicted nature of an injury defeats the irreparable harm required for an injunction, even when it does not defeat Article III standing. *Amicus* Memo. at 6-7, 8.
- Movant FAIR argues that the remedy for equal-protection violations can "level up" the treatment for the disfavored class or "level down" the treatment of the favored class (that is, terminate payments to everyone), which this Court would need to consider before issuing equitable relief that requires paying unappropriated funds from the Treasury. *Amicus* Memo. at 7-8.

- On the merits, movant FAIR supplements the federal defendants' arguments that the rational-basis test applies here, *Amicus* Memo. at 10-12, and that the challenged legislation satisfies the rational-basis test. *Amicus* Memo. at 12-13.

These issues all are relevant to this Court's decision on the federal defendants' motion to dismiss, and movant FAIR respectfully submits that its *amicus* memorandum will aid the Court.

With respect to the jurisdictional issues, this Court has an obligation to consider them *sua sponte*, even if not raised by the parties. *Demore v. Kim*, 538 U.S. 510, 516 (2003). For that reason, jurisdictional issues are an exception to courts' general hesitation to consider issues raised only by an *amicus*. *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 97 n.4 (1991). But even the non-jurisdictional issues raised by an *amicus* can aid the court, either by helping the court decide the case or by highlighting issues that the court does *not decide* because not raised by a party: "We therefore leave for another day the challenging questions raised by [the *amicus*]." *United States v. Hunter*, 786 F.3d 1006, 1008 (D.C. Cir. 2015); *Physicians Comm. for Responsible Med. v. EPA*, 292 F.App'x 543, 545 n.1 (9th Cir. 2008) (declining to reach issue raised by *amicus*). Consequently, even the issues that movant raises that the Court need not consider will aid the Court in clarifying what it did not consider.

The timing of FAIR's motion – filed after the parties' briefs – does not preclude this Court from considering the issues that FAIR raises. To the extent that the Court wants the parties' views on these issues, the Court could request the parties to file supplemental responses. Indeed, the model followed by California's *state* courts is to have *amicus* briefs follow the parties' briefing, CAL. R. CT. 8.200(c)(1), with an opportunity for the parties to respond. *Id.* 8.200(c)(6). In addition, with respect to including Senator McConnell as a defendant, despite the Speech or Debate Clause, U.S. CONST., art. I, § 6, cl. 1, movant respectfully submits that the Court should

order the plaintiffs to explain how suing Senator McConnell is "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." FED. R. CIV. P. 11(b)(2). Political plaintiffs or counsel should not have leave to use the Article III process to harass members of Congress.

CONCLUSION

For the foregoing reasons, movant respectfully requests that this motion for leave to file the accompanying memorandum of law as *amicus curiae* be granted.

Dated: June 29, 2020

Respectfully submitted,

/s/ Lawrence J. Joseph

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Counsel for Movant

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June 2020, I electronically filed the foregoing motion for leave to file together with the accompanying *amicus curiae* brief, with the Clerk of the Court for the United States District Court for the Central District of California by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Notice of this filing will be sent by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Lawrence J. Joseph

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Counsel for Federation for American Immigration Reform

IN THE UNITED STATES DISTRICT COURT
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SOUTHERN DIVISION

JANE DOE, *et al.*,

Plaintiff,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

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

Movant Federation for American Immigration Reform's Notice of Interested Parties

Hearing on Motion to Dismiss

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

Movant and proposed *amici curiae* Federation for American Immigration Reform has no parent corporation or outstanding stock within the ambit of FED. R. CIV. P. 7.1.

The undersigned, counsel of record for movant and proposed *amicus curiae* Federation for American Immigration Reform, certifies that the following listed party (or parties) may have a pecuniary interest in the outcome of this case. These representations are made to enable the Court to evaluate possible disqualification or recusal:

- Plaintiffs Jane Doe and John Doe and all others similarly situated (*i.e.*, those excluded from receiving payment under 26 U.S.C. § 6428 because they file taxes jointly with a spouse who lacks a Social Security Number).
- All congressionally intended beneficiaries of 26 U.S.C. § 6428, for whom payments might need to cease to equalize treatment *vis-à-vis* plaintiffs if plaintiffs prevail.
- United States of America.

Dated: June 29, 2020

Respectfully submitted,

/s/ Lawrence J. Joseph

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IN THE UNITED STATES DISTRICT COURT
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JANE DOE, *et al.*,

Plaintiff,

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Proposed Order

Hearing on Motion to Dismiss
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

On considering the Federation for American Immigration Reform's motion for leave to file its *amicus curiae* brief, the parties' positions on filing the brief, and the entire record herein, it is hereby

ORDERED that the motion is GRANTED; and it is

FURTHER ORDERED that the Clerk is ordered to file the *amicus curiae* brief that accompanied the motion on the docket;

SO ORDERED.

Dated: _____

_____

U.S. DISTRICT JUDGE

Lawrence J. Joseph (SBN 154908)
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IN THE UNITED STATES DISTRICT COURT
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JANE DOE, *et al.*,

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

Amicus Curiae Federation for American Immigration Reform's Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss

Hearing on Motion to Dismiss

Hearing Date:	July 13, 2020
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Hon. Stephen V. Wilson

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Individuals whose spouses lack Social Security Numbers (collectively, "Plaintiffs") have sued various federal officials and offices (collectively, the "Government") over the exclusion of married couples filing joint tax returns from the stimulus payments of the Coronavirus Aid, Relief, and Economic Security Act, PUB. L. NO. 116-136, § 2201(a), 134 Stat. 281, __ (2020) ("CARES Act"), as codified at 26 U.S.C. § 6428.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae Federation for American Immigration Reform ("FAIR") is a nonprofit organization incorporated in the District of Columbia and classified as an educational charity under I.R.C. § 501(c)(3). FAIR is American's largest and oldest public interest group advocating for the control of illegal immigration and the reduction in legal migration to levels more consistent with the national interest and sound public policy. FAIR has members in all fifty states, and nearly one million members in total.

STATUTORY BACKGROUND

As enacted by the CARES Act, Section 6428 establishes a payment program enacted as an emergency macroeconomic stimulus immediately to boost consumer spending within the United States. Congress chose a funding distribution method rationally related to that goal, in that it used a government dataset — individual tax return filers for tax years 2018 and 2019 — that included bank direct deposit information for tens of millions of recipients, thus obviating the delay that requiring an application for the funds wherein the applicant designated deposit information would necessarily entail. In doing so, Congress made the rational political decision to direct funding to a subset of taxpayers — excluding (a) alien taxpayers without work authorization (that is, without Social Security numbers, a precise proxy for aliens without work authorization due to unlawful presence), 26 U.S.C. § 6428(g), (b) citizen or alien taxpayers with

reported incomes above certain levels (who could be assumed to be more likely to save rather than immediately spend the stimulus funds), 26 U.S.C. § 6428(c), (c) nonresident aliens (who are exempt from taxation on foreign income and also much more likely to remit the stimulus funding overseas), 26 U.S.C. § 6428(d)(1), and (d) dependents of taxpayers in these three classes, §6428(d)(2). Congress rationally elected not to make an exception for so-called mixed status families, with the narrow exception for alien taxpayers without a Social Security number who were spouses of members of the Armed Forces. 26 U.S.C. § 6428(g)(3).

STATEMENT OF FACTS

For purposes of a motion to dismiss, this Court assumes the well-pleaded facts of the complaint. *Hernandez v. Mesa*, 137 S.Ct. 2003, 2005 (2017), In the interest of brevity, FAIR adopts the facts as stated by the Government. Gov't Memo. at 4-5.

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER PLAINTIFFS' CLAIMS.

Federal courts are courts of limited jurisdiction. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Accordingly, federal courts must determine their jurisdiction, even if the parties concede jurisdiction: "Although the parties did not raise the issue in their briefs on the merits, we must first consider whether we have jurisdiction to decide this case." *Demore v. Kim*, 538 U.S. 510, 516 (2003) (interior quotation marks omitted); *cf. Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 97 n.4 (1991) (jurisdictional arguments are an exception to rule that courts ordinarily do not consider issues raised only by an *amicus*). *Amicus* FAIR concurs with the Government that this Court lacks jurisdiction over Plaintiffs' claims. *See* Gov't Memo. at 5-14. In this Section, FAIR not only expands on the issues that the Government

raises but also raises additional jurisdictional defects in Plaintiffs' case.

A. Plaintiffs lack standing.

Under Article III, a "bedrock requirement" is that federal courts are limited to hearing cases and controversies. U.S. CONST. art. III, § 2; *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). As relevant here, courts assess Article III standing under a tripartite test for an "injury in fact": judicially cognizable injury to the plaintiff, causation by the challenged conduct, and redressability by a court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). Plaintiffs fail to meet their burden to show that they have standing. Because Plaintiffs cannot meet that burden, moreover, this Court should dismiss this action.

Although Plaintiffs seek to represent those who file their federal taxes with an individual taxpayer identification numbers ("ITIN") rather than a Social Security Number ("SSN"), the standing analysis requires digging deeper to inquire into the *reason* that a given plaintiff or member of the proposed plaintiff class files with an ITIN. For illegal aliens whose only option is to use an ITIN, the plaintiffs have no right to enforce here. By contrast, for class members who are not illegal aliens, the filing via an ITIN over an SSN is the class member's choice (that is, the class members could get an SSN). For this second subset of the plaintiff class, the injury that this suit seeks to redress is, therefore, self-inflicted and does not form the basis for either Article III jurisdiction or injunctive relief.

By way of background, § 6428 excludes taxpayers who are not work-authorized from recovery payment eligibility. *Amicus* FAIR suspects that that immigration status is the only reason many — or even all — Plaintiffs' alien spouses lack an SSN. For any Plaintiffs' spouses who were not illegal aliens, those Plaintiffs could have petitioned for no-quota work-authorized

immigrant visas (and SSNs) under the "immediate relative" classification. 8 U.S.C. § 1151(b)(2)(A)(i). For this reason, the proposed class consists of two *subclasses*: (a) illegal aliens ineligible for SSNs; and (b) other aliens who have chosen not to apply for an SSN. The standing analysis differs for these two subclasses, but neither has standing.

1. Class members who *are not* illegal aliens suffer self-inflicted injuries, which do not support standing.

For Plaintiffs — and class members, if a class is certified — who could obtain an SSN, but have chosen not to do so, the injury from the CARES Act's criteria is a self-inflicted injury. Such injuries cannot support standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013); *Pennsylvania v. New Jersey,* 426 U.S. 660, 664 (1976). Accordingly, if any of Plaintiffs are in this subclass, they should be dismissed.

2. Class members who are spouses of illegal aliens lack a legally protected interest.

As indicated, *amicus* FAIR suspects that most Plaintiffs fall into this second subclass: citizens married to illegal aliens who cannot obtain an SSN because they are not authorized to work in the United States. Even these Plaintiffs could, of course, obtain CARES payments for the U.S. citizen spouse and any U.S. citizen children by filing a "married, filing separately" tax return, but Plaintiffs want more.

But these Plaintiffs simply have no right to more. Even if Plaintiffs' characterization of § 6428 were presumed to be accurate, that section could not provide the basis for a claim for the individual taxpayers or their proposed class members because that assistance would constitute a "welfare" or "similar" federal public benefit "provided by appropriated funds of the United States." 8 U.S.C. § 1611(c)(2). Thus, none of these Plaintiffs or proposed class members would be eligible for such assistance. Their alien spouses are not "qualified aliens" as defined by federal

welfare reform law. *See* 8 U.S.C. §§ 1611(a) (restriction of federal public benefits to "qualified aliens"), 1641(b) (definition of "qualified alien"). In sum, the CARES Act payments are not open to illegal aliens based on federal immigration law.

An Article III "injury in fact" requires "an invasion of a *legally protected interest* which is … concrete and particularized" to that plaintiff. *Defenders of Wildlife*, 504 U.S. at 560 (emphasis added). Plaintiffs have no such rights, so this is an instance where standing merges with the merits. *See* Section II, *infra* (Plaintiffs fail to state a claim); *Land v. Dollar,* 330 U.S. 731, 735 (1947) (when jurisdiction and the merits "intertwine," federal courts resolve the jurisdictional and merits issues together). As the Supreme Court recently explained in rejecting standing for *qui tam* relators based on their financial stake in a False Claims Act penalty, not all *interests* qualify as *legally protected* interests:

> There is no doubt, of course, that as to this portion of the recovery — the bounty he will receive if the suit is successful — a *qui tam* relator has a concrete private interest in the outcome of the suit. But the same might be said of someone who has placed a wager upon the outcome. *An interest unrelated to injury in fact is insufficient to give a plaintiff standing*. The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right. A *qui tam* relator has suffered no such invasion[.]

Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 772-73 (2000) (emphasis added, interior quotation marks, citations, and alterations omitted); *accord McConnell v. FEC*, 540 U.S. 93, 226-27 (2003). Thus, not all pecuniary losses necessarily qualify as an injury in fact. The same is true with Plaintiffs' alleged interest.

"[Article] III standing requires an injury with a nexus to the substantive character of the statute or regulation at issue." *Diamond v. Charles*, 476 U.S. 54, 70 (1986); *cf. Stevens*, 529 U.S. at 772-73 (claimed interest must qualify as a "legally protected right"). As explained in Section II, *infra*, neither the CARES Act nor the Constitution provides Plaintiffs a legally protected

interest in payments to families with illegal-alien spouses.[3]

B. Plaintiffs' claims are not ripe.

As the Government explains, Plaintiffs' claims are not ripe. Gov't Memo. at 9-11. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotations and citations omitted). Here, it is uncertain whether Plaintiffs will be entitled to a CARES payment (for example, their income might go up, their immigration or Armed Forces status might change).

C. Sovereign immunity bars this suit.

As the Government explains, Plaintiffs' tax-refund remedy under 26 U.S.C. § 7422 provides not only an adequate remedy but also the exclusive remedy for Plaintiffs' injuries. Gov't Memo. at 6-8, 11-14. That puts this action outside the United States' waiver of sovereign immunity. *Id.* at 11-12. Specifically, the status quo does not constitute "final agency action," but even if it did, Plaintiffs would have an "adequate remedy in a court." *See* 5 U.S.C. § 704. For either reason — lack of finality or availability of an alternate remedy — the injuries raised here must proceed under the special statutory review in the tax code, *see* 5 U.S.C. § 703, not the general action for review under the Administrative Procedure Act ("APA"). *Id.*

D. Plaintiffs cannot bring an officer suit under *Ex parte Young*.

By naming federal officers, Plaintiffs seek to evade sovereign immunity by enjoining a violation of federal law. *See*, *e.g.*, *United States v. Lee*, 106 U.S. 196, 220-21 (1882) (property); *Ex parte Young*, 209 U.S. 123, 149 (1908) (property); *Youngberg v. Romeo*, 457 U.S. 307, 316

[3] Although this requirement is analogous to the prudential zone-of-interests test, *Stevens* and *McConnell* make clear that the need for a *legally protected interest* is an element of the threshold inquiry under Article III of the Constitution, not a merely prudential inquiry.

(1982) (liberty). But — like the APA and its waiver of sovereign immunity — equity requires the lack of an adequate alternate remedy, which restricts Plaintiffs' equitable claims for the same reason that it bars their APA claims. *See* Section I.C, *supra*. Three other issues also bar the relief that Plaintiffs seek in equity.

First, the other half of the core entitlement to equitable relief is irreparable harm. As explained, some of the alleged injuries may be self-inflicted. *See* Sections I.A.1-I.A.2, *supra*. Even injuries that can qualify as cognizable under Article III can nonetheless fail to qualify under the higher bar for irreparable harm. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149-50, 162 (2010). Plaintiffs' injuries result from their own choices, such as not getting an SSN or filing jointly. "[S]elf-inflicted wounds are not irreparable injury." *Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003); *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 596 (3d Cir. 2002) ("injury … may be discounted by the fact that [a party] brought that injury upon itself"); *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002). To the extent Plaintiffs' allegedly irreparable harm is self-inflicted, this Court should not issue relief to Plaintiffs.

Second, the *Ex parte Young* exception to sovereign immunity does not allow the Court to order the Government to make payments from the Treasury that Congress has not appropriated or authorized. Under the circumstances, then, this Court's injunctive relief would need to "level down" the allegedly unequal treatment if Plaintiffs prevailed:

> [W]hen the 'right invoked is that to equal treatment,' the appropriate remedy is a mandate of *equal* treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.

Heckler v. Mathews, 465 U.S. 728, 739-40 (1984) (citations and footnotes omitted, emphasis in original). In other words, Plaintiffs cannot get CARES payments, but they potentially can stop citizens, lawful residents, and other work-authorized aliens from getting CARES payments.

Third, the CARES Act seeks to stimulate the economy in a national emergency. This Court should hesitate before enjoining the payment of benefits that Congress found necessary to help address that emergency. Thus, even if Plaintiffs could establish not only this Court's jurisdiction but also the merits of Plaintiffs' claims, that would not necessarily require injunctive relief: "a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982); *cf. Burford v. Sun Oil Co.,* 319 U.S. 315, 318 (1943) ("It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of … governments in carrying out their domestic policy."). Where Plaintiffs have a later action for a tax refund, their equitable cause of action could be "dismissed for want of equity without prejudice to an action at law." *Beasley v. Tex. & P. R. Co.*, 191 U.S. 492, 494 (1903). *Port Angeles W. R. Co. v. Clallam Cty.*, 44 F.2d 28, 31 (9th Cir. 1931). That would leave Plaintiffs free to request the favorable treatment that they seek.

While *amicus* FAIR respectfully submits that Plaintiffs lack a legally protected interest and bring meritless claims, this Court should dismiss an equitable action even if the Court views its jurisdiction and the merits differently.

E. <u>With respect to Senator McConnell, the Speech or Debate Clause bars this suit.</u>

The Speech or Debate Clause, U.S. CONST., art. I, § 6, cl. 1, provides immunity for Congress and its Members for any claims predicated on legislative activities. *See Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502 (1975). This immunity extends to all civil actions.

Id. at 503. "[T]he Speech or Debate Clause immunizes Congressmen from suits for either prospective relief or damages." *Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 731 (1980); *accord Chateaubriand v. Gaspard*, 97 F.3d 1218, 1220 (9th Cir. 1996). Where it applies, the Clause protects legislators "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). Accordingly, "[t]he Speech or Debate Clause operates as a jurisdictional bar" to this type of action. *Howard v. Office of the Chief Admin. Officer*, 720 F.3d 939, 941 (D.C. Cir. 2013) (interior quotation marks omitted).

While it has become common under the Obama and Trump administrations for plaintiffs to name Presidents as defendants for claims that a federal court lacks jurisdiction to press against the President, Plaintiffs here can cite no such trend with respect to Senator McConnell, who was merely one sponsor of the challenged legislation. *Amicus* FAIR respectfully submits that this Court should not only dismiss Senator McConnell as a defendant but also ask Plaintiffs' counsel to explain why including Senator McConnell as a defendant is "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." FED. R. CIV. P. 11(b)(2).

II. PLAINTIFFS CANNOT STATE A CLAIM UNDER EITHER THE CARES ACT OR THE CONSTIUTION.

If this Court has jurisdiction, the Court should dismiss Plaintiffs' claims for failure to state a claim.

A. The Government has not interfered with Plaintiffs' right to marry.

Nothing in the CARES Act impinges on Plaintiffs' marriages. *See* Gov't Memo. at 15-18. Under the circumstances, Plaintiffs' invocation of the heightened scrutiny afforded to state or federal marriage restrictions is misplaced.

B. The rational-basis test applies to discrimination based on work-authorization or illegal-alien status.

Amicus FAIR agrees with the Government that the SSN-ITIN divide is a proxy for work status, not race or alienage. *See* Gov't Br. at 19. Equal-protection and due-process analyses under the Fifth Amendment involve sliding scales of scrutiny, based on whether a fundamental right or protected class is implicated. Here, the discrimination — *if there is any* — would fall under the rational-basis test because no fundamental right or protected class suffers from the CARES Act's focus on work-authorization status.

In *Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076 (9th Cir. 2010), the Ninth Circuit rejected a claim that denying an application for adjustment of status "violates a substantive due process right of Morales and his family to live together as a family, by effectively excluding him from the United States for ten years." 600 F.3d at 1091. While expressing "sympathy … as it is always troubling when the impact of our immigration laws is to scatter a family," the Ninth Circuit held that "the right as asserted by Morales is one far removed from the right of United States citizens to live together as a family." *Id.* Specifically, denial of the benefit "does not violate any of his or his family's substantive rights protected by the Due Process Clause." *Id.* The Ninth Circuit explained:

> To hold otherwise would create a barrier to removing an illegal alien like Morales in any case where that alien has married a United States citizen wife or fathered United States citizen children. Stated another way, to indulge this theory is to hold that an illegal alien with United States citizen family members cannot be removed, regardless of the illegality of that alien's entry into the United States or conduct while within its borders. Such a remarkable proposition, which would radically alter the status quo of our immigration law, simply cannot be gained by judicial fiat from an intermediate court.

Morales-Izquierdo, 600 F.3d at 1091. If the Constitution does not protect against separating these families *geographically*, it cannot protect against a requirement to file *tax returns* separately.[4]

Assuming *arguendo* that the CARES Act discriminates based on a type of alienage, the Act still triggers rational-basis review. Targeted in Plaintiffs' view against those officially known as "illegal aliens," the CARES Act would "discriminate" based on illegality, not on race or national origin: "Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy." *Plyler v. Doe,* 457 U.S. 202, 223 (1982); *cf. Korab v. Fink*, 797 F.3d 572, 577-78 (9th Cir. 2014) ("federal statutes regulating alien classifications are subject to the easier-to-satisfy rational-basis review"). Where, as here, a law does not "discriminate[] against aliens *lawfully admitted* to this country," it is constitutional. *DeCanas v. Bica,* 424 U.S. 351, 358 n.6 (1976) (emphasis added); *INS v. Nat'l Ctr. for Immigrants' Rights,* Inc., 502 U.S. 183, 196 n.11 (1991). To avoid the issue of illegality, the defenders of illegal aliens often claim discrimination based on race or national origin, but doing so has two problems.

First, equal-protection analysis applies only to an action taken "at least in part *because of,* not merely *in spite of,* its adverse effects" on a protected class. *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (emphasis added). That does not apply to disparate impacts like those alleged here.[5] Second, the disparate impact is not so great or so unexpected as to provide an

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[4] The fact that Plaintiffs' "mixed-status" families may include citizen dependents with SSNs is also constitutionally irrelevant. *Gonzalez-Cuevas v. INS*, 515 F.2d 1222 (5th Cir. 1975) (having citizen children does not advantage alien parents, directly or vicariously, regarding immigration laws).

[5] In *Feeney,* the passed-over female civil servant alleged that Massachusetts' veteran-preference law for civil-service promotions and hiring constituted sex discrimination. Because women then represented less than two percent of veterans, *Feeney,* 442 U.S. at 270 n.21, men were more than *fifty times* more likely to benefit from the state law challenged in *Feeney.*

inference of animus: "because Latinos make up a large share of the unauthorized alien population, one would expect them to make up an outsized share of recipients of any cross-cutting immigration relief program." *Dep't of Homeland Sec. v. Regents of the Univ. of California*, Nos. 18-587, 18-588, 18-589, 2020 U.S. LEXIS 3254, at *47 (June 18, 2020) (Slip Op. at 27-28). Neither illegality nor unauthorized work status are protected classes. Plaintiffs must, therefore, proceed under the rational-basis test.

C. The CARES Act satisfies the rational-basis test.

Plaintiffs argue that the CARES Act's ITIN focus is a proxy for alienage or race. Under the rational-basis test, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data," *F.C.C. v. Beach Communications, Inc.,* 508 U.S. 307, 315 (1993).[6] Consequently, rational-basis plaintiffs must "negative every conceivable basis which might support [the challenged statute]," including those bases on which the state plausibly *may have* acted. *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364 (1973) (internal quotation marks omitted, emphasis added). By contrast, plaintiffs cannot prevail even by marshaling "impressive supporting evidence … [on] the probable consequences of the [statute]" vis-à-vis the legislative purpose but must instead negate "the *theoretical* connection" between the two. *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 463-64 (1981) (emphasis in original). Plaintiffs' conjecture — while not evidence — would not help Plaintiffs, even if it were evidence.

Nonetheless, Massachusetts did not discriminate *because of sex* when it acted because of another, permissible criterion (veteran status). *Id.* at 272. Like Massachusetts, the CARES Act is based on a permissible criterion (work authorization), which is not unlawful discrimination.

[6] The rational-basis test applies because the due-process right here involves neither fundamental rights nor protected classes. *Id.* at 313.

Under *Beach* and *Lehnhausen*, it would be enough for the Government if Congress plausibly *may have* acted based on work-authorization status. Under the Supreme Court's recent *Regents* decision, any disparate impact is entirely understandable and shows no animus. In short, Plaintiffs cannot disprove the *theoretical* connection between Congress's efforts to target CARES Act payments and the CARES Act's goals.

CONCLUSION

This Court should grant the Government's motion to dismiss this action.

Dated: June 29, 2020

Respectfully submitted,

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