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June 2, 2020

The Honorable Ellen L. Hollander
United States District Court for the District of Maryland
101 W. Lombard St., Chambers 5B
Baltimore, MD 21201

Re: *Amador, et al., v. Mnuchin, et al.*, 1:20-cv-01102-ELH (D. Md.)

Dear Judge Hollander:

I represent the Federation for American Immigration Reform (FAIR) in the above-captioned case. FAIR has respectfully moved the Court for leave to file this amicus curiae brief in support of the Defendant government officials, and urges the Court to dismiss the complaint for failure to state a claim. Fed. R. Civ. Pro. 12(b)(6). Both parties have denied consent. *See* Motion for Leave to File Amicus Curiae Brief. As detailed in the Motion, FAIR's interests and arguments are distinct from both parties'.

Standard for Granting a Rule 12(b)(6) Motion to Dismiss.

A complaint survives a Rule 12(b)(6) motion to dismiss when it contains sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In the Fourth Circuit, "we must assume all well-pled facts to be true," and "draw all reasonable inferences in favor of the plaintiff." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009) (citations omitted).

Argument

Plaintiffs claim that they have a fundamental right to have the federal government "give recognition to their marriage and families, and to allow their children to understand … their concord with other

[mixed-status] families in their communities," First Amended Complaint, Docket No. 31(Complaint) ¶ 64. Yet, because many or all spouses of members of Plaintiffs' proposed class are illegal aliens, these members have no such fundamental right. Nor are Defendants barred from asserting these members' spouses' immigration status in order to show that the policy Plaintiffs challenge should not be given the heightened scrutiny implicated by a fundamental right, but rather should be reviewed (and upheld) under the rational basis standard. The privacy provisions Plaintiffs rely on are themselves clearly superseded by 8 U.S.C. § 1373, which forbids restrictions on the sharing of immigration-status information by federal officers.

1. Because the spouses of Plaintiffs' proposed class members include illegal aliens, the appropriate standard of review for Plaintiffs' Fifth Amendment claims is rational basis.

Plaintiffs are proposed representatives of a class of citizen "spouses" who claim to meet all the qualifications for entitlement to recovery payments under the CARES Act, 26 U.S.C. § 6428.2020, P.L. 116-140 ("§ 6428"), except for the requirement that each tax return filer—including both filers of a joint return—have included a valid Social Security number (on their 2018 or 2019 returns). Complaint ¶ 67. Section 6428 excludes taxpayers who are not work-authorized, due to their illegal immigration status, from recovery payment eligibility. Their immigration status is the only reason many or all of the alien spouses of the plaintiffs are ineligible for a Social Security number (SSN). If that were not so, each plaintiff by law could have petitioned for a no-quota work-authorized immigrant visa (and SSN) for their spouse under the "immediate relative" classification. 8 U.S.C. § 1151(b)(2)(A)(i). For this reason, it is not reasonable to infer from Plaintiffs' alleged facts that the class they propose to represent does not contain illegal alien members.

Plaintiffs' Fifth Amendment Equal Protection and Due Process theories rely on an impermissibly overbroad reading of the holding in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). Complaint, ¶ 76-77. In *Moore*, the Supreme Court stated that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment," and that "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which are served by the challenged regulation." *Id*. at 499. Even presuming Plaintiffs' factual claim that "§ 6428(g)(1)(B) selects certain categories of married individuals who may receive payments and declares that others may not," Complaint ¶ 77, the appellate circuits that have considered the application of *Moore* to unadmitted or inadmissible alien spouses have rejected it. There is "no authority to suggest that the Constitution provides an alien spouse with a fundamental right to reside in the United States simply because other [family] members … are citizens or lawful permanent residents." *De Mercado v. Mukasey*, 539 F.3d 1102, 1107 n.5 (9th Cir. 2008).

In *Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076 (9th Cir. 2010), the plaintiff relied on *Moore* to argue that denial of 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 espoused in

Moore." *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.

The fact that plaintiffs' "mixed-status" families may include citizen dependents with SSNs, *see* Complaint ¶ 41, is also constitutionally irrelevant. *Gonzalez-Cuevas v. INS*, 515 F.2d 1222 (5th Cir. 1975) (holding that alien parents who have violated the immigration laws cannot gain favored status, directly or vicariously, through their citizen children over those aliens complying with the immigration laws.)

In short, because Plaintiffs have not shown a fundamental right or any other basis for heightened scrutiny, the appropriate standard of review for the policy they challenge is rational basis.

2. <u>The privacy provisions plaintiffs rely on do not bar a showing that the rational basis test is appropriate here</u>.

Plaintiffs claim that the Treasury Department Defendants may not challenge their class action claims of recovery payment eligibility, on the statutory ground that the Internal Revenue Service (IRS) is "prohibited by law from sharing any taxpayer information with any other governmental agencies. I.R.C. § 6103(a)." Complaint ¶ 55.

Plaintiffs are mistaken that taxpayer records that include citizenship or immigration status information are protected from disclosure for civil immigration enforcement purposes, although it is true that Defendants themselves have regrettably facilitated this unlawful proposition. Since 1996 Treasury officials have wrongly relied on I.R.C. § 6103(a) to maintain an agency-wide policy that they are "only" a tax collection agency and not an immigration enforcement agency, and non-enforcement of the immigration and welfare reform laws makes the task of enforcement of the tax laws easier. Plainiffs'cause of action relies on Treasury internal policy that the IRS must comply with the detailed privacy protections of § 6103(a) even if that means in effect that the Internal Revenue Service is operating an agency-wide "sanctuary" program for otherwise removable aliens.

Both parties are wrong. In 1996, Congress enacted an unambiguous exception to the taxpayer privacy statute that, because of its pan-agency scope, is codified in Title 8, rather than Title 26. In relevant part, 8 U.S.C. § 1373 (Communication between government agencies and the Immigration and Nationality Service) (2020) provides that

> (a) In general. Notwithstanding any other provision of Federal … law, a Federal…government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the [Department of Homeland Security] information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional authority of government entities. Notwithstanding any other provision of Federal… law, no person or agency may prohibit, or in any way restrict, a Federal … government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual: (1) Sending such information to, or requesting or receiving such information from, the [Department of Homeland Security]. (2) Maintaining such information. (3) Exchanging such information with any other Federal … government entity.

The unambiguous mandatory language of § 1373 exempts such communications with DHS from the privacy restraints of 26 U.S.C. § 6103(a). The § 6103 privacy provisions were in force when Congress enacted § 1373 as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, P.L. 104-208 (IIRIRA). The term "notwithstanding any other provision of Federal…law" clearly includes and thus overrides § 6103.

Plaintiffs' theory of constitutional injury may begin with the undisputed fact that under federal tax law they were required as mixed-status filers to include an ITIN on their joint return. But plaintiffs' cause of action relies on the claim that IRS privacy law bars the government from establishing the obvious rational basis for their recovery payment ineligibility—that the alien spouses used an ITIN because they lack Social Security numbers (and work authorization) due to their unlawful immigration status. As shown, Plaintiffs' claim of law is incorrect. This Court must reject attempts to rely on the Defendant's current unlawful policy—that of providing protection from civil immigration enforcement based on information disclosed on Plaintiff's tax returns—to bolster Plaintiffs' constitutional claims, or to draw any inferences in Plaintiffs' favor from Defendants' policy.

3. The challenged provisions have a rational basis.

A statute has a rational basis if it "is rationally related to a legitimate state interest." *Heller v. Doe*, 509 U.S. 312, 319-321 (1993). The Fourth Circuit has instructed that, to withstand a motion to dismiss, a plaintiff "must plead sufficient facts to overcome the presumption of rationality that applies to government classifications." *Giarratano v. Johnson*, 521 F.3d 298, 304 (4th Cir. 2008) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, (1973). The plaintiff must "negate every conceivable basis which might support the legislation." *Just Puppies, Inc. v. Frosh*, 2020 U.S. Dist. LEXIS 21506, *87 (D.Md. Feb. 7, 2020) (citing *Giarratano*, at 303).

Plaintiffs attempt to evade dismissal by pleading that the intent of Congress in enacting the new 2020 version of the § 6428 recovery provision in the CARES Act was "to provide families and workers assistance during this … crisis…" Complaint ¶ 29.

Plaintiffs falsely describe § 6428 as a family and worker "assistance" program. *Id.* ¶ 19. But the fact that Congress directed that § 6428 economic stimulus payments be distributed using 2018 and 2019 taxpayer identification data does not make the payments either a tax benefit or public "assistance." The § 6428 recovery payment program was enacted as an emergency macroeconomic stimulus immediately to boost consumer spending within the United States. The funding distribution method chosen by Congress was 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 ten of millions of recipients, thus obviating the delay that requiring an application for the funds wherein the applicant designated deposit information would necessarily entail.

Congress further made the rational political decision to direct funding to a small 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), § 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), §6428(c), (c) nonresident aliens (who are exempt from taxation on foreign income and also much more likely to remit the stimulus funding overseas), § 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, regardless of whether those taxpayers chose to file individually, to file as married filing separately, or to file jointly, with the narrow exception within an 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).

Even if Plaintiffs' characterization of the § 6428 were presumed to be accurate, it cannot provide a cause of action for the individual taxpayers or their proposed class members, because that assistance would then constitute a "welfare" or "similar" federal public benefit "provided by appropriated funds of the United States." *See* 8 U.S.C. § 1611(c)(2). As such, no plaintiff or proposed class member 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").

Conclusion

For the foregoing reasons, Plaintiffs' Fifth Amendment claims should be dismissed.

Respectfully submitted,
~// Michael Hethmon //~
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