U.S. Department of Justice
Office of Legal Counsel

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

December 9, 2020

MEMORANDUM FOR BRIAN CALLANAN
GENERAL COUNSEL, DEPARTMENT OF THE TREASURY

Re: Aliens' Limited Eligibility for Certain Refundable Tax Credits

Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 400–451, 110 Stat. 2105, 2260–77 ("PRWORA"), restricts aliens' eligibility for federally supported public benefits. Among other things, Title IV generally prohibits non-qualified aliens, including aliens unlawfully present in the United States, from being "eligible for any Federal public benefit," including "any . . . welfare, . . . postsecondary education, . . . or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States." 8 U.S.C. § 1611(a), (c)(1).

You have asked whether that definition of "Federal public benefit" includes the refundable portions of three tax credits: (1) the Earned Income Tax Credit ("EITC"), 26 U.S.C. § 32; (2) the Additional Child Tax Credit ("ACTC"), which is the refundable portion of the Child Tax Credit, 26 U.S.C. § 24(d); and (3) the American Opportunity Tax Credit ("AOTC"), 26 U.S.C § 25A(i). Unlike a tax deduction, which reduces income, a tax credit is "subtracted directly from one's total tax liability, dollar for dollar." *Black's Law Dictionary* 1762 (11th ed. 2019). Although most tax credits are nonrefundable and merely offset tax liability, a *refundable* tax credit may provide a payment to a taxpayer who owes less tax than the amount of the credit. *See* 26 U.S.C. §§ 6401(b), 6402; *Sorenson v. Sec'y of the Treas.*, 475 U.S. 851, 854–55 (1986). In the view of the Department of the Treasury ("the Department"), the refundable portions of the EITC, ACTC, and AOTC "may reasonably be construed as a 'Federal public benefit' within the meaning of" PRWORA's provision on aliens' ineligibility for such benefits.[1]

We agree with this conclusion. Each of these programs provides direct payments to individual taxpayers and households. The programs are materially similar to other kinds of

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[1] *See* Letter for Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, from Brent J. McIntosh, General Counsel, Department of the Treasury (Aug. 16, 2018) ("McIntosh Letter"); *see also* Memorandum for the Office of Legal Counsel, from the Office of the General Counsel, Department of the Treasury, *Re: Application of Section 401 of PRWORA to the Additional Child Tax Credit* (Apr. 25, 2018) ("Treasury Memorandum"). In a supplemental memorandum, the Chief Counsel of the Internal Revenue Service has provided us with additional information about other refundable tax credits, including some enacted in legislation that postdates your opinion request. *See* Memorandum for Henry Whitaker, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Michael Desmond, Chief Counsel, Internal Revenue Service, *Re: Supplemental Information on the Application of Section 401 of PRWORA to Certain Refundable Tax Credits* (Nov. 10, 2020) ("IRS Memorandum").

monetary payments that the federal government makes to individuals outside of the tax system. And each satisfies PRWORA's definition of a "Federal public benefit," either as a "welfare" or "postsecondary education" benefit, or as "any other similar benefit." 8 U.S.C. § 1611(c)(1)(B). We therefore believe it is reasonable to conclude that PRWORA makes the refundable portions of such credits generally unavailable to non-qualified aliens. You have not asked us to consider, and we do not reach, the question whether this is the only permissible reading of the statute.

I.

PRWORA adopted a series of comprehensive reforms to the federal welfare system. Title IV, entitled "Restricting Welfare and Public Benefits for Aliens," 110 Stat. at 2260, addressed Congress's concerns that aliens had been "receiving public benefits from Federal, State, and local governments at increasing rates," which was compromising the "basic principle" of "[s]elf-sufficiency" in the Nation's "immigration statutes." 8 U.S.C. § 1601(1), (3). Congress found that "[c]urrent eligibility rules" had "proved wholly incapable" of preventing aliens from "burden[ing] the public benefits system." *Id.* § 1601(4). It thus reiterated the "immigration policy of the United States that . . . the availability of public benefits not constitute an incentive for immigration to the United States" and further declared it a "compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." *Id.* § 1601(2)(B), (6).

A.

Title IV of PRWORA addressed those concerns by broadly restricting aliens' eligibility for Federal public benefits. Specifically, Congress provided that, "[n]otwithstanding any other provision of law . . . an alien who is not a qualified alien . . . is not eligible for any Federal public benefit," subject to narrow exceptions. 8 U.S.C. § 1611(a). The definition of "qualified alien" includes lawful permanent residents, refugees, and certain others lawfully permitted to be in the United States, but excludes other aliens, including those unlawfully present in the United States.[2] The statute defines a "Federal public benefit" as follows:

> (A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and
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> (B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.

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[2] *See* 8 U.S.C. § 1641(b), (c) (defining "qualified alien" as including an alien who has been granted status as a lawful permanent resident, a refugee, or an asylee, or is a Cuban or Haitian migrant, or has, in certain circumstances, been granted parole or conditional entry, had deportation withheld, or suffered domestic battery).

Id. § 1611(c)(1). The restriction on eligibility is inapplicable to specific categories of "Federal public benefits," such as emergency medical treatment, emergency disaster relief, and programs providing "in-kind services" that are "necessary for the protection of life or safety." *Id.* § 1611(b)(1)(A)–(D). Congress also grandfathered federal housing and community-development benefits that an alien was already receiving when PRWORA was enacted, and, for categories of aliens deemed "lawfully present" by the Attorney General, certain Social Security benefits. *Id.* § 1611(b)(1)(E), (2). Since PRWORA, Congress has excepted certain additional benefits, including Medicare, for aliens deemed lawfully present by the Attorney General, and has grandfathered pre-PRWORA supplemental-security-income benefit recipients. *See id.* § 1611(b)(3)–(5). Other provisions of Title IV of PRWORA, not at issue here, limit government assistance to certain lawfully present aliens for five years after their entry, *see id.* § 1613, or until the alien becomes a lawful permanent resident or citizen, *see id.* § 1612. Title IV also bars State and local governments from providing "public benefits" to unlawfully present aliens subject to limited exceptions. *See id.* § 1621.

Title IV of PRWORA addresses tax credits in section 451, which governs the administration of the EITC—the only refundable tax credit available at the time of PRWORA's adoption in 1996. Section 451 requires individuals claiming the credit to report a qualifying Social Security Number ("SSN") for themselves, their spouses, and any children they report to qualify for the credit.[3] *See* PRWORA § 451(a), 110 Stat. at 2276–77 (codified as amended at 26 U.S.C. § 32(c)(1)(E), (m)). The SSN helps the IRS confirm that the claimant is correctly reporting the income necessary to qualify for the credit. But because an alien may generally obtain a qualifying SSN only when authorized to work in the United States, the reporting requirement simultaneously bars most aliens who are not authorized to work, including those who are unlawfully present, from obtaining the credit. PRWORA also classified the omission of a proper SSN when claiming the EITC as a "mathematical or clerical error," which enables the Internal Revenue Service ("IRS") to use summary enforcement procedures to deny an erroneously claimed credit. *See* 26 U.S.C. § 6213(b)(1), (g)(2)(F).

B.

Under the Internal Revenue Code, a refundable tax credit entitles a taxpayer to a payment when the amount of the credit exceeds the tax liability. *See Sorenson*, 475 U.S. at 855 ("An individual who is entitled to an earned-income credit that exceeds the amount of tax he owes thereby receives the difference[.]"). A qualifying taxpayer claims such a credit by filing a tax return. *See* 26 C.F.R. § 301.6402-3(a)(1), (5). If the taxpayer owes more tax than the amount of

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[3] *See* 26 U.S.C. § 32(m) (requiring EITC claimants to report using SSNs other than those assigned under section 205(c)(2)(B)(i)(II)–(III) of the Social Security Act, which authorizes the issuance of SSNs for the limited purpose of federal benefits distribution; *see also* U.S. Gov't Accountability Office, GAO-06-253T, *Social Security Administration: Procedures for Issuing Numbers and Benefits to the Foreign-Born* at 3 (Mar. 2, 2006) (noting that 15,000 of the 1.1 million SSNs issued to noncitizens in Fiscal Year 2005 were for persons unauthorized to work). Therefore, under section 32(m) of the Internal Revenue Code, aliens applying for the EITC must report either an SSN issued on the basis of their lawful authority to work in the United States, *see* 42 U.S.C. § 405(c)(2)(B)(i), or a grandfathered SSN issued prior to 2003 for the limited purpose of acquiring a driver's license or bank account, *see* Cong. Budget Office ("CBO"), *Options for Reducing the Deficit: 2019 to 2028*, at 248 (Dec. 2018).

the credit, then the credit offsets the tax liability. If the credit exceeds the amount of tax owed, then the Department will schedule an overpayment in the amount of the excess. 26 U.S.C. §§ 6401, 6402.

The first of the refundable tax credits at issue, the EITC, was adopted in 1975 to reduce the disincentive to work otherwise produced by the reduction of federal welfare benefits as a taxpayer's income increases. By providing "relief to families" that pay "little or no income tax," the EITC "provides an added bonus or incentive for low-income people to work." S. Rep. No. 94-36, at 11 (1975). It is available to low-income individuals and families based on an "earned income amount," which is a percentage of the taxpayer's earnings that increases with the number of dependents. 26 U.S.C. § 32(a)(1), (b)(2). For the 2020 tax year, the maximum amount of the credit ranges from $538 for a childless filer to $6,660 for a filer with three or more qualifying children. *See id.* § 32(f); IRS, *Earned Income Tax Credit Income Limits and Maximum Credit Amounts*, https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/earned-income-tax-credit-income-limits-and-maximum-credit-amounts (last updated Dec. 7, 2020) ("2020 EITC Income Limits"). The credit phases out as income increases, completely phasing out at $15,820 in income for a childless single filer and at $56,844 for a joint filer with three or more children. *See* 2020 EITC Income Limits.

The Internal Revenue Code makes *non*resident aliens ineligible for the EITC. 26 U.S.C. § 32(c)(1)(D). But that restriction does not apply to aliens who are lawful permanent residents or otherwise have a substantial presence in the United States for tax purposes. *Id.* § 7701(b). Even among those aliens, however, a taxpayer seeking the EITC must provide qualifying SSNs for himself, his spouse, and qualifying children. *Id.* § 32(c)(1)(E), (m). As discussed below, *see infra* pp. 14–157, that requirement has the effect of preventing many categories of aliens, including many without a lawful presence, from receiving the EITC, because aliens without work authorization generally may not obtain the requisite SSNs.[4]

The second credit, the ACTC, dates from 1997, when Congress created the Child Tax Credit—a $500-per-child credit with a refundable component. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 101, 111 Stat. 788, 796–99. In 2001, Congress expanded the refundable portion, which is known as the ACTC. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 201, 115 Stat. 38, 45–47. Several subsequent changes to this program were made "to benefit low-income families." *In re Hardy*, 787 F.3d 1189, 1194–96 (8th Cir. 2015). Under current law, the maximum credit is $2,000 per child, with a maximum refund of $1,400 per child. 26 U.S.C. § 24(h)(2), (5)(A). The total credit begins to phase out at $200,000 in income for unmarried or separately filing taxpayers and at $400,000 for joint filers. *Id.* § 24(b), (h)(3). But, in practice, the refundable portion goes overwhelmingly to lower-income families whose tax liability is less than the amount of the credit. The Internal Revenue Code does not expressly address aliens' eligibility for the ACTC or require an SSN in order for a *taxpayer* to claim the credit. Since the 2018 tax year, however, a filer seeking to claim the credit

[4] The 2020 refundable recovery rebate credit is similarly denied to nonresident aliens and also includes a requirement for taxpayers to furnish work-authorized SSNs. 26 U.S.C. § 6428(d)(1), (g).

must, for each qualifying child, provide an SSN consistent with work authorization. *See* 26 U.S.C. § 24(h)(7); Pub. L. No. 115-97, § 11022(a)–(b), 131 Stat. 2054, 2073–74 (2017).

In 2009, Congress created the AOTC, which renamed, expanded, and made refundable the prior "Hope Scholarship Credit." American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, div. B, § 1004(a), 123 Stat. 115, 313. This credit is available to a postsecondary-education student, the student's spouse, or someone claiming the student as a dependent. 26 U.S.C. § 25A(f)(1)(A), (g)(3), (g)(6). If the student spends at least half-time in an educational program leading to a certificate or degree, the credit covers expenses such as tuition, enrollment fees, and course materials. *Id.* § 25A(b)(2), (f)(1)(A), (D). The credit is available for the first four years of postsecondary education. *Id.* § 25A(b)(2)(A), (C). In each year, it covers 100 percent of the student's first $2,000 of qualifying expenses and 25 percent of the next $2,000, for a maximum possible credit of $2,500. *Id.* § 25A(b)(1)(A)–(B). The credit phases out between $80,000 and $90,000 in income for single filers (and twice those amounts for joint filers). *See id.* § 25A(d)(1)(A)–(B). Up to 40 percent of the credit is refundable. *Id.* § 25A(i). As with the EITC, the Internal Revenue Code makes nonresident aliens, but not resident aliens, ineligible for the AOTC. *Id.* § 25A(g)(7). Unlike with the EITC, someone claiming the AOTC may use a taxpayer identification number that is not an SSN. *Id.* § 25A(g)(1).[5]

C.

In 2011, the Treasury Inspector General for Tax Administration ("TIGTA") reported a substantial increase in ACTC claims by persons not authorized to work in the United States, rising from $924 million in 2005 to $4.2 billion in 2010. *See* TIGTA, Ref. No. 2011-41-061, *Individuals Who Are Not Authorized to Work in the United States Were Paid $4.2 Billion in Refundable Credits* at 4 (July 7, 2011). TIGTA noted that making ACTC payments to "aliens residing without authorization in the United States" "contradicts Federal law and policy," as established in PRWORA, by "appear[ing] to provide an additional incentive for aliens to enter, reside, and work in the United States without authorization." *Id.* at 2, 6.[6]

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[5] We note that, although they are not the subject of your request and are not addressed in this opinion, there are other fully or partially refundable tax credits, including the credit for health insurance costs of eligible individuals under 26 U.S.C. § 35, the first time homebuyer credit under 26 U.S.C. § 36 that is denied to nonresidents but does not require the reporting of an SSN, *id.* § 36(d), and the health insurance premium tax credit under 26 U.S.C. § 36B. Individuals who are "not lawfully present" in the United States are generally denied the premium tax credit. 26 U.S.C. § 36B(e). Section 2201(a) of the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020) ("CARES Act"), also enacted a refundable recovery rebate credit for individuals, limited to the 2020 tax year. 26 U.S.C. § 6428(a); *see also* IRS Memorandum, *supra* note 1, at 1–3 (discussing the CARES Act credit). And sections 7001 through 7004 of the Families First Coronavirus Response Act ("FFCRA") established refundable credits for employment-related family leave and sick leave, applicable through December 31, 2020. Pub. L. No. 116-127, 134 Stat. 178, 210–19 (Mar. 18, 2020); *see also id.* §§ 7001(g), 7002(e), 7003(g), 7004(e); IRS Memorandum at 4.

[6] In 2009, TIGTA suggested that section 1611(a)'s limitation on aliens' eligibility for Federal public benefits "could be interpreted to apply to the ACTC." TIGTA, Ref. No. 2009-40-057, *Actions Are Needed to Ensure Proper Use of Individual Taxpayer Identification Numbers and to Verify or Limit Refundable Credit Claims* at 17 (Mar. 31, 2009). But "IRS management[]" took the view that "the law does not provide sufficient legal authority for the IRS to disallow the ACTC" to those who filed with an Individual Taxpayer Identification Number,

Following the TIGTA report, twelve members of the Senate Finance Committee, including both the Chairman and Ranking Member, wrote to the Secretary of the Treasury and the Commissioner of Internal Revenue, noting that "taxpayers' hard-earned dollars are at stake" and requesting "clarification of whether or not the ACTC may be paid to those who are not authorized to work in the United States, under current law."[7] In response, the Commissioner advised that the Department and the IRS had "concluded that a tax credit, refundable or otherwise, is not a Federal public benefit" under PRWORA. *See* Letter for Senator Max Baucus, Chairman, Committee on Finance, from Douglas H. Shulman, Commissioner of Internal Revenue at 2–3 (Nov. 7, 2011) ("Shulman Letter"). The Commissioner reasoned that PRWORA's text and legislative history did not expressly mention refundable tax credits when prohibiting benefits and suggested that Congress had separately addressed its concern about aliens' claiming the EITC by requiring taxpayers to furnish SSNs. *See id.* at 3.

In April 2018, your office advised us that the Department was reconsidering its view on the applicability of PRWORA's eligibility restriction to the ACTC. *See* Treasury Memorandum, *supra* note 1, at 3–6 (explaining that "the ACTC appears to fit the definition" of "Federal public benefit"). In an August 2018 letter, then-General Counsel Brent McIntosh advised that the Department had concluded that not only the ACTC but also the EITC and the AOTC "may reasonably be construed as a 'Federal public benefit' within the meaning" of section 401 of PRWORA. McIntosh Letter, *supra* note 1, at 1. Accordingly, you requested this Office's "formal opinion on the best interpretation of the law on this issue." *Id.*

II.

PRWORA's restriction on non-qualified aliens' eligibility for any "Federal public benefit" extends broadly to any individualized payment, grant, contract, loan, license, or in-kind service provided from federal appropriations or by a federal agency. We consider first whether refundable tax credits, as a class, constitute a "benefit . . . for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States." 8 U.S.C. § 1611(c)(1)(B). We then examine whether the three tax credits at issue meet the definition's reference to "any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit." *Id.*

A.

PRWORA defines a "Federal public benefit" to include any "*benefit* for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States." 8 U.S.C. § 1611(c)(1)(B)

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rather than an SSN. *Id.* TIGTA recommended legislation to "clarify whether or not refundable tax credits such as the ACTC may be paid to filers without a valid SSN." *Id.* at 4.

[7] Letter for Timothy F. Geithner, Secretary of the Treasury, and Douglas Shulman, IRS Commissioner, from Max Baucus, Chairman, Finance Committee, U.S. Senate, et al. (Sept. 9, 2011), https://www.finance.senate.gov/ranking-members-news/finance-committee-members-ask-treasury-irs-for-clarification-of-law-regarding-additional-child-tax-credits.

(emphasis added). Because the statute does not define the term "benefit," we look to its ordinary meaning. *See, e.g.*, *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019). A "benefit" is "something to [the] advantage of, or profit to, [the] recipient." *Black's Law Dictionary* 158 (6th ed. 1990). More specifically, a benefit can include "[f]inancial assistance received in time of sickness, disability, unemployment, etc. either from insurance *or public programs* such as social security." *Id.* (emphasis added). Given the nature of such programs, a benefit often takes the form of a monetary payment. *See, e.g.*, *Webster's Third New International Dictionary* 204 (1993) (defining "benefit" as "payment, gift: as . . . financial help in time of sickness, old age, or unemployment," or "a cash payment . . . provided under an annuity, pension plan, or insurance policy") (capitalization altered); *Random House Dictionary of the English Language* 194 (2d ed. 1987) (defining "benefit" as "something that is advantageous or good," an "advantage," or "a payment or gift, as one made to help someone or given by a benefit society, insurance company, or public agency"). And the statutory definition of "Federal public benefit" confirms that meaning because it refers to a "benefit . . . for which *payments* . . . are provided" to the recipient. 8 U.S.C. § 1611(c)(1)(B) (emphasis added).

The refundable portion of a federal tax credit constitutes a "benefit" in precisely that sense. It results in a payment from the federal government to the taxpayer, which goes beyond returning any overpayment of taxes previously made to the government. *See Black's Law Dictionary* at 1763 (11th ed.) (observing that the refundable EITC "reduces income taxes on a dollar-for-dollar basis when a taxpayer's income from work is below a prescribed threshold"; "The credit is paid to the taxpayer even if it exceeds total tax liability."). A refundable tax credit provides a "payment" because it gives the taxpayer money that the taxpayer did not earn and would not have received, but for the existence of the government program.[8]

A refundable tax credit therefore differs from an ordinary tax refund, even though both kinds of payments come from the Treasury after the processing of a tax return. Like the beneficiary of a refundable credit, a taxpayer who receives a refund from the IRS of a tax overpayment also receives a "payment" from the government. But the latter payment is not a "benefit" because it does no more than return to the taxpayer his own money, which Treasury had held until the taxpayer's net obligations for the tax period could be settled. A borrower who repays the principal on a loan is not conferring a benefit on the lender. Similarly, a taxpayer who advances too much of his own funds to the government does not receive a benefit when the excess is returned as a refund.

The other benefits included in section 1611(c)(1) reinforce the conclusion that "Federal public benefit[s]" include refundable tax credits. The adjoining clause defining "Federal public benefit" refers to a "grant, contract, loan, professional license, or commercial license," *id.* § 1611(c)(1)(A)—each of which is, like a refundable credit, something that the government affirmatively awards to a recipient. And the reference in section 1611(c)(1)(B) to "payments *or assistance*" (emphasis added) carries a similarly broad connotation, since assistance may come

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[8] You have expressed the view that nonrefundable tax credits that "simply offset tax liability . . . are excluded from PRWORA's definition" of "Federal public benefits" "because they do not provide 'payment or assistance'" to the taxpayer. Treasury Memorandum, *supra* note 1, at 1. Because you have not asked us to consider that question, our opinion addresses only the *refundable* portions of the three credits.

through a subsidy as well as an in-kind benefit. *See, e.g.*, 42 U.S.C. § 1383 (referring to "payments" of Supplemental Security Income benefits for aged, blind, and disabled individuals); *id.* § 1396d(a) (defining "medical assistance" under Medicaid as including "payment of part or all of the cost of [certain] care and services or the care and services themselves, or both"); *Estey v. Comm'r, Maine Dep't of Human Servs.*, 21 F.3d 1198, 1201 (1st Cir. 1994) ("A payment that provides 'assistance' commonly refers to a public subsidy; for example: housing assistance, rental assistance, and medical assistance payments.").

A refundable tax credit further satisfies the statutory requirement that a benefit be "provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States." 8 U.S.C. § 1611(c)(1)(B). The IRS treats a refundable credit in the same manner as an overpayment of tax. *See* 26 U.S.C. § 6401(b)(1); 26 C.F.R. § 301.6401-1(a)(2). Thus, unless used to offset certain other obligations, the amount of the credit is "refund[ed]" to the taxpayer, who is either an individual or the joint-filing members of a household or family. 26 U.S.C. § 6402(a); 26 C.F.R. § 301.6402-3(a)(6). The refund is made by an "agency" (i.e., the Department, through the IRS). *See id.*; Treas. Order No. 150-10 (Apr. 22, 1982). In addition, the refundable credits plainly come from "appropriated funds of the United States," namely the permanent indefinite appropriation of amounts necessary for "refunding internal revenue collections," 31 U.S.C. § 1324(a)(2), and Congress has expressly authorized disbursements from that appropriation for "refunds due" for certain credits, including the EITC, the ACTC, and the AOTC, *id.* § 1324(b)(2).[9] Consequently, refundable tax credits constitute a "benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States." 8 U.S.C. § 1161(c)(1)(B).

B.

Having determined that refundable tax credits generally constitute a benefit under PRWORA, we now consider whether the three tax credits at issue fall within the kinds of "benefit[s]" identified in section 1611(c)(1)(B). By its terms, the provision applies to "retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit." 8 U.S.C. § 1611(c)(1)(B). We think that each of these tax credits falls within these categories. The EITC and the ACTC are

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[9] In 1997, this Office addressed the scope of PRWORA's limitations on aliens' eligibility for "Federal means tested public benefits." *See Proposed Agency Interpretation of "Federal Means-Tested Public Benefit[s]" Under Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 21 Op. O.L.C. 21 (1997) ("*Means-Tested Public Benefits*"). We concluded that, due to the applicability of the Congressional Budget Act during parts of the legislative process that culminated in PRWORA's enactment, the Departments of Health and Human Services and Housing and Urban Development could reasonably construe "the restrictions on federal means-tested public benefits contained in title IV" of PRWORA as "apply[ing] only to mandatory spending programs, i.e. programs for which funding is not subject to a definite appropriation." *Id.* at 21–22. We limited our conclusion to the phrase "Federal means-tested public benefit," disclaiming an interpretation of "Federal public benefit" as defined in section 1611(c)(1), but noting that the latter "appears to draw no distinction between mandatory and discretionary programs." *Id.* at 28–29. In any event, even if section 1611(c)(1) were limited to mandatory-spending programs, refundable tax credits would still be covered, because they are paid from an indefinite appropriation.

each properly understood as a "welfare" benefit (or at least as a "similar benefit" to a welfare benefit), and the AOTC is plainly a "postsecondary education" benefit.

The definition of "Federal public benefit" encompasses a wide range of federal benefits. The first subparagraph of the definition includes "any grant, contract, loan, professional license, or commercial license." *Id.* § 1611(c)(1)(A). The next subparagraph enumerates eight additional categories of government benefits, a list that covers virtually all cash-like, or in-kind, individualized federal government payments or assistance. *Id.* § 1611(c)(1)(B). Even so, the definition does not stop there, but instead, adds a broad catchall for "any other similar benefit," thereby covering also those benefits that are "of the same general kind or class specifically mentioned." Antonin Scalia & Bryan A. Gardner, *Reading Law* 199 (2012) (defining the canon of *ejusdem generis*); *see also Autoskill Inc. v. Nat'l Ed. Support Sys., Inc.*, 994 F.2d 1476, 1484 (10th Cir. 1993) (describing the adjectival phrase "any other similar" in a bankruptcy provision as a "broad catchall"), *overruled on other grounds by TW Telecom Holdings. Inc. v. Carolina Internet Ltd.*, 661 F.3d 495 (10th Cir. 2011). It is difficult to avoid the conclusion that—subject to narrow exceptions—Congress sought to prevent every alien, who is not a qualified alien, from receiving every kind of financial benefit that could be provided by an agency or by appropriated funds of the United States.

Indeed, shortly after the adoption of PRWORA, the Department of Health and Human Services reached a similar conclusion, recognizing that "the litany of categories in [section 1611](c)(1)(B) is broad," and finding that the statute applied to 31 separate programs, including adoption assistance, assistance related to developmental disabilities, dissertation grants to study health-care policy, clinical-training grants for faculty development related to drug and alcohol abuse, child care and development programs, independent-living programs, job-opportunity programs, and low-income home-energy-assistance programs, among others. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA); Interpretation of "Federal Public Benefit," 63 Fed. Reg. 41,658, 41,659–60 (Aug. 4, 1998).

During the same period, the Department of Justice proposed a regulation governing the verification of eligibility for Federal public benefits. At the time, it did not think it practical to list all of the benefits covered by PRWORA but instead sought to "identify and summarize certain types of government programs that are not 'similar benefit[s]' under" section 1611(c)(1)(B). The only benefits it excluded were "regular, widely available public services or accommodations" such as "police, fire, ambulance, transportation (including paratransit), [and] sanitation" services. Verification of Eligibility for Public Benefits, 63 Fed. Reg. 41,662, 41,664 (Aug. 4, 1998). A district court later rejected the Department of Justice's separate contention that payments in a crime-victim-compensation program could be excluded from the definition of a "Federal public benefit." *Uriostegui v. Ala. Crime Victims Compensation Comm'n*, No. 10-cv-1265, 2010 WL 11613802, at *15 (N.D. Ala. Nov. 16. 2010) (observing that "[t]he categories of benefits listed in § 1611(c)(1)(B) are quite broad in their variety, going well beyond basic means-

tested social programs"), *recommendation & report adopted*, 2011 WL 13285298 (N.D. Ala. Jan. 12, 2011).[10]

The statute's exceptions similarly attest to the breadth of the definition. Section 1611(b)(1) excepts from the restriction five kinds of "Federal public benefits" that would otherwise have been covered. *See United States v. Quality Stores, Inc.*, 572 U.S. 141, 147–48 (2014) (finding that the inclusion of an exemption for certain payments in a statutory scheme reinforced the interpretation that the payments fell within the meaning of a general provision, as the exemption would otherwise be unnecessary).[11] Three involve the in-kind provision of emergency services, allowing the "treatment of an emergency medical condition" for some aliens, 8 U.S.C. § 1611(b)(1)(A), "short-term, non-cash, in-kind emergency disaster relief," *id.* § 1611(b)(1)(B), and "in-kind services" that the Attorney General determines "are necessary for the protection of life or safety," *id.* § 1611(b)(1)(D). Another protects the public health by allowing immunizations and "testing and treatment of symptoms of communicable diseases." *Id.* § 1611(b)(1)(C). And the fifth exception grandfathers in certain aliens who were receiving housing benefits and other forms of assistance from the Secretary of Housing and Urban Development as of the date of PRWORA's enactment in August 1996. These examples confirm that Congress considered a variety of types of public assistance programs to meet the test for "Federal public benefit[s]"—including even in-kind emergency disaster relief. They also confirm that Congress drew its exceptions quite narrowly, and none of them encompasses refundable tax credits.

Other provisions of PRWORA similarly indicate that Congress restricted aliens from receiving public benefits and thereby remove any incentives that would encourage legal or illegal

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[10] This Office had previously advised that, although a "close question," it would be reasonable for agencies to conclude that programs funded through the Victims of Crime Act ("VOCA") were not benefits for purposes of section 1611. *See* Memorandum for David Ogden, Counsel to the Attorney General, from Randolph D. Moss, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of Section 401(a) of PRWORA to Victims Compensation and Victims Assistance Programs Funded Through Victims of Crime Act* at 11–12 (Dec. 19, 1997). We concluded that it was reasonable to find that those programs' assistance was more like an "enterprise liability scheme" than a "wealth, health or disability program," because it was "funded almost exclusively through fines and payments by persons convicted of federal crimes." *Id.* at 7, 8. That rationale is inapplicable to refundable tax credits, which are a direct transfer from the federal fisc. *See id.* at 10 (noting that, if the States' victim-assistance programs are funded "through general appropriations," they "may begin to look more like welfare programs"). The interpretation that our opinion called "reasonable" was adopted by this Department's Office for Victims of Crime, which concluded that neither victim compensation nor assistance funded by VOCA grants is a Federal public benefit under PRWORA. *See* Letter for Dr. Cassie T. Jones, Executive Director, Alabama Crime Victims Compensation Commission, from Joye E. Frost, Acting Director, Office for Victims of Crime, U.S. Department of Justice (July 2, 2010). The district court, however, disagreed with that position in *Uriostegui*.

[11] In 1997, we declined to draw inferences from "the list of exceptions to 'federal means-tested public benefit' programs in section [1613(c)(2)]," noting that at least one of the exceptions involved programs that were not means tested. *Means-Tested Public Benefits*, 21 Op. O.L.C. at 29. Here, by contrast, there is no apparent conflict between the exceptions in section 1611(b) and the definition of "Federal public benefit" in section 1611(c)(1). Moreover, the exceptions in section 1611(b)(1) are specifically identified as "Federal public benefits." 8 U.S.C. § 1611(b)(1). *See also* Verification of Eligibility for Public Benefits, 63 Fed. Reg. at 41,664 (notice of proposed rulemaking by Attorney General Janet Reno, describing the programs listed in section 1611(b) as "Federal public benefits" that are nonetheless excepted from "PRWORA's limitations on alien eligibility").

immigration. *Id.* § 1601(2)(B), (6). Section 1611's eligibility bar exempts "qualified aliens" (i.e., a subset of the aliens who are lawfully present in the United States), but many remain barred from receiving Supplemental Security Income disability benefits or food-stamp assistance. *See id.* § 1612(a)(2)(D). Congress also authorized the States to limit eligibility for Medicaid, Temporary Assistance for Needy Families ("TANF"), and Social Security Block Grant assistance for certain lawfully present aliens. *See id.* § 1612(b)(1), (3). And a "qualified alien" who entered the United States after PRWORA's enactment is generally ineligible for "any Federal means-tested public benefit for a period of 5 years" after entry. *Id.* § 1613(a).

Against the backdrop of that statutory context and the broad range of benefits expressly included in section 1611(c)(1)(B), we consider whether the EITC, the ACTC, and the AOTC fall within the definition of "Federal public benefit":

The Earned Income Tax Credit. The EITC is available to low-income individuals and families and provides a credit that is equal to a percentage of a taxpayer's earnings up to a particular amount. 26 U.S.C. § 32(a)(1). The EITC is calculated according to factors that include earned income, number of qualified children, if any, and marital status. *Id.* § 32(b). It ranges from $538 to $6,660, but it completely phases out at $15,820 in income for a childless single filer and at $56,844 for a joint filer with three or more children. *See supra* p. 4.

Consistent with these income limits, the EITC was intended "to provide relief for low-income families." *Sorenson*, 475 U.S. at 864. Accordingly, the EITC falls with the ordinary meaning of a "welfare" benefit, which refers to "[f]inancial or other aid that is provided, especially by the government, to people in need." *American Heritage Dictionary* 1952 (4th ed. 2000). The term is "esp[ecially]" associated with the "improvement of the welfare of social groups ([such] as children, workers, or *underprivileged* or disabled persons)." *Webster's Third New International Dictionary* at 2594 (emphasis added); *see also Black's Law Dictionary* 1588 (7th ed. 1999) ("A system of social insurance providing assistance to those who are financially in need, as by providing food stamps and family allowances.").

Federal bankruptcy courts have similarly described the EITC as a kind of welfare program for purposes of determining the property of the estate. *See, e.g.*, *In re Goertz*, 202 B.R. 614, 616 (Bankr. W.D. Mo. 1996) (explaining that courts have long "characterized the earned income credit as 'an item of social welfare legislation' effectuated through income tax laws." (quoting *Hoffman v. Searles*, 445 F. Supp. 749, 753 (D. Conn. 1978))). Thus, courts have found that an EITC refund constitutes "public assistance" exempt from the property of the debtor's estate. *See, e.g.*, *In re Brasher*, 253 B.R. 484, 489 (Bankr. M.D. Ala. 2000) (holding that an EITC refund was an "amount[] paid or payable as public assistance to needy persons"); *In re Longstreet*, 246 B.R. 611, 614 (Bankr. S.D. Iowa 2000) (holding that an EITC refund is a "public assistance benefit" because it is a "government aid payment"; noting that the EITC "goes beyond mere tax relief to become, in essence, a grant").

Others have similarly described the EITC as a program aimed at benefiting low-income households. The U.S. Government Accountability Office ("GAO") "consider[s] the refunded portion of the EITC to be a low-income program . . . because it subsidizes the wages of low-income workers and provides a direct cash benefit to the taxpayer." GAO-17-558, *Federal Low-*

Income Programs: Eligibility and Benefits Differ for Selected Programs Due to Complex and Varied Rules at 2 n.3 (June 2017). GAO reported that, in fiscal year 2013, "the EITC was among the four largest federal spending programs for people with low-incomes." *Id.* Similarly, the Congressional Research Service includes the EITC in its reports about federal "benefits and services for people with low income." *E.g.*, Karen E. Lynch et al., Cong. Research Serv., R46214, *Federal Spending on Benefits and Services for People with Low Income: FY2008-FY2018*, at 1, 9 (Feb. 5, 2020). And the Census Bureau, when analyzing its "Supplemental Poverty Measure," which takes "account of many of the government programs designed to assist low-income families and individuals that are not included in the official poverty measure," has explained that the refundable portions of the EITC and the ACTC, when taken together, are second only to Social Security benefits in moving people above the poverty line. Liana Fox, U.S. Census Bureau, P60-268, *The Supplemental Poverty Measure: 2018*, at 1, 11 (Oct. 2019).

The EITC does not benefit every low-income household, but it provides support to the working poor who meet a minimum income requirement. *See* 26 U.S.C. § 32(a). That eligibility limit, however, does not make the EITC any less of a "welfare" benefit. Other forms of government welfare programs—such as TANF and the Supplemental Nutrition Assistance Program ("SNAP")—impose eligibility requirements, including minimum work requirements. *See* 42 U.S.C. § 607 (work requirements for TANF recipients); 7 C.F.R § 273.7 (work requirements for recipients of SNAP benefits); *see also, e.g.*, *In re Brown*, 186 B.R. 224, 227 (Bankr. W.D. Ky. 1995) ("[T]he earned income credit is a public assistance grant similar to other state and federal income-based grant programs, such as Aid to Families with Dependent Children . . . and food stamps."). We think that the EITC, which provides substantial monetary assistance to low-income households, constitutes a "welfare" benefit and thus a "Federal public benefit" under PRWORA.

The Additional Child Tax Credit. The ACTC is the refundable portion of the Child Tax Credit, which is available for households with children. 26 U.S.C. § 24. The maximum available Child Tax Credit is $2,000 per child, with a maximum refundable portion of $1,400 per child. *Id.* § 24(h)(2), (h)(5)(A). Like the EITC, the ACTC is one of the federal government's largest cash-aid programs for low-income families. Federal bankruptcy courts have similarly treated the ACTC as a "public assistance benefit" in a number of cases. In 2015, for instance, the Eighth Circuit explained that the refundable portion of the Child Tax Credit had been expanded over time in ways that "overwhelmingly benefit low-income families." *In re Hardy*, 787 F.3d at 1196. It thus agreed with several other courts that the ACTC was a "public assistance benefit," and noted that contrary decisions had relied too heavily upon the Child Tax Credit as originally enacted. *Id.* at 1196–97. GAO similarly has described the ACTC "as a low-income 'program,'" because it is generally "claimed by those with lower tax liabilities and lower income than those that claim only the Child Tax Credit." U.S. Gov't Accountability Off., GAO-15-516, *Federal Low-Income Programs: Multiple Programs Target Diverse Populations and Needs* 10 n.16 (July 2015). In Fiscal Year 2013, the ACTC was among the ten largest federal low-income programs, and was the third largest "cash-aid" program (after the EITC and Supplemental Security Income), *id.* at 14, and that remained true in Fiscal Year 2018. *See* Lynch, *Federal Spending on Benefits and Services* at 6, 9. And, as noted above, the Census Bureau has identified the ACTC as one of the federal government's most effective programs in moving people above the poverty line.

In 2017, Congress sharply expanded the Child Tax Credit by raising the income limits at which the Child Tax Credit would phase out for tax years 2018 through 2025. Now, the entire credit—including the refundable portion—begins to phase out at $200,000 of income for single taxpayers and at $400,000 for those filing joint returns. 26 U.S.C. § 24(b), (h)(3).[12] Although there could be an argument that these increased income limits make the Child Tax Credit less of a welfare program, the effect of these changes on the *refundable* portion, the ACTC, is not likely to be significant. Because a taxpayer will receive a refundable credit only when the tax liability is less than the credit, the ACTC will rarely be available to higher-income taxpayers. *See In re Koch*, 299 B.R. 523, 528 (Bankr. C.D. Ill. 2003) ("[A] taxpayer will not be eligible for the [ACTC] unless the amount of the child tax credit exceeds the tax liability, reduced by other tax credits. Taxpayers at the high end of the spectrum are not likely to fall into that category."); *see also* IRS, Statistics of Income Division, SOI Tax Stats—Individual High Income Tax Returns, Table 11 (Number and Percentages of Returns), https://www.irs.gov/statistics/soi-tax-stats-individual-high-income-tax-returns (last updated Dec. 3, 2020); Individual Income Tax Returns With and Without U.S. Income Tax Liability: Number and Percentage of Returns by Effective Tax Rate, and by Size of Income Under Alternative Concepts, Tax Year 2017, https://www.irs.gov/pub/irs-soi/17in11hi.xls (indicating that 52.7 percent of taxpayers with an adjusted gross income ("AGI") below $50,000 owed no income tax, while only 6.5 percent of taxpayers with an AGI of between $50,000 and $100,000 had an effective tax rate of zero percent or less, with the numbers dropping to 1.1 percent for an AGI of between $100,000 and $200,000 and 0.3 percent for an AGI of more than $200,000). Thus, the ACTC still overwhelmingly benefits low-income families who, for each child claimed, owe less than $1,400 in federal income tax. We think therefore that the program may still be considered to be a "welfare" program under PRWORA.

But even if there were doubt about whether the ACTC should currently be viewed as a "welfare" benefit, we believe that the provision would still reasonably qualify as "any other similar benefit" under the catchall clause. The refundable credit was originally established as a welfare program, its benefits remain targeted to those with low incomes, and the structure of the program remains exactly the same. The fact that Congress has expanded the number of taxpayers who may theoretically qualify for the benefit does not render it fundamentally dissimilar to a welfare program. Like the other benefits listed in section 1611(c)(1)(B), the ACTC results in an individualized net-positive payment from the government that goes beyond simply reimbursing payments previously made by the taxpayer. We therefore believe that the ACTC should be viewed as a "Federal public benefit" under PRWORA.

The American Opportunity Tax Credit. Our analysis of the AOTC is straightforward. PRWORA recognizes that a "postsecondary education" benefit qualifies as a "Federal public benefit." The AOTC is available to a postsecondary-education student, the student's spouse, or someone who claims the student as a dependent. *See* 26 U.S.C. § 25A(f)(1)(A), (g)(3), (g)(6). A student in at least a half-time educational program leading to a certificate or degree can claim the credit for expenses like tuition and course materials. *Id.* § 25A(b)(2), (f)(1)(A), (D). The AOTC

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[12] The modifications to the Child Tax Credit for tax years 2018 through 2025 also included a $500 credit for each "dependent" who is not a qualifying child, 26 U.S.C. § 24(h)(4), but that portion of the credit is not refundable, *id.* § 24(h)(5)(A).

thus provides a payment to individual taxpayers to help defray expenses associated with postsecondary education. We think it is similar to other forms of federal educational benefits assistance and therefore qualifies as a "postsecondary education" benefit.

III.

Although we have concluded that all three refundable tax credits satisfy PRWORA's definition of "Federal public benefit," the Commissioner of Internal Revenue, on behalf of the Department, took the opposite view in 2011. The Commissioner provided two rationales in support of his view: first, that PRWORA did not "specifically identify tax credits in its list of prohibited benefits" under PRWORA, either in the text or the legislative history, Shulman Letter at 3; second, that he viewed Congress's decision to require taxpayers seeking the EITC to submit SSNs as a measure that would have been unnecessary had PRWORA already barred aliens without work authorization from receiving the EITC, *see id.* We do not believe that either of these justifications offered in 2011 suffices to overcome the plain language of section 1611. We likewise consider, but reject, a similar argument based upon more recent amendments to the ACTC.

A.

We consider first section 1611's silence on the question of tax credits. It is true that among PRWORA's long list of restricted benefits, Congress did not separately identify "tax credits" as a class. Yet we do not believe that this omission supports an inference that Congress wanted to provide refundable tax credits to all non-qualified aliens, including those who lack a lawful presence in the United States. To the contrary, virtually everything we know about the text and structure of the statute supports precisely the opposite inference. Congress made clear in adopting the statute that there is a "compelling government interest" in ensuring that "the availability of public benefits" does not create an "incentive for illegal immigration." 8 U.S.C. § 1601(6). To advance that goal, Congress defined "Federal public benefit" as including a wide range of benefits provided by federal appropriations. As discussed, the statute identifies eight types of benefits and a catchall to sweep in "any other similar benefit." *Id.* § 1611(c)(1)(B).

With respect to the EITC—the only refundable tax credit available when PRWORA was enacted—Congress expressly amended the Internal Revenue Code to require that certain SSNs be submitted by applicants for the tax credit. *See* 26 U.S.C. § 32(m). This measure was designed to limit the benefit to those authorized to work in the United States. And there is little doubt that the EITC was an important welfare program provided by the federal government. *See, e.g.*, Cong. Budget Off., *Refundable Tax Credits* 16–17 (Jan. 2013) ("Many refundable tax credits have been created to meet social policy goals by subsidizing living expenses to certain activities—for example, providing assistance to low-income families or encouraging people to attend college . . . . Such goals, however, can also be achieved through spending programs. The choice between the two approaches hinges, in large part, on administrative considerations[.]"). But none of these considerations supports an inference that non-qualified aliens would remain eligible to receive, evidently alone among federal financial benefits, refundable tax credits. To the contrary, had Congress sought to exclude refundable tax credits, then it surely would have expressly carved them out of its sweeping definition of "Federal public benefit."

We also do not believe any inference can be drawn from the absence in PRWORA's legislative history of any discussion "to indicate that Congress intended a tax credit to constitute a benefit similar to the 'welfare,' 'grants,' or government 'assistance,' referred" to in section 1611(c)(1). Shulman Letter at 3. Given Congress's affirmative decision to require SSNs to be submitted when claiming the EITC, it is simply not the case that Congress was entirely silent about whether non-qualified aliens would receive refundable tax credits. But even if the legislative history were deemed silent on the precise question of section 1611's application, the Supreme Court has recognized that it is a mistake to conclude anything from silence in the legislative history. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1143 (2018) ("[I]f the text is ambiguous, silence in the legislative history cannot lend any clarity," and "[i]f the text is clear, it needs no repetition in the legislative history."); *see also Avco Corp. v. U.S. Dep't of Justice*, 884 F.2d 621, 625 (D.C. Cir. 1989) ("[S]ilence in legislative history is almost invariably ambiguous. If a statute is plain in its words, the silence may simply mean that no one in Congress saw any reason to restate the obvious."). At the time of the adoption of PRWORA, the EITC was the only refundable federal tax credit. Congress may well have understood the EITC to be the kind of welfare "benefit" covered by the statute—and certainly the plain language of the statute supports that conclusion. But since it is the words of the statute that must govern, the absence of discussion in the legislative history does not provide any assistance, either way.

B.

We turn then to consider the second argument against including refundable tax credits in the definition of "Federal public benefits." According to the Commissioner, PRWORA's requirement that EITC claimants submit SSNs suggested that Congress had found an alternative way to prevent many non-qualified aliens from receiving the EITC. "If Congress had intended section [1611] to apply to tax credits more broadly," the Commissioner wrote, "it would not have needed section 451 to deny the earned income tax credit to undocumented aliens residing in the United States." Shulman Letter at 3. We do not believe, however, that Congress's decision to provide a practical means of restricting EITC benefits is in any way inconsistent with interpreting the prohibition in section 1611 to include refundable tax credits.

In PRWORA, Congress not only adopted section 1611's general limitation on eligibility for "Federal public benefit[s]," but also amended the requirements for claiming the EITC. Before then, a taxpayer claiming the EITC needed to supply a Taxpayer Identification Number ("TIN") for each qualifying child. 26 U.S.C. § 32(c)(3)(D)(i) (1994). A taxpayer could use an SSN as a TIN, but a taxpayer who was not eligible for an SSN (such as resident aliens who are unauthorized to work in the United States) could instead obtain an Individual Taxpayer Identification Number ("ITIN"). *See id.* § 6109; 26 C.F.R. § 301.6109-1.[13] In section 451 of PRWORA, Congress required the taxpayer to submit SSNs for both the filer, the filer's spouse, and any children being reported for purposes of qualifying for the credit, and provided that those

[13] Those who may receive an ITIN include aliens who may not be lawfully present in the United States as well as certain lawfully present aliens who are not authorized to work and receive an SSN, such as the spouse or dependent of a U.S. citizen or lawful permanent resident, or the spouse or dependent of a foreign national holding a temporary visa. *See* U.S. General Accounting Office, GAO-04-529T, *Internal Revenue Service: Individual Taxpayer Identification Numbers Can Be Improperly Obtained and Used* at 14 (Mar. 10, 2004).

SSNs could not be obtained solely for the purposes of applying for or receiving federally funded benefits. PRWORA § 451(a)–(b), 110 Stat. at 2276–77; *see* 26 U.S.C. § 32(c)(1)(E), (m). Without SSNs for those individuals, the taxpayer could not claim the EITC.

The staff of the Joint Committee on Taxation thus made clear what was evident from the new statutory amendment: "Congress did not believe that individuals who are not authorized to work in the United States should be able to claim the [EITC]," and requiring an SSN would "indicat[e] that they had been authorized to work legally in the" United States." Staff of the Joint Comm. on Taxation, 104th Cong., JCS-12-96, *General Explanation of Tax Legislation Enacted in the 104th Congress* at 394 (Dec. 18, 1996); *see also* Staff of the H. Comm. on Ways and Means, 104th Cong., WMCP 104-15, *Summary of Welfare Reforms Made by Public Law 104-193 The Personal Responsibility and Work Opportunity Reconciliation Act and Associated Legislation* at 38 (Nov. 6, 1996) ("This requirement is intended to disqualify illegal aliens and other noncitizens who are not authorized to work in the United States.").

The Commissioner viewed Congress's decision to require taxpayers to submit SSNs for the EITC as implying that aliens would otherwise be eligible to claim the EITC under section 1611. But it is not apparent why this would be so. Congress's decision to restrict most non-qualified aliens from receiving virtually any kind of "Federal public benefit" is entirely consistent with a decision to reinforce that restriction as it applies to the EITC by requiring a taxpayer to submit SSNs that are strongly probative of eligibility for the credit.[14] Even before PRWORA, Congress had barred nonresident aliens from claiming the EITC. *See* 26 U.S.C. § 32(c)(1)(E) (1994). But Congress did not repeal or otherwise amend that limitation when it imposed the SSN-reporting requirement. Congress thus viewed an SSN-reporting requirement as supplementing, not supplanting, an underlying eligibility requirement turning on immigration status.

In other benefit statutes, Congress has similarly imposed application requirements separate from the question of eligibility under section 1611. For instance, in 1984, Congress

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[14] There is also not a complete match between the SSN-reporting requirement for the EITC and the definition of qualified aliens under section 1641. Although the reporting requirement excludes SSNs that are issued solely for purposes of receiving federal benefits, it does not exclude SSNs that were issued up through 2003 (and have not been rescinded) for non-citizens who needed them to obtain driver's licenses or bank accounts. *See* CBO, *Options for Reducing the Deficit*, *supra* note 3, at 248. In addition, the provision requires a taxpayer to use an SSN that was issued "on or before the due date for filing the return for the taxable year." 26 U.S.C. § 32(m). Even if an alien had work authorization when the SSN was issued, *see* 42 U.S.C. § 405(c)(2)(B)(i)(I), (III), the SSN will not be rescinded if that work authorization later lapses. Thus, an alien who cannot currently work may technically comply with the terms of the SSN-reporting requirement by claiming the EITC and listing a valid SSN. Furthermore, there are other categories of nonresident aliens who may have work-authorized SSNs—such as students, au pairs, and other holders of F-, J-, M-, or Q- visas—but do not meet the definition of "qualified aliens." *See* 8 U.S.C. § 1101(a)(15)(F), (J), (M), & (Q); 26 U.S.C. § 3121(b)(19); *see also* IRS, *Taxpayer Identification Numbers (TIN's) for Foreign Students and Scholars*, https://www.irs.gov/individuals/international-taxpayers/taxpayer-identification-numbers-tins-for-foreign-students-and-scholars (last updated Nov. 4, 2020) ("Most foreign students and scholars in F-1, J-1, M-1, Q-1, and Q-2 nonimmigrant status are eligible to be employed in the United States, and are therefore eligible to apply for an SSN if they are actually employed in the United States."). They are nevertheless precluded from claiming the EITC by their nonresident status, rather than their failure to be "qualified aliens" under PRWORA. *See* 26 U.S.C. § 32(c)(1)(D).

required the States to obtain SSNs from applicants "as a condition of eligibility for benefits" under Aid to Families with Dependent Children, Medicaid, unemployment compensation, and food stamps. 42 U.S.C. § 1320b-7(a)(1), (b) (Supp. II 1984). In the Immigration and Reform Control Act of 1986, Congress added a requirement of a written declaration that the individual seeking benefits is "a citizen or national of the United States" or "in a satisfactory immigration status." Pub. L. No. 99-603, § 121(a)(1)(C), 100 Stat. 3359, 3384–85 (codified at 42 U.S.C. § 1320b-7(d)). Although those separate requirements remain in the law, there can be little doubt that the payments provided by each of these programs are also "Federal public benefit[s]" under section 1611(c)(1)(B) and thus subject to the overarching limitation on eligibility in section 1611(a).

We do not believe that there is any inconsistency in applying both the eligibility restriction under PRWORA (in 8 U.S.C. § 1611) and the enforcement-promoting amendments under the Internal Revenue Code (in section 451 of PRWORA). *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) ("Respect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work."). Giving due weight to the limitation that section 1611 imposes on "qualified" aliens does not deprive section 451 of further effect. To the contrary, the requirement that taxpayers provide SSNs gives the IRS an administrable enforcement mechanism to not only identify aliens unauthorized to earn income, but also identify fraudulent or improper claims by *anyone* seeking to claim the EITC, including U.S. citizens, lawful permanent residents, and qualified aliens. These are serious and recurring concerns with these programs. *See, e.g.*, U.S. Gov't Accountability Office, GAO-18-224, *Tax Fraud and Noncompliance: IRS Can Strengthen Pre-refund Verification and Explore More Uses* at 1 (Jan. 2018). Indeed, Congress has continued to seek ways to minimize fraudulent and improper claims. Since the 2016 tax-filing season, the IRS has been precluded from issuing refunds for the EITC (or the ACTC) until February 15, a delay that increases the chances that the IRS will have information that it needs from employers and the Social Security Administration to verify wage and related information supplied by the taxpayer. *Id.* at 2; *see* 26 U.S.C. § 6402(m).

Accordingly, we do not believe that Congress's inclusion of section 451 in PRWORA supports the conclusion that refundable tax credits are not "Federal public benefit[s]."

C.

We have also considered a related objection arising from the statutory requirements governing claims for the ACTC and the AOTC. Although both tax credits postdate PRWORA, they did not originally require taxpayers to use SSNs to claim them. The ACTC was recently amended to require an SSN for each qualifying child, but not for the taxpayer or the taxpayer's spouse. For essentially the same reason as explained in connection with the EITC, we do not view that limitation on who can be a qualifying child (or the absence of any such limitation for the AOTC) as bearing upon the question whether each of these refundable credits constitutes a "Federal public benefit."

For most of the ACTC's history, a taxpayer could claim the Child Tax Credit (in both its nonrefundable and refundable forms) by supplying a TIN, rather than an SSN, for each qualifying child. *See* 26 U.S.C. § 24(e)(1). In 2017, however, Congress amended the tax code to

require a taxpayer claiming the refundable AFTC for taxable years 2018 through 2025 to supply an SSN for each qualifying child. *Id.* § 24(h)(7).[15] During that same period, a taxpayer may now seek a new, *nonrefundable* credit (known as the credit for other dependents or ODC) of $500 for a non-qualifying child (or other dependent) for whom no such SSN is supplied. *Id.* § 24(h)(4)(C). Taken together, those two changes reflect a decision to require more information for the refundable ACTC than for the nonrefundable credit.

As with the EITC, the ACTC's SSN-reporting requirement serves an enforcement purpose that is entirely separate from delineating eligibility for the underlying benefit. It helps the IRS to weed out fraudulent and improper claims for reasons that may not bear upon taxpayers' immigration status. In fact, the House Ways and Means Committee cited this purpose as the reason underlying the new SSN-reporting requirement. *See* H.R. Rep. No. 115-409, at 142 (2017) ("The Committee believes that it is important to ensure that refundable and other credits are not being claimed fraudulently."). We therefore do not view this requirement as ousting other limitations on aliens' eligibility for the ACTC.

Congress similarly relied upon an SSN-reporting requirement to assist enforcement mechanisms in connection with the CARES Act's refundable tax credit. *See supra* note 5. Consistent with the ACTC requirement for qualifying children, the CARES Act requires each taxpayer claiming the refundable credit, as well as the taxpayer's spouse and qualifying children, to submit a valid SSN. *See* 26 U.S.C. § 6428(g). As the IRS has explained, most nonresident aliens with SSNs are "non-qualified aliens" under PRWORA, *see* IRS Memorandum, *supra* note 1, at 3, and the Department's Office of the Inspector General recently observed that more than 300,000 likely nonresident aliens with SSNs may have erroneously received payments. *See* TIGTA, Ref. No. 2020-46-041, *Interim Results of the 2020 Filing Season: Effect of COVID-19 Shutdown on Tax Processing and Customer Service Operations and Assessment of Efforts to Implement Legislative Provisions* at 6–7 & n.6 (June 30, 2020). This recent experience confirms that there is a distinction between whether an alien is eligible under PRWORA and whether an applicant must submit an SSN.

With respect to the AOTC, Congress has never required a claimant to supply an SSN to obtain the benefit. Instead, the taxpayer must include only a TIN for the eligible student and the Employer Identification Number of the institution of higher learning associated with the educational expenses. 26 U.S.C. § 25A(g)(1)(A), (B)(iii). But we do not think that means Congress wanted such credits necessarily available to non-qualified aliens. Congress instead could have omitted such a requirement because it saw less need to connect the applicant with information from the Social Security Administration, since a student need not have any earned income to obtain the benefit. Ultimately, though, we do not believe that Congress's reason for

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[15] In 2011, the IRS Commissioner cited then-unenacted legislative proposals that would impose an SSN-reporting requirement on the ACTC as evidence that PRWORA did not then restrict eligibility for that refundable tax credit. Shulman Letter at 3. We do not believe that pending legislative proposals at that time provide any more of a guide to section 1611's meaning than does the later adoption of such a requirement in 2017. *See, e.g.*, *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 382 n.11 (1969) (recognizing that rejected legislative proposals "are not the best of guides to legislative intent").

requiring a TIN, rather than an SSN, bears upon the question whether the AOTC is a "Federal public benefit."

Finally, we do not think it meaningful that Congress gave certain agencies other than the IRS and the Department of the Treasury significant roles in implementing various aspects of Title IV of PRWORA. Although the statutory scheme gave the Attorney General and the Secretary of Health and Human Services responsibility for developing verification mechanisms for public-benefit schemes, *see, e.g.*, 8 U.S.C. § 1642(a), the definition of Federal public benefit clearly applies to agencies that were not similarly singled out.[16] And the IRS did, of course, have the key role in implementing section 451's amendments to the EITC. We think there is nothing incongruous in its being equally able to enforce the restrictions on non-qualified aliens' eligibility for "Federal public benefit[s]" under section 1611.

IV.

For these reasons, we conclude that the refundable portions of the EITC, the ACTC, and AOTC may reasonably be construed as a "Federal public benefit" for which non-qualified aliens are generally ineligible under 8 U.S.C. § 1611. You have not asked us to consider, and we do not reach, the question whether this is the only permissible reading of the statute.

Please let us know if we may provide any further assistance.

JENNIFER L. MASCOTT
Deputy Assistant Attorney General

[16] A later-enacted amendment to PRWORA that allowed benefits to be extended to domestic-violence victims required the Attorney General to consult with the heads of four specified departments and agencies and "the heads of such Federal agencies administering benefits as the Attorney General considers appropriate." 8 U.S.C. § 1641(c)(4). The IRS's absence from that list is unsurprising, since it has no special expertise about domestic violence. And it is clear that other agencies that were not part of that consultation process consider themselves bound by PRWORA's restrictions. *See, e.g.*, Disaster Unemployment Assistance Program, 68 Fed. Reg. 10,932, 10,935 (Mar. 6, 2003) (preamble to Department of Labor final rule describing its disaster unemployment assistance benefits as "federal public benefits" under PRWORA); Flood Mitigation Grants and Hazard Mitigation Planning, 74 Fed. Reg. 47,471, 47,476 (Sept. 16, 2009) (preamble to Federal Emergency Management Agency final rule observing that an offer to purchase, at "pre-event market value," property harmed by a national disaster constitutes a "Federal public benefit"; implementing regulation codified at 44 C.F.R. § 80.13(a)(6)).