IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS & ST. JOHN

JAMAL A. MORTON, individually and on behalf of all others similarly situated, Plaintiff, v. THE UNITED STATES VIRGIN ISLANDS, The Honorable ALBERT BRYAN, JR., in his official capacity as the Governor of the United States Virgin Islands, JOEL A. LEE, in his official capacity as the Director of the Bureau of Internal Revenue, KIRK CALLWOOD SR., in his official capacity as the Commissioner of the Department of Finance, Defendants.	Case No. 3:20-cv-109

MOTION FOR PRELIMINARY INJUCTION

COMES NOW, Plaintiff JAMAL A. MORTON on behalf of himself and all others similarly situated, pursuant to Fed. R. Civ. P. 65, moves the Court to enjoin the Defendants from their on-going failure to comply with the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, as mirrored to the USVI. In support thereof the Plaintiff states as follows.[1]

INTRODUCTION & SUMMARY OF ARGUMENT

In the midst of an unprecedented pandemic and economic crisis, Congress passed the CARES Act, which in part provided for direct cash relief to qualifying United States citizens and legal permanent residents, otherwise known as Economic Impact Payments ("EIPs"). *See* 26 U.S.C. § 6428. Congress did not exclude incarcerated people from these benefits. Indeed, incarcerated persons will soon re-enter a devastated economy; many have a pressing need for

[1] The Plaintiff thanks and acknowledges the work the attorneys for the plaintiffs in *Scholl* did in obtaining an injunction against the Federal Government. The instant motion is based on the preliminary injunction motion in *Scholl*, but block quotes have been omitted for ease of reading.

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economic aid to maintain relationships with loved ones, and communications with loved ones and/or counsel; all need to purchase basic necessities (e.g., hygiene products, food, and clothing) even while behind bars; and many have children who are in need of assistance, either through child support obligations or otherwise, or owe restitution to the victims of crime. When they cannot afford those necessities, incarcerated people, who disproportionately come from economically disadvantaged and minority communities, must rely on friends and family. Notwithstanding clear statutory criteria regarding EIPs, Defendants in this case, like the Federal Government in *Scholl*, have unlawfully withheld EIP benefits from otherwise eligible incarcerated persons. Because the delayed delivery of such benefits will cause Plaintiffs and members of the proposed Class irreparable harm this Court should enter a class-wide preliminary injunction declaring Defendants' policy unlawful and requiring them to issue EIP benefits to eligible Class Members.

BACKGROUND

I. CARES Act

Congress passed the CARES Act on March 27, 2020, and the President signed it into law on the same day. *See* Pub. L. 116-136, 135 Stat. 335 (Mar. 27, 2020). Section 2201(a) of the CARES Act, codified at 26 U.S.C. § 6428, created a mechanism to issue direct cash support called "Economic Impact Payments" ("EIP") to Americans and legal permanent residents through the federal government's tax infrastructure. *Id.* The CARES Act, in general, and the EIP, in particular, apply to the USVI by operation of the Mirror Code. 48 U.S.C. § 1397.

How the EIP works: The Act creates a 2020 tax-year "credit" of $1,200 for an eligible individual, or $2,400 for eligible individuals filing a joint return, plus $500 per qualifying child. 26

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U.S.C. § 6428(a).[2] The statute deems all eligible individuals to have made an overpayment in tax years beginning in 2019 (whether or not they made any payment at all), such that the EIP is termed a "refund." 26 U.S.C. §§ 6428(f)(1)-(2). The statute directs that EIP benefits may be issued automatically through electronic deposits, 26 U.S.C. § 6428(f)(3)(B).

Eligibly: The statute defines an "eligible individual" as: "any individual other than— (1) any nonresident alien individual, (2) any individual with respect to whom a deduction under section 151 is allowable to another taxpayer for a taxable year beginning in the calendar year in which the individual's taxable year begins, and (3) an estate or trust." 26 U.S.C. § 6428(d).

Timing: Because the purpose of the EIP is emergency relief, the statute directs that "[t]he Secretary shall . . . refund or credit any overpayment attributable to this section as rapidly as possible," no later than December 31, 2020. 26 U.S.C. § 6428(f)(3)(A).

II. THE IRS'S POSITION ON THE CARES ACT IN THE USVI

Per the IRS website, a copy of which is attached hereto as Exhibit 2,

> Q A3. If I live in Puerto Rico, the U.S. Virgin Islands, American Samoa, Guam, or the Commonwealth of the Northern Mariana Islands, will I get a payment if I'm eligible? (Updated October 26, 2020)
>
> A3. In many cases, the answer is yes. But special rules in the law apply to these five U.S. territories (possessions). *In general, the tax authorities in each territory will make Payments to eligible residents. If you are a resident of one of these territories with questions about a payment, you should contact your local tax authority.*
>
> Resident of a U.S Territory: If you receive a Payment from the IRS and a U.S territory tax agency and you are a resident of a U.S. territory for the 2020 tax year, please consult with your U.S. territory tax agency concerning information about an incorrect or duplicate Payment.
>
> Not a resident of a U.S. Territory: If you have received a Payment from more than one jurisdiction and you are a not a resident of a U.S. territory for the 2020 tax year, you should return any incorrect or duplicate Payment received from the U.S. territory tax agency to the IRS following the instructions about

[2] Payments are reduced by 5% of the amount of a taxpayer's income above $150,000 if a joint return, $112,500 if a head of household, and $75,000 for all others. 26 U.S.C. § 6428(c).

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> repayments. Go to Topic I: Returning the Economic Impact Payment for instructions.

https://www.irs.gov/newsroom/economic-impact-payment-information-center-topic-a-eip-eligibility (last accessed Oct. 31, 2020) (emphasis added). The Court can, and should, take judicial notice of the IRS website pursuant to Fed. R. Evid. 201.

III. THE BIR'S ACTIONS REGARDING THE CARES ACT

The BIR issued guidance on its website, a copy of which is attached hereto as Exhibit 3, requiring individuals who are eligible for the EIP, but did not have a filing obligation to:

> please fill out the 2018 Form 1040, and include all forms of income received on the respective lines of the return. Check the spelling of your name, include the current mailing address, and sign the return. The returns are signed under the penalty of perjury, so please ensure that your information is correct. Write FOR STIMULUS CHECK on the top of the return.
>
> If you did not work in 2018, and have no income at all, please complete a 2018 Form 1040, and include $1 of interest income on the line 2b of the return. If you have a qualifying child, you can also claim the dependent credit, if that child is under the age of 17. Include the qualifying child's name, social security number and relationship to you when filing the return. Check the spelling of your name, include the current mailing address, and sign the return. You are signing this return under the penalties of perjury that you did not receive any other income in 2018. Write FOR STIMULUS CHECK on the top of the return. Once the returns are completed, please mail them to the Bureau using the following mailing address: 6115 Estate Smith Bay, Suite 225, St. Thomas, VI 00803, or drop off to the Bureau's offices. Office hours are 8:00a.m.- 3:00p.m.

https://bir.vi.gov/article/vibir-provides-instructions-for-non-filers-to-obtain-stimulus-checks (last accessed Oct. 31, 2020). The Court can, and should, take judicial notice of the BIR website pursuant to Fed. R. Evid. 201.

IV. THE N.D. OF CALIFORNIA CLASS ACTION LITIGATION/*SCHOLL* LITIGATION

On August 8, 2020, a class action complaint was filed against the Federal Government contesting the IRS's position that incarcerated individuals are not eligible for the EIP under the

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CARES Act. *Scholl, et al. v. Mnuchin, et al.*, case no. 4:20-cv-5309 (N.D. Cal.). 33. Indeed, IRS Chief Counsel Michael J. Desmond provided a declaration, *Scholl, et al. v. Mnuchin, et al.*, case no. 4:20-cv-5309 (N.D. Cal.) at ECF No. 44-1 (a copy of which is attached hereto as Exhibit 4)[3] stating that: "incarcerated individuals do not qualify for the advance payments." Exhibit 4 at ¶5.

On September 24, 2020, Judge Hamilton granted the *Scholl* plaintiffs a preliminary injunction and class certification. *Scholl v. Mnuchin*, 2020 WL 5702129 (N.D. Cal. Sept. 24, 2020) ("*Scholl I*").

The *Scholl* class was provisionally certified as:

> All United States citizens and legal permanent residents who:
> (a) are or were incarcerated (i.e., confined in a jail, prison, or other penal institution or correctional facility pursuant to their conviction of a criminal offense) in the United States, or have been held to have violated a condition of parole or probation imposed under federal or state law, at any time from March 27, 2020 to the present;
> (b) filed a tax return in 2018 or 2019, or were exempt from a filing obligation because they earned an income below $12,000 (or $24,400 if filing jointly) in the respective tax year;
> (c) were not claimed as a dependent on another person's tax return; and
> (d) filed their taxes with a valid Social Security Number, and, if they claimed qualifying children or filed jointly with another person, those individuals also held a valid Social Security Number.
> Excluded from the class are estates and trusts; defendants; the officers, directors, or employees of any defendant agency; and, any judicial officer presiding over this action and his/her immediate family and judicial staff.

Id. at *25. The *Scholl* class does not include incarcerated individuals in the USVI by operation of 26 U.S.C. § 7701(a)(9).

On October 14, 2020, Judge Hamilton entered an order granting in party and denying in

[3] The Court can, and should, take judicial notice of the Federal Government's district court filings pursuant to Fed. R. Evid. 201. *See Huff v. Comm'r of IRS*, 743 F.3d 790, 797 (11th Cir. 2014) (taking judicial notice of the facts and legal positions in related cases set forth in district court filings for purposes of appellate litigation).

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part the *Scholl* plaintiffs' motion for summary judgement and entered a permanent injunction against the Federal Government, and certified the class for all purposes. *Scholl v. Mnuchin*, 2020 WL 6065059, at *22 (N.D. Cal. Oct. 14, 2020) ("*Scholl II*").

On October 30, 2020, the Federal Government field as status report, *see Scholl, et al. v. Mnuchin, et al.*, case no. 4:20-cv-5309 (N.D. Cal.), at ECF Nos. 133 & 133-2, providing evidence of communications the IRS sent to correctional facilities, which included Notice 1446. A copy of Notice 1446 is attached as Exhibit 5.[4] IRS Notice 1446 established November 4, 2020, for incarcerated individuals to provide the IRS with information required in order to issue the EIP.

On October 30, 2020, the Federal Government also provided a copy of the legal notice (Notice 1444-D) informing the *Scholl* class members of how to obtain their EIP, *see Scholl, et al. v. Mnuchin, et al.*, case no. 4:20-cv-5309 (N.D. Cal.), at ECF Nos. 133-3; a copy of Notice 1444-D is attached hereto as Exhibit 6.[5] IRS Notice 1444-D does not apply to the BIR; nor does it apply to individuals incarcerated and in the custody and care of the USVI and/or BOC.

The Federal Government has appealed the *Scholl* case to the Ninth Circuit, and moved the Ninth Circuit for an order staying the District Court's decision pending appeal. *See* Ninth Cir. case no. 20-17077.

V. MORTON SEEKS CLARIFICATION OF THE BIR'S POSITION ON THE CARES ACT APPLICATION TO INCARCERATED INDIVIDUALS BUT RECEIVES NO RESPONSE

On October 27, 2020, counsel for the Plaintiff sent LEE correspondence seeking clarification as to whether the BIR shares the same view as the IRS regarding the CARES Act in

[4] The Court can, and should, take judicial notice of the Federal Government's district court filings pursuant to Fed. R. Evid. 201. *See Huff, supra.*

[5] The Court can, and should, take judicial notice of the Federal Government's district court filings pursuant to Fed. R. Evid. 201. *See Huff, supra.*

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general, and the EIP in particular, applied to incarcerated individuals. A copy of the October 27th correspondence, is attached as Exhibit 7. Counsel for the Plaintiff expressed that time was of the essence because the EIP must be issued "as rapidly as possible," 26 U.S.C. § 6428(f)(3), and that "[n]o refund or credit shall be made or allowed under this subsection after December 31, 2020[,]" *id.* Exhibit 1 at p. 2.

To date, counsel for the Plaintiff has received no response to his October 27th correspondence. Plaintiff concludes that the Defendants take the same position as the Federal Government as to the EIP for incarcerated individuals, i.e., they are not eligible.

VI. THE BIR'S POSITION APPLIED TO MORTON AND THE CLASS

Incarcerated people live "at the economic margin of existence." *Beno v. Shalala*, 30 F.3d 1057, 1064 n.10 (9th Cir. 1994). They are disproportionately among the most economically disadvantaged in our society, with few to no opportunities for gainful income. Many incarcerated people also rely on the assistance of friends and family on the outside to cover the gap between necessary expenses and low incomes. In this context, Defendants' withholding of CARES Act assistance from incarcerated people has impaired their ability to communicate with loved ones and/or counsel; purchase basic hygiene and food necessities; and prepare for reentry into society.

Because of the BIR's policy, Plaintiff and other similarly situated persons who did not receive automatic EIP benefits are unsure whether filing a request for the EIP will result in an accusation of filing a fraudulent claim with the potential to result in new criminal charges, enhanced sentences, denial and/or revocation of parole, or other adverse consequences for currently or formerly incarcerated people. Further, given BIR's position regarding the ineligibility of incarcerated persons for an EIP benefit, filing a claim (which is not required under the text of

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the CARES Act, nor under 26 U.S.C. § 6012(a)(1)(A)) would be futile.

The USVI through the BOC has knowledge of the individuals in its custody, care, and control, including such basic information as name, date of birth, social security number, income earned while incarcerated, and home address. In turn, the USVI has all the information needed for the BIR to determine whether any particular incarcerated individual is entitled to the EIP. Thus, the USVI has all the information needed for the DOF to issue checks transmitting the EIPs to incarcerated individuals in the custody of the USVI and/or the BOC.

APPLICABLE LAW

Rule 65(a) governs the entry of preliminary injunctions. The well-established test under Rule 65 is whether a litigant is "(1) reasonably likely to prevail eventually in the litigation and (2) that they are likely to suffer irreparable injury without relief." *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 105 (3d Cir. 2013) (citation omitted). "If these two threshold showings are made the District Court then considers, to the extent relevant, (3) whether an injunction would harm the [defendants] more than denying relief would harm the plaintiffs and (4) whether granting relief would serve the public interest." *Id.*

To establish a likelihood of success, a party must show "a reasonable chance, or probability, of winning." *In re Revel AC, Inc.*, 802 F.3d 558, 568 (3d Cir. 2015) (citation omitted). A reasonable chance of winning is one that is "significantly better than negligible but not necessarily more likely than not[.]" *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 & n.3 (3d Cir. 2017) (internal citations omitted). "How strong a claim on the merits is enough depends on the balance of the harms: the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief." *Id.* at 179 (citation omitted).

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DISCUSSION

I. THRESHOLD CONSIDERATIONS

A. Standing

Standing contains three elements: (1) "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (cleaned up).

Just as the Plaintiffs in *Scholl, see Scholl I* and *II, supra,* had Article III standing, so does Morton in this case. *First*, "the deprivation of a monetary benefit is precisely the sort of economic injury that normally satisfies the injury in fact requirement." *Scholl I*, at *5 (citing *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972)). The loss of the EIP, which is statutorily set at $1,200 is concrete and particularized, and the loss of the EIP is actual as the Defendants have not issued Morton and the Class as soon as possible, but no later than December 31, 2020. 26 U.S.C. § 6428(f)(3)(A). *Second*, the injury is directly traceable to the Defendants' actions, i.e., they have not issued the Plaintiff and the Class the EIP even though required to under the CARES Act. *Third*, a decision ordering the Defendants to comply with the CARES Act and issue the EIP addresses the injury that the Plaintiff is suffering at the hands of the Defendants. *See Scholl I*, at *6 ("[t]he failure to disburse the EIPs to incarcerated persons is directly traceable to a decision made by the IRS and

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an order for injunctive relief would directly remedy plaintiffs' injury."). Thus, all three elements of Article III standing have been satisfied.

Additionally, the Plaintiff has standing under 5 V.I.C. § 80. Morton "has standing to bring suit on behalf of all similarly situated taxpayers against the Virgin Islands to restrain illegal or unauthorized acts by a territorial officer or employee, or the wrongful disbursement of territorial funds." *Berne Corp. v. Gov't of The Virgin Islands*, 570 F. 3d 130 at fn. 5 (3d Cir. 2009) (quotation omitted). Thus, Morton has independent standing under Section 80 to bring this case.

B. Ripeness

The Supreme Court instructs that ripeness is "peculiarly a question of timing," *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 140 (1974), designed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). To determine whether a case is ripe, a court must consider "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Plains All Am. Pipeline L.P. v. Cook*, 866 F.3d 534, 539 (3d Cir. 2017) (cleaned up). When a plaintiff seeks both declaratory and injunctive relief, the Third Circuit has instructed courts to evaluate ripeness using the following three factors: "(1) the adversity of the parties' interests, (2) the conclusiveness of the judgment, and (3) the utility of the judgment." *Plains All Am. Pipeline L.P.*, 866 F.3d at 540 (internal citations omitted).

The issues present here and legal in nature that are on-going, which presents a particularly tidy case presenting straight-forward legal issues for this Court's decision. As to the hardship to the Plaintiff of withholding court consideration – the Plaintiff is in need as the CARES Act provides a hard statutorily deadline to have the EIP issue, i.e. the end of the calendar year. *See* 26

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U.S.C. § 6428(f)(3)(A). The harm to the Plaintiff is patent and on-going and is ripe for consideration. As the court in *Scholl* found the case to be ripe, so should this Court.

As to the Third Circuit's three additional ripeness factors for declaratory and/or injunctive relief, each is present. As the Third Circuit has explained, "[a]lthough the party seeking review need not have suffered a completed harm to establish adversity of interest, it is necessary that there be a substantial threat of real harm and that the threat must remain real and immediate throughout the course of the litigation." *Presbytery of N.J. of Orthodox Presbyterian Church v. Florio*, 40 F.3d 1454, 1463 (3d Cir. 1994) (cleaned up). There can be no credible argument that the parties are adverse, the Plaintiff wants his EIP and the Defendants will have to expend money of the public fisc to issue the Plaintiff his $1,200.

To determine whether a judgment would be conclusive, a court must examine whether the facts of the case are sufficiently developed so that any judgment would not be based on a hypothetical situation. *NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 344 (3d Cir. 2001) ("[Conclusiveness] addresses the extent to which further factual development of the case would facilitate decision, so as to avoid issuing advisory opinions."). A judgment is more likely to be conclusive when the issues in the case are legal rather than factual. *Armstrong World Indus., Inc. by Wolfson v. Adams*, 961 F.2d 405, 412 (3d Cir. 1992) ("[A] factual record is not as important where the question presented is "predominantly legal."). The facts of this case are simple – the Defendants (like the IRS) take the position that incarcerated individuals aren't eligible for the EIP under the CARES Act, which is essentially a legal dispute (there can be no bona fide dispute the Plaintiff is incarcerated and the Defendants haven't issued him his EIP). Finally, the Court's judgment would have utility. "Practical utility goes to 'whether the parties' plans of actions are

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likely to be affected by a declaratory judgment,' and considers the hardship to the parties of withholding judgment." *NE Hub Partners, L.P.*, 239 F.3d at 344–45. The facts in this case are sufficiently developed to make the Court's judgment conclusive, a judgment ordering the Defendants to pay the Plaintiff his EIP will conclusively provide the Plaintiff with relief, and the utility of the judgment (and the attendant payment of $1,200) is plain as it will affect the parties' actions in this case.

C. Sovereign Immunity

Section 1983 and 5 V.I.C. § 80, each allow an aggrieved individual the capacity to bring suit against the Defendants.

Section 80 provides, in full, that "[a] taxpayer may maintain an action to restrain illegal or unauthorized acts by a territorial officer or employee, or the wrongful disbursement of territorial funds." Section 80 operates as a waiver of the USVI's sovereign immunity for both (1) illegal or unauthorized acts by a territorial officer or employee and (2) the wrongful disbursement of territorial funds. Indeed, "Section 80 means what it says, that any taxpayer may sue the Government or one of its officers or employees to prevent a violation of the law." *Haynes v. Ottley*, 61 V.I. 547, 567 (V.I. 2014) (cleaned up). "With respect to 5 V.I.C. § 80, the Virgin Islands taxpayer statute 'is amongst the original provisions found in the Virgin Islands Code,' 'remedial,' and with 'intentionally broad' language, 'having the salutary purpose of affording to Virgin Islands taxpayers full and adequate relief from illegal actions of the territorial government and its officers.'" *Lorraine Assocs., L.L.C. v. Gov't of the Virgin Islands*, 2016 WL 11550745, at *8 (V.I. Super. 2016) (cleaned up).

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In this case, the Plaintiff has contested the Defendant's position of not issuing EIPs as required under the CARES Act as an illegal or unauthorized act under the Internal Revenue Code (i.e. Count 1), in violation of the Equal Protection Clause (i.e. Count 2), and the USVI version of the Administrative Procedures Act (i.e. Count 3).

Additionally, Section 1983 has been long been recognized as providing a way to sue state official for damages and injunctive relief for violations of federal law. *See Monroe v. Pape*, 365 U.S. 167 (1961). Section 1983 permits suits against state actors for violations of the federal Constitution, and for violations of a federal statutes and rights. *See Maine v. Thiboutot*, 448 U.S. 1 (1980).

Finally, 26 U.S.C. § 7422(a) does not operate to strip this Court of jurisdiction because (1) Section 7422 not an adequate alternative because he is not seeking to recover tax imposed or collected by the BIR, (2) Section 7422 does not permit prospective injunctive and declaratory relief, which he seeks in this case, and (3) assuming Section 7422 applies, then it is not an adequate alternative because it would entail years of delay to file a tax return, file administrative claims, exhaust those claims, and then file in court. The *Scholl* court relying on cases from the Fourth and D.C. Circuits noted that "because § 7422(a) references recovery of any internal revenue tax', the statute does not explicitly allow for the type of prospective equitable relief requested by plaintiffs." *Scholl I*, at *11 (citing *King v. Burwell*, 759 F.3d 358, 366 (4th Cir. 2014), *aff'd*, 576 U.S. 473 (2015); *Cohen v. United States*, 650 F.3d 717, 732 (D.C. Cir. 2011) (*en banc*)).

To be clear, Plaintiff does not seek the recovery of any monies wrongfully "assessed" because he does not allege that the BIR improperly calculated his tax liability. *See Hibbs v. Winn*, 542 U.S. 88, 100 (2004) ("As used in the Internal Revenue Code (IRC), the term 'assessment'

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involves a 'recording' of the amount the taxpayer owes the Government."). Nor does Plaintiff complain of taxes wrongfully "collected." Accordingly, Section 7422 is not an obstacle for this Court's review of the Plaintiff's allegations.

II. LIKELIHOOD OF SUCCESS

Courts must examine the legal principles controlling the claim and the potential defenses available to the opposing party. *See BP Chems. Ltd. v. Formosa Chem. & Fibre Corp.*, 229 F.3d 254, 264 (3d Cir. 2000). A mere possibility that the claim might be defeated does not preclude a finding of probable success if evidence clearly satisfies the essential prerequisites of the cause of action. *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 173 (3d Cir. 2001). As shown below, the Plaintiff has a high (if not certain) likelihood of success on the causes of action in his Complaint.

A. CARES Act

The CARES Act creates stimulus payments for "eligible individuals" in the amount of $1,200 per individual, with additional relief of $500 per qualified child. 26 U.SC. § 6428(a). The eligibility requirements are intentionally broad, and could not be clearer: "The term 'eligible individual' means any individual other than—(1) any nonresident alien individual, (2) any individual with respect to whom [another taxpayer claims them to be a dependent], and (3) an estate or trust." 26 U.S.C. § 6428(d). There are no other statutory criteria.

Interpretation of Section 6428 should begin and end here, with the unambiguous[6] text of the statute. *See Lamie v. United States Trustee.*, 540 U.S. 526, 534 (2004) ("[t]he starting point in

[6] To the extent the text may be ambiguous, courts must endeavor to discern Congress's intent. *Susinno v. Work Out World Inc.*, 862 F.3d 346, 348-49 (3d Cir. 2017). But the legislative history confirms the straightforward text. Congress intended the CARES Act's stimulus payments to reach

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discerning congressional intent is the existing statutory text."). Our inquiry will "end[ ] there as well if the text [of the statute] is unambiguous." *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004). "The preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *Id.* (alteration in original) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)). If "the statute's language is plain, the sole function of the courts … is to enforce it according to its terms." *Lamie*, 540 U.S. at 534 (quoting *Hartford Underwriters Ins. v. Union Planters Bank*, 530 U.S. 1, 6 (2000)).

The *Scholl* court reviewed Section 6428(f) and concluded that (a) the CARES Act provides for an advance refund, (b) the amount of the advance refund, and (c) the payment of the advance refund. *See Scholl I*, at *12–13 (discussing Section 6428(f)(1)-(3) in depth). Ultimately the *Scholl* court concluded that Section 6428(f)(3) required the issuance of the advance refund (i.e. the EIP) because of the mandatory language of the statute, *id.* at *13; *see also Lopez v. Davis*, 531 U.S. 230, 241 (2001) ("Congress used 'shall' to impose discretionless obligations"), to be accomplished "as quickly as possible", *Scholl I*, at *13.

The *Scholl* court quickly dispensed with any argument that incarcerated individuals are not eligible for the EIP. *See Scholl I*, at *14. Indeed, there is no indication that Congress intended to exclude incarcerated persons from the relief package. Significantly, when Congress has excluded incarcerated people from benefits programs in the past, it has done so explicitly. For example,

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American citizens and legal permanent residents with virtually no exceptions, in recognition of the broad impact of the pandemic. *See, e.g.*, 166 Cong. Rec. S2007 (Mar. 24, 2020) (statement of Sen. McConnell) (stating that purpose of Act was to "rush financial assistance to Americans through direct checks to households from the middle class on down"); 166 Cong. Rec. E339 (Mar. 31, 2020) (statement of Rep. Jayapal) (stating the CARES Act provides "relief to the vast majority of everyday people to immediately help put cash in people's pocket to pay those mounting bills") (emphasis added); 166 Cong. Rec. S1929 (Mar. 23, 2020) (statement of Sen. Lankford) (same).

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when Congress passed a stimulus package during the Great Recession of 2008, eligibility for a stimulus was based on meeting a certain minimum income, *see* 26 U.S.C. § 6428(e)(4) (eff. Feb. 13, 2008), and Congress specifically excluded incomes earned by incarcerated persons from the calculation, *see* 26 U.S.C. § 32(c)(2)(B) (excluding any amount earned by "an inmate at a penal institution"). "The fact that Congress previously devised a method to indirectly exclude incarcerated persons from the 2008 stimulus but included no such provision here indicates that Congress did not intend to exclude incarcerated persons from the definition of 'eligible individual.'" *Scholl I*, at *14.

At bottom, the CARES Act "mandates distribution of the advance refund to eligible individuals. Incarcerated persons who otherwise qualify for an advance refund are not excluded as an 'eligible individual.' The [BIR's] decision to exclude incarcerated persons from advance refund payments is likely contrary to law." *Scholl I*, at *15.

B. Section 1983

1. Right to EIP under the CARES Act

Section 1983 creates a private cause of action to redress constitutional wrongs committed by state officials. 42 U.S.C. § 1983. The statute is not a source of substantive rights, but serves as a mechanism for vindicating rights otherwise protected by federal law. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284-85 (2002); *Kneipp v. Tedder*, 95 F.3d 1199, 1204 (3d Cir. 1996). To state a Section 1983 claim, a plaintiff must show a deprivation of a "right secured by the Constitution and the laws of the United States ... by a person acting under color of state law." *Kneipp*, 95 F.3d at 1204 (cleaned up). "If a plaintiff alleges a violation of a federal right as the basis of a § 1983 action,

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[courts] must determine whether the applicable federal statute confers an individual right." *Grammer v. John J. Kane Reg'l Centers-Glen Hazel*, 570 F.3d 520, 525 (3d Cir. 2009).

There are three factors courts use to "determine whether a statute conferred a federal right upon an individual: first, courts should determine whether Congress intended that the statutory provision in question benefits the plaintiff; second, courts should decide whether the right asserted is so 'vague and amorphous' that its enforcement would strain judicial competence; and lastly, courts should determine whether the statute unambiguously imposes a binding obligation on the states." *Id.*

In this case the Plaintiff easily meets all three factors. *First*, the CARES Act conferred a federal right to receive the EIP by the end of 2020 if he/she meets the statutory definition. *Second*, an individual's entitlement to the EIP is concrete and certain based on the express statutory factors of 26 U.S.C. § 6428(d). *Third*, the CARES Act imposes a binding obligation upon the Federal Government under the Internal Revenue Code, and the same obligation upon the USVI by operation of 48 U.S.C. § 1397.

For example in *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180 (3d Cir. 2004), the Circuit held that that the Medicaid Act required that a "state plan for medical assistance must provide medical assistance to all eligible individuals" and that "such assistance shall be furnished with reasonable promptness to all eligible individuals." *Id.* at 182, n. 4, 189 (cleaned up). The Circuit concluded that the statutory language requiring that a state "must provide" medical services with reasonable promptness met all three factors of the *Blessing* analysis because the plaintiffs were the intended beneficiaries of the statute, the rights the plaintiffs sought to enforce were specific and enumerated and that the obligation imposed upon the states was unambiguous and binding. *Id.* at

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189. Significantly, the language of the CARES Act and 26 U.S.C. § 6428 is expressed in even more certain terms as to amount ($1,200, *see* 26 U.S.C. § 6428(a)), eligibility (*see* 26 U.S.C. § 6428(d)), and timing (Dec. 31, 2020, *see* 26 U.S.C. § 6428(f)(3)(A)), than the Medicaid provisions addressed in *Sabree*.

The Plaintiff presents a similar case for this Court's consideration. In *Paeste v. Government of Guam*, 798 F.3d 1228 (9th Cir. 2015), the Ninth Circuit affirmed the district court's imposition of an injunction in a class action brought by territorial taxpayers who claimed local officials' failure to issue timely refunds violated their equal protection rights under § 1983. *Id.* at 1240-42. While *Paeste* involved refunds of overpaid taxes to Guam there is no analytical reason why the failure of a territory to refund overpaid income taxes is treated any different than a territory failing to issue mandatory payments contained in the Internal Revenue Code. Accordingly, as Section 1983 provided a viable mechanism to enforce equal treatment of the Internal Revenue Code in *Paeste* so too should it operate to provide the Plaintiff his EIP in this case under the CARES Act.

2. Equal Protection

The Equal Protection Clause provides that no state shall "deny to any person … the equal protection of its laws." U.S. Const. Amend. XIV, § 1. The 14th Amendment applies to the USVI via the Revised Organic Act. 48 U.S.C. § 1561. "The Equal protection Clause applies only to taxation which in fact bears unequally on person or property of the same class." *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty.*, 488 U.S. 336, 343 (1989) (quoting *Charleston Fed. Savs. & Loan Ass'n v. Alderson*, 324 U.S. 182, 190 (1945) (collecting cases)) (internal quotation marks omitted).

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In this case the Defendants are treating incarcerated individuals who meet the statutory criteria of an "eligible person" under 26 U.S.C. § 6428(a) & (d) unequally (i.e. differently) than non-incarcerated individuals who meet the statutory criteria under the same subsections. The Defendants' position that incarcerated individuals are not eligible for the EIP is so "standardless and arbitrary that it violate[s the] principles of equal protection." *Paeste,* 798 F.3d at 1238.

To that end, "the IRS has put forward virtually no public explanation concerning its decision to withhold payments to incarcerated persons." *Scholl I*, at *16; *see also id.* ("[the IRS website] does not describe why or how the IRS arrived at its decision to deny payments to incarcerated persons."). However, unlike the IRS who put forth a passing reference to incarcerated individuals on its website, *see id.,* the BIR has given no public explanation regarding incarcerated individuals. Indeed, when the undersigned reached out to the BIR and LEE they failed to respond. *See* Exhibit 1 (DiRuzzo Dec.) at ¶11. The Defendants actions taken vis-à-vis USVI incarcerated individuals is so standardless and arbitrary that it violates equal protection. *See Paeste,* 798 F.3d at 1238.

C. USVI APA

The USVI APA defines a regulation as "every rule, regulation or order, amendments thereto or revocations thereof, made by any agency." 3 V.I.C. § 911(b). The blanket refusal to issue EIPs to incarcerated individuals are "regulations" as that term is defined in 3 V.I.C. § 911(b).

The Virgin Islands Code imposes limitations upon the Defendants to issue a "regulation." Specifically, Section 912 provides that: "Except as provided in section 934 of this title, *nothing in this chapter confers authority upon or augments the authority of any agency to adopt, administer or enforce any regulation*. Each regulation adopted, to be effective, must be within the scope of authority

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conferred and *in accordance with standards prescribed by other provisions of law*." 3 V.I.C. § 912 (emphasis added).

However, "[t]he CARES Act contains an express authorization to engage in the rulemaking process; section 6428(h) permits *the Treasury Secretary* to prescribe such regulations or other guidance necessary to carry out the purpose of the CARES Act." *Scholl I*, at *12 (emphasis added); *see also Perkins v. United States Virgin Islands* (D.V.I. Feb. 12, 2018) ("Internal Revenue Code *and its accompanying regulations* apply to taxes levied in the Virgin Islands except where displaced by local law.") (emphasis added). Thus, the BIR cannot issue "regulations" regarding the CARES Act as that capacity is wholly in the purview of the U.S. Treasury Department.

However, assuming the Defendants do have the capacity to issues regulations (a point we contest) regarding the CARES Act, such would need to comply with the robust statutory scheme found in Chapter 35 of Title 3 of the Virgin Islands Code, i.e., 3 V.I.C. § 911, *et seq.* For example, the Defendants would have to comply with 3 V.I.C. § 913(a) (requiring BRYAN to approve any new rule), 3 V.I.C. § 913(b) (requiring BRYAN to submit the new rule/regulation to the Legislature), 3 V.I.C. § 933 (requiring that any regulations containing the new rules (an original and two duplicates) must be filed with the Lieutenant Governor and published in the Virgin Islands Rules and Regulations), 3 V.I.C. §§ 935-36 (requiring that the Lieutenant Governor must indorse and approve the regulations), 3 V.I.C. § 913(a)-(b) (requiring BRYAN must submit the new rules to the Legislature), 3 V.I.C. § 913(a) (requiring that the USVI and the agency (in this case the BIR) must give public notice of the regulation by publication in a newspaper of general circulation), and 3 V.I.C. § 941 (requiring that copies of the regulation must be distributed to libraries territory-wide so that they are available for public viewing), none of which has occurred in

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this case. Accordingly, the Defendants' position (which by operation of 3 V.I.C. § 911(b) functions as a regulation) has no legal force or effect, and must be set aside pursuant to 3 V.I.C. §§ 913(a) & 933.

As to the merits, the addition of eligibility requirements beyond those provided by the CARES Act effectively re-writes the statutory definition of "eligible individual," violating core separation of powers principles. *See Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 327-28 (2014) ("The power of executing the laws . . . does not include a power to revise clear statutory terms," because of the "core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate."). Additionally, Defendants violated the "basic procedural requirement" that "an agency must give adequate reasons for its decisions," and when it "has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

To the extent Defendants' policy can be construed as an "interpretation" of the CARES Act, it is not entitled to judicial deference as it has not followed the USVI APA, is unexplained and cites no legal authority, and appears to be nothing more than the Defendants' litigating position, so it lacks persuasive value. *See Kisor v. Wilkie,* 139 S. Ct. 2400, 2417 (2019) (cleaned up) ("[t]hat means, we have stated, that a court should decline to defer to a merely convenient litigating position or *post hoc* rationalization advanced to defend past agency action against attack.").

III. IRREPARABLE HARM

Plaintiff and the Class by definition are considered to be economically disadvantage by Congress (which is why the meet the statutory criteria for the EIP in the first instance), and it is

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axiomatic that the loss of a right provided by Congress, and codified in the Internal Revenue Code, is irreparable. For example, in *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) the Supreme Court held that a complete loss of financial aid under the federally assisted program of Aid to Families with Dependent Children ("AFDC") is such a serious deprivation that a post-termination hearing with retroactive reimbursement of benefits is constitutionally insufficient.

While the Plaintiff's claims are meritorious, and assuming that payment of EIP will eventually will be made, the delay in payments here nonetheless gives rise to irreparable harm because, in passing the CARES Act, Congress intended to provide rapid economic relief at a moment of crisis: it directed the Treasury to distribute payments "as rapidly as possible," but no later than year end. 26 U.S.C. § 6428(f)(3)(A). The fact that "the injured could not be made whole by retroactive payments at some later time[,]" *Briggs v. Sullivan*, 886 F.2d 1132, 1140 (9th Cir. 1989) (finding irreparable harm where agency withheld non-discretionary SSI payments), weighs in favor of concluding that there is irreparable harm. This principle holds particularly true when the government wrongfully withholds benefits that are intended to provide critical assistance to vulnerable populations. Consequently, losing EIP benefits with no ability to obtain them at a later time (by virtue of the 2020 year-end requirement of 26 U.S.C. § 6428(f)(3)(A)) would undoubtably qualify as irreparable harm.

In respect to economic hardship, courts from around the country have concluded that irreparable harm exists to those that are economically disadvantaged when they are deprived of governmental monetary support. *See, e.g., Beno v. Shalala*, 30 F.3d 1057, 1064 n.10 (9th Cir. 1994) (reversing denial of preliminary injunction for a class of families who experienced cuts to their Aid for Families with Dependent Children checks because "[f]or people at the economic margin of

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existence, the loss of $172 a month and perhaps some medical care cannot be made up by the later entry of a money judgment"); *Chu Drua Cha v. Noot*, 696 F.2d 594, 599 (8th Cir. 1982) (cleaned up) ("We have no doubt that irreparable harm is occurring to the plaintiff class as each month passes even if the 11th amendment would permit a court order requiring retroactive benefits payments, because for people at the economic margin of existence, the loss of $172 a month and perhaps some medical care cannot be made up by the later entry of a money judgment."), *mod. on other grounds*, 701 F.2d 750 (8th Cir. 1983); *Moore v. Miller*, 579 F.Supp. 1188, 1191–92 (N.D. Ill. 1983) ("For those in the grip of poverty, living on the financial edge, even a small decrease in payments can cause irreparable harm."); *Crane v. Mathews*, 417 F.Supp. 532, 539–40 (N.D. Ga. 1976) (imposition of $2 copayment for medical treatment is irreparable injury to welfare recipients living at subsistence level). *See also Scholl I*, at *17-188 (surveying cases holding that that irreparable harm can exist where a plaintiff lacks the resources to procure the basic necessities of life).

As the weight of authorities demonstrate, the loss of the economic hardship of losing the EIP operates as an irreparable harm in this case. This Court should, like the court in *Scholl, see Scholl I,* at *19, conclude that the Plaintiff has established he is likely to be irreparably injured without an injunction.

IV. EQUITY & PUBLIC INTEREST

When the government is the party opposing the motion for preliminary injunctive relief, these two factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). The balance here tips sharply in favor of an injunction because without a preliminary injunction, Plaintiff and the Class will be forced to forego the ability to use the EIP to support themselves and their loved ones. To be clear, the $1,200 the EIP provides can be used for a multitude of expenditures including, but not limited

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to, child support, paying for food and hygiene products at the commissary, communications expenses (e.g. envelopes, stamps, paper, pens, etc.) with their loved ones and/or counsel, court costs, and restitution.

In contrast, the Defendants do not suffer harm from being required to follow the letter of the law. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013) (government "cannot suffer harm from an injunction that merely ends an unlawful practice"); *League of Women Voters of U.S. v. Newby,* 838 F.3d 1, 12 (D.C. Cir. 2016) ("There is generally no public interest in the perpetuation of unlawful agency action. To the contrary, there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations.") (cleaned up).

Additionally, the public also has a strong interest in the enforcement of legally-protected rights, including Plaintiffs' and the Class's rights under the CARES Act. *See A. O. v. Cuccinelli*, 2020 WL 2097586, at *11 (N.D. Cal. May 1, 2020) ("These factors weigh in favor of a preliminary injunction when plaintiffs have also established that the government's policy violates federal law."); *W. Watersheds Project v. Bernhardt*, 391 F. Supp. 3d 1002, 1026 (D. Or. 2019) (same); *Inland Empire-Immigrant Youth Collective v. Nielsen*, 2018 WL 1061408, at *21 (C.D. Cal. Feb. 26, 2018) (same).

To the extent that the injunction may cause the Defendants to incur additional expenses or expend appropriations at a quicker pace, the Court should concluded that these concerns are clearly outweighed by the public interest in providing immediate assistance to low-income taxpayers that would otherwise be eligible for relief but have not received much needed emergency support, i.e., EIPs. *See Gilliam v. United States Dep't of Agric.*, 2020 WL 5501220, at *16 (E.D. Pa. Sept. 11, 2020) (providing a preliminary injunction based on the denial of emergency SNAP

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allotments, and citing *Wilson v. Heckler*, 622 F. Supp. 649, 655 (D. N.J. 1985), *aff'd in part and vacated in part*, ("Faced with such a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor." (internal quotation marks and citation omitted)); *Blanco v. Anderson*, 39 F.3d 969, 973 (9th Cir. 1994) (finding that lack of resources is no excuse for failing to provide the plaintiffs their statutory entitlements under the Food Stamp Act)).

Finally, the *Scholl* court concluded that "[t]he potential damage to plaintiffs and putative class members is evident from the court's discussion of irreparable harm. Briefly, the harm suffered by incarcerated persons is acute and ongoing. Their interest in injunctive relief is substantial." *Scholl I*, at *20. This Court should likewise conclude that the Plaintiff and the Class have demonstrated that the equities of the case and the public interest both weights clearly in favor of issuing an injunction against the Defendants.

CONCLUSION

WHEREFORE, based on the foregoing, the Court should grant the instant motion in full.

Respectfully Submitted,

By: /s/ Joseph A. DiRuzzo, III Digitally signed by /s/ Joseph A. DiRuzzo, III Date: 2020.11.04 12:39:39 -05'00' Dated Nov. 4, 2020

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