

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

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JAMAL A. MORTON, individually and on behalf	:	Case No. 3:20-cv-109
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,	:	
CLARINA MODEST ELLIOT, in her official	:	
capacity as acting the Commissioner of the	:	
Department of Finance,	:	
Defendants.	:	
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FIRST AMENDED CLASS ACTION COMPLAINT

PLAINTIFF, JAMAL A. MORTON, by and through his undersigned counsel, alleges as follows:

NATURE OF THE CASE & INTRODUCTION

1. This case is brought on behalf of persons who have been incarcerated under the custody of United States Virgin Islands (“USVI”) at any time from March 27, 2020 to the present (“incarcerated persons” or “incarcerated people”) to challenge Defendants’ unauthorized and unlawful refusal to issue Economic Impact Payments (“EIP”) to which these persons are entitled under the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act. *See* 26 U.S.C. § 6428. On behalf of himself and all others similarly situated, Plaintiff seeks a declaratory judgment that Defendants lack statutory authority to withhold EIP benefits from them and other incarcerated persons based solely on their status as such, and injunctive relief ordering Defendants (a) to

automatically issue EIP benefits to those who are entitled to an automatic payment based on the Bureau of Internal Revenue's ("BIR") records but for their incarcerated status; (b) to re-consider any filed claim for an EIP that has been denied based solely on the claimant's incarcerated status and, moving forward, to prohibit Defendants from considering incarcerated status in reviewing claims for EIP benefits under the CARES Act; and (c) to issue EIP benefits to all incarcerated persons under the custody of USVI otherwise eligible for those benefits.

JURISDICTION, VENUE, & STANDING

2. This Court has jurisdiction over this action pursuant to 48 U.S.C. § 1612(a), 28 U.S.C. §§ 1331, 1367, 1343, 2201, and 2202.
3. Venue is proper under 28 U.S.C. § 1391 in this Court as at least of the Defendants resides in this venue, and this is a class action suit against the United States Virgin Islands.
4. Plaintiff has Article III standing as he is being deprived of the EIP that he is statutorily eligible for under 26 U.S.C. § 6428; he also has standing under 5 V.I.C. § 80 to bring this action as he is a Virgin Islands taxpayer.

THE PARTIES

5. The USVI was created through the enactment of the Revised Organic Act (48 U.S.C. § 1541 *et. seq.*). The USVI is the entity to whom income taxes are paid by Virgin Islands taxpayers pursuant to the Naval Services Appropriation Act of 1921 (48 U.S.C. § 1397). The Internal Revenue Code applies in the USVI via a substitution regime commonly referred to as the "Mirror Code." Under 26 U.S.C. § 7701(a)(9) the "United States" does not include the USVI.
6. The Honorable ALBERT BRYAN, JR. is the current Governor of the USVI.
7. Director JOEL A. LEE is the current Director of the Bureau of Internal Revenue ("BIR").

8. Commissioner CLARINA MODEST ELLIOT is the acting Commissioner of the Department of Finance (“DOF”).

9. Plaintiff is an American citizen, a USVI resident under 26 U.S.C. §§ 932(c) and 937, and is not claimed as a dependent on anyone else’s tax return. Plaintiff has been continuously under the custody of the USVI and/or BOC since 2009, and is being held in custody at the Golden Grove Correctional Facility (“Golden Grove”) on St. Croix. Plaintiff has not filed an income tax return with the BIR during the last decade because he did not have a filing requirement since his income was below the gross income exclusion. See 26 U.S.C. § 6012(a)(1)(A). Plaintiff has yet to receive his EIP from the BIR and/or DOF.

BACKGROUND

The CARES Act

10. Beginning in early 2020, the novel coronavirus pandemic created a severe economic hardship on millions of Americans. To address this economic crisis, Congress passed and President Trump signed into law the Coronavirus Aid, Relief, and Economic Security (CARES) Act. See Pub. L. 116-136, 134 Stat. 281 (Mar. 27, 2020).

11. Under the CARES Act, eligible individuals may receive a payment of up to \$1,200 (or \$2,400 in the case of eligible individuals filing a joint return), plus \$500 for each qualifying child. 26 U.S.C. § 6428(a). The amount of the credit may be adjusted based on an individual’s adjusted gross income. *Id.* § 6428(c).

12. The CARES Act defines eligibility for an EIP broadly. The statute defines “eligible individual” to include “any individual other than—(1) any non-resident alien individual, (2) any individual with respect to whom a deduction under section 151 is allowable to another taxpayer . .

., and (3) an estate or trust.” 26 U.S.C. § 6428(d). Congress did not impose any other status-based limitations on the definition of “eligible individual” under 26 U.S.C. § 6428(d).

13. By operation of the Mirror Code, 48 U.S.C. § 1397, the CARES Act applies to the USVI.

14. Pursuant to the CARES Act, Defendants are required to issue EIP benefits “as rapidly as possible.” 26 U.S.C. § 6428(f)(3)(A). Pursuant to the IRS’s implementation of the CARES Act, eligible persons who already filed a tax return for 2018 have automatically received their EIP benefits without taking any additional action. See IRS, Economic Impact Payment Information Center, Q4. Do I need to take action?, <https://www.irs.gov/coronavirus/economic-impact-payment-information-center>. All eligible persons who were not entitled to an EIP based on their 2018 return and have filed a 2019 return that entitles them to payment have or will receive an EIP without taking additional action. Persons who were not required to file a tax return in either year must file a claim through the IRS’s online portal for “non-filers.” See <https://www.irs.gov/coronavirus/non-filers-enter-payment-info-here>. Once filed, the IRS has no discretion to refuse to disburse an EIP to anyone who satisfies the CARES Act’s statutory requirements.

15. Although the CARES Act does not exclude incarcerated individuals from eligibility for an EIP, the IRS announced on its website on May 6, 2020, more than five weeks after the passage of the CARES Act, that incarcerated individuals were ineligible for the EIP. The IRS’s website stated:

Q15. Does someone who is incarcerated qualify for the Payment?

A15. No. A Payment made to someone who is incarcerated should be returned to the IRS by following the instructions about repayments. A person is incarcerated if he or she is described in one or more of clauses (i) through (v) of Section 202(x)(1)(A) of the Social Security Act (42 U.S.C. § 402(x)(1)(A)(i) through (v)). For a Payment made with respect to a joint return where only one spouse is incarcerated, you only need to return the portion of the Payment made on account of the incarcerated spouse. This amount will be \$1,200 unless adjusted gross

income exceeded \$150,000.

16. In addition to requesting that incarcerated individuals return their EIP benefits without providing any explanation of the legal basis for doing so, the IRS has affirmatively taken action to withhold or retrieve the EIP from incarcerated individuals as described in a Government Accountability Office (GAO) report dated June 25, 2020 entitled “COVID 19 Opportunities to Improve Federal Response and Recovery Efforts.” On page 222 of that report, the GAO states: “According to IRS officials, IRS also worked with federal and state prison officials to assist in the return of payments made to incarcerated individuals.” GAO-20-625, <https://www.gao.gov/reports/GAO-20-625/>.

17. On June 24, 2020, the Associated Press reported that although “checks of up to \$1,200 were automatically sent in most cases to people who filed income tax returns for 2018 or 2019, including some who are incarcerated,” “[a] couple of weeks later, the IRS directed state correction departments to intercept payments to prisoners and return them.” Rebecca Boone, *Inmates Got Virus Relief Checks, and IRS Wants Them Back*, Associated Press, June 24, 2020, <https://apnews.com/0810bb67199c9cef34d4d39ada645a92>. Pursuant to the IRS’s directive, “[t]he Kansas Department of Correction alone intercepted more than \$200,000 in checks by early June. Idaho and Montana combined had seized over \$90,000.” *Id.* Other states, including Washington, Vermont, Mississippi, Pennsylvania, Arizona, California, Oregon, and Utah have intercepted stimulus payments to incarcerated persons at the IRS’s behest.

18. The IRS has no legal basis for withholding, retracting, or asking others to intercept stimulus payments to incarcerated persons. When asked, IRS spokesman Eric Smith stated “I can’t give you the legal basis. All I can tell you is this is the language the Treasury and ourselves have

been using.” *Id.*

19. Indeed, a Department of Treasury Inspector General report analyzed only the initial set of 81.4 million EIP payments to eligible Americans and legal permanent residents issued on April 10, 2020. When the Inspector General inquired about the inclusion of incarcerated persons in this disbursement, “IRS management noted that payments to these populations of individuals were allowed because the CARES Act does not prohibit them from receiving a payment. However, the IRS subsequently changed its position, noting that individuals who are prisoners . . . are not entitled to an EIP.” *See* Treasury Inspector General for Tax Administration, 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, Ref No. 2020-46-041, at 4-5 (June 30, 2020), a copy of which is attached hereto as Exhibit 1; *see also* <https://www.treasury.gov/tigta/auditreports/2020reports/202046041fr.pdf>. Thereafter, the IRS took action to exclude incarcerated persons from subsequent EIP disbursements, and notified the Inspector General on May 13, 2020, that “programming was implemented to discontinue calculating and sending EIPs to prisoners” *Id.* at 5. Specifically, “the IRS provided the [U.S. Department of the Treasury’s Bureau of the Fiscal Service (BFS)] with a file that contained the Taxpayer Identification Numbers of prisoners . . . and requested that the BFS remove these individuals from payment files. This approach was applied to the May 1, 2020 and May 8, 2020, payment files.” *Id.* According to the report, as of May 21, 2020, the IRS had issued 84,861 payments to incarcerated people totaling \$100 million, and had begun taking steps to advise those individuals (or their spouses) of the steps they should take to return those payments, as reflected in the online FAQ discussed above. *Id.* at 6. (It is unclear whether these 84,861 payments include

only incarcerated people who received payments pursuant to the April 10, 2020 disbursement before the IRS reversed course, or whether these payments also include checks inadvertently sent in subsequent disbursements.).

20. The IRS's refusal to distribute the EIP to incarcerated individuals, and its attempt to intercept, retrieve, and request the return of EIPs to incarcerated individuals who already received them, violates the CARES Act, which does not condition eligibility for EIP benefits on incarcerated status. If Congress had intended to exclude incarcerated individuals, it would have done so expressly.

21. Although incarcerated individuals fall squarely within the group of individuals determined by Congress to be eligible for EIPs the IRS improperly denied them their EIPs. Upon information and belief, the IRS has also refused to distribute EIP benefits to incarcerated persons who filed a claim through the IRS's online portal on the basis of their incarcerated status alone.

The IRS's Position on the CARES Act in the USVI

22. 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 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 BIR's Actions Regarding the CARES Act

23. 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).

24. However, upon information and belief, the BIR (and by extension all Defendants) take the same position as the IRS in respect to incarcerated individuals, i.e., they are not eligible to receive EIPs.

The Incarcerated Population

25. Congress did not exclude incarcerated individuals from the EIP program, and neither the IRS nor the Defendants have cited any legal authority to do so. Even assuming the BIR had the

power to establish its own non-statutory eligibility criteria under the CARES Act, it lacks a reasonable basis to exclude incarcerated people from the EIP benefit program.

26. Incarcerated individuals, as defined by 42 U.S.C. § 402(x)(1)(A)(i)-(v), have tax obligations and can obtain tax benefits just like other individuals subject to the taxes imposed by Title 26 of the United States Code, made applicable to the USVI via 48 U.S.C. § 1397. Incarcerated individuals do not lose their status, responsibilities, rights, or privileges as taxpayers by virtue of their incarceration.

27. Incarcerated individuals, like other members of society, have personal, financial, and other relationships that put them in need of economic assistance just like other members of society. For example, incarcerated individuals will be released from custody in the near future, returning to the same bleak economy that necessitated passage of the CARES Act; EIP funds will assist them with re-entry and help mitigate recidivism.

28. Additionally, most incarcerated individuals come from low income families where assistance is needed most, and thus can use the EIP funds to support family members who are not in confinement.

29. The EIP also provides important funds to incarcerated persons when other sources may have evaporated due to the economic pressures related to COVID-19. Prisons and jails have shifted more and more costs onto incarcerated people—costs for things like hygiene supplies, medical copayments, and communication with loved ones—and this is unlikely to diminish given the predicted government budget shortfalls caused by a COVID-affected tax base. Indeed, incarcerated people are also consumers in a sizeable retail market. A 2016 report concluded that approximately one-third of state prison systems privatize their commissaries in some respect, with

sales by commissaries operated by private corporations accounting for more than half of the \$1.6 billion in annual prison commissary revenues. See Stephen Raheer, Paging Anti-trust Lawyers: Prison Commissary Giants Prepare to Merge, Prison Policy Initiative (July 5, 2016), <https://www.prisonpolicy.org/blog/2016/07/05/commissary-merger/>. The spending of people under confinement is largely focused on life essentials like food and hygiene, and often is reliant on support from people on the outside as prison incomes are too low to cover average costs. EIP benefits will thus go in large part towards providing for these life essentials which are often sold to incarcerated people by private corporations.

30. Because incarcerated people have little to no ability to earn incomes, they tend to rely on money transfers from friends and family to pay for basic necessities. This is very expensive for family members, because any deposits they make may be automatically garnished by the prison system to pay for an incarcerated person's outstanding financial obligations, such as restitution, child support, and so on.

31. Finally, many incarcerated people have outstanding financial obligations and debts, including child support, mortgages, and restitution obligations. The EIP checks will go toward satisfying those obligations, as well.

The Northern District of California Class Action Litigation

32. 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 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) stating that: “incarcerated individuals do not qualify for the advance payments.” Exhibit 4 at ¶5.

34. 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).

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.

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

36. On October 14, 2020, Judge Hamilton entered an order granting in part and denying in part the *Scholl* plaintiffs’ motion for summary judgement and denied the Federal Government motion to stay, 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).

37. On October 30, 2020, the Federal Government filed 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.

38. IRS Notice 1446 established November 4, 2020, for incarcerated individuals to provide the IRS with information required in order to issue the EIP.

39. 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.

40. 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.

41. Upon information and belief, the USVI and/or BOC has not received either Notice 1446 or Notice 1444-D from the IRS and, has not disseminated these respective IRS notices to individuals incarcerated in the custody and care of the USVI and/or BOC.

Morton Seeks Clarification of the BIR's Position on the CARES Act Application to Incarcerated Individuals But Receives No Response

42. 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 general, and the EIP in particular, applied to incarcerated individuals. A copy of the October 27th correspondence is attached as Exhibit 7.

43. 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 7 at p. 2.

44. To date, counsel for the Plaintiff has received no response to his October 27th correspondence.

45. Accordingly, upon information and belief, the Plaintiff concludes that the Defendants take the same position as the Federal Government as to the EIP for incarcerated individuals, i.e., incarcerated individuals are not eligible.

The BIR's Position Applied to Morton and the Class

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

47. 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.

48. In turn, the USVI has all the information needed for the BIR to determine whether any particular incarcerated individual is entitled to the EIP.

49. In turn, 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.

Class Allegations

50. Plaintiff brings this action on behalf of themselves and all others similarly situated (the

“Class”), pursuant to Federal Rule of Civil Procedure 23. The Class is defined as follows:

All USVI 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) under the custody and control of the USVI and/or BOC, or have been held to have violated a condition of parole or probation imposed under federal, state, or territorial 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 of Defendants’ agencies; and, any judicial officer presiding over this action and his/her immediate family and judicial staff.

51. The exact size of the class is unknown, but upon information and belief, the number of individuals incarcerated under the custody and control of the USVI and/or BOC is well in excess of 100 and could very well be in excess of a thousand. Thus, joinder of that many people is impractical.

52. There are multiple questions of law and fact common to the class including but not limited to: (A) whether Defendants have unlawfully withheld or unreasonably delayed delivery of EIP benefits to Plaintiffs and the Class; (B) whether Defendants’ policy treating incarcerated people as ineligible for EIP benefits based on their incarcerated status is contrary to law, in excess of statutory authority, and/or arbitrary and capricious; (C) whether Defendants violated the CARES Act by withholding EIP checks from Plaintiff and the Class based on their status as incarcerated people alone; (D) whether Defendants are liable to Plaintiff and the Class for the sum of the EIP benefits to which they are entitled under the CARES Act; and, (E) the remedies to which Plaintiff

and the Class are entitled.

53. These and other questions of law and fact are common to the Class, and predominate over any questions affecting only individual members of the Class.

54. Plaintiff's claims are typical of the Class, as all Class Members challenge Defendants' authority to withhold EIP checks from them on the sole basis of their status as incarcerated people. The answer to this question is the same for all members of the Class. There are no defenses of a unique nature that may be asserted against Plaintiff individually, as distinguished from other members of the Class, and the relief sought is common to the Class.

55. Plaintiff will fairly and adequately protect the interests of the members of the Class. Plaintiff's interests are aligned with, and not antagonistic to, those of the other members of the Class, and Plaintiff has retained counsel competent and experienced in the prosecution of class action litigation to represent himself and the Class.

56. Certification of the class for injunctive relief is appropriate under Fed. R. Civ. P. 23(b)(1) because the prosecution of separate actions by individual class members would create a risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for Defendants or would, as a practical matter, be dispositive of the interests of other class members not parties to the individual adjudications or otherwise substantially impair or impede their ability to protect their interests. Certification for injunctive and declaratory relief is also appropriate under Rule 23(b)(2) because Defendants have acted on grounds that apply generally to the whole class.

57. Additionally, certification of a class for monetary relief under Fed. R. Civ. P. 23(b)(1) and/or 23(b)(2) and/or 23(c)(4) because the common questions of fact and law predominate over

questions specific to individual class members. The common questions of law will determine Defendants' liability to every member of the class. Class-wide treatment of these common issues in a single forum is a superior means of determining Defendants' liability to each Class Member than potentially hundreds if not thousands of other lawsuits. As a result, class-wide adjudication of Defendants liability is the most efficient means of adjudication.

CLAIMS FOR RELIEF

COUNT 1

against the USVI

(CARES Act, as Mirrored to the USVI)

58. Paragraphs 1 through 57 are realleged and incorporated herein.

59. Plaintiff and the Class are eligible for EIP benefits pursuant to the CARES Act, 26 U.S.C. § 6428, as mirrored to the USVI by operation of 48 U.S.C. § 1397, because they are (1) bona fide USVI residents under 26 U.S.C. §§ 932 and 937; (2) filed tax returns in 2018 or 2019, or were exempt from doing so under 26 U.S.C. § 6012(a)(1)(A); (3) are not claimed as dependents of another tax filer; (4) are not estates or trusts; and (5) if they filed tax returns jointly with another person or claimed qualifying children, those persons had a valid Social Security Number.

60. Defendants have refused to issue EIP benefits to Plaintiffs and the Class based solely on their status as incarcerated persons, despite lacking any statutory authority to do so.

61. Plaintiffs and each Class Member therefore have a civil claim against the USVI founded upon the CARES Act and are entitled to maintain this civil suit against the USVI for the issuance of the EIP, pursuant to, *inter alia*, 26 U.S.C. § 7422; 48 U.S.C. § 1612(a); 26 U.S.C. § 6532; 26 U.S.C. § 6511; 28 U.S.C. § 1346(a)(2).

62. Based on the foregoing allegations, Plaintiffs and the Class seek monetary relief in an

amount equal to each Class Member's benefit under the CARES Act and an order compelling Defendants to issue EIP benefits to them and the Class.

COUNT 2

against LEE, BRYAN and ELLIOT in their Official Capacities
(Section 1983 Relief and request for Declaratory Judgment & a Permanent Injunction)

63. Paragraphs 1 through 57 are realleged and incorporated herein.

64. The BIR is the executive agency of the USVI which is charged with enforcing the income tax laws of the USVI.

65. The DOF is the executive agency of the USVI which is charged with issuing payments on behalf of the USVI.

66. Under the Mirror Code, taxpayers in the Virgin Islands have a right under the CARES Act to receive an EIP "as rapidly as possible," 26 U.S.C. § 6428(f)(3), and no later than the end of 2020, *id.*

67. LEE, BRYAN, and ELLIOT have failed to issue, and refuse to issue, the EIPs to the Plaintiff and members of the Class.

68. These on-going failures to issue the EIPs by LEE, BRYAN, and ELLIOT was taken under color of territorial law, with each acting in their official capacity.

69. The Equal Protection Clause of the 14th Amendment to the U.S. Constitution is made applicable to the USVI by the Revised Organic Act.

70. The Equal Protection Clause guarantees all persons subject to the jurisdiction of the United States equal protection of the laws.

71. LEE, BRYAN, and ELLIOT's respective (and cumulative) refusal to issue the EIP as required under the CARES Act violates the Plaintiff's and the Class Member's respective rights for

equal protection under the law in violation of the Equal Protection Clause of the 14th Amendment made applicable by the Revised Organic Act.

72. LEE, BRYAN, and ELLIOT have further violated the Equal Protection Clause by creating a class of persons who denied their rights to obtain the EIP under the CARES Act.

73. LEE, BRYAN, and ELLIOT have further violated the laws of the United States (i.e. federal law, 26 U.S.C. § 6428) by depriving the Plaintiff and the Class Members of their respective rights, and privileges provided by Congress under the CARES Act, including depriving the Plaintiff and Class Members of the EIP.

74. 42 U.S.C. § 1983 allows the Plaintiff and the Class to sue for equitable relief for violations of the law by LEE, BRYAN, and ELLIOT in their official capacity as officers of the USVI for violations of the Plaintiff and the Class members' rights under law.

75. LEE, BRYAN, and ELLIOT respective actions (individually and collectively) of not issuing the EIP qualifies as arbitrary discrimination and enforcement of the income tax laws applicable in the Virgin Islands (i.e., the Mirror Code), including the CARES Act, through its improper execution.

76. This Court has the power to declare that the Defendants are in violation of the CARES Act, the Mirror Code, and/or the Revised Organic Act, and are in violation of Section 1983 in light of their respective roles in administering the Mirror Code in a manner that violates the Equal Protection Clause and/or the CARES Act.

77. Plaintiff and the class have no adequate remedy at law. Requiring incarcerated taxpayers to bring offers no solution because the problem is systemic and cannot be addressed piecemeal. Instead, the type of overarching change that only permanent injunctive relief can provide is

required.

78. This Court has the power and should enter a permanent injunction against the Defendants because the Class members are suffering irreparable injury, *viz.*, their rights under the Equal Protection Clause and/or the CARES Act have been, and currently are being, violated.

79. Based on the foregoing allegations, Plaintiffs seek an order compelling Defendants to issue EIP benefits to them and the Class.

80. Plaintiff and class members seek attorney's fees and costs pursuant to 42 U.S.C. § 1988.

COUNT 3
against all Defendants
(Defendants' Unlawful Withholding of EIP Benefits to Plaintiffs and the Class)

81. Paragraphs 1 through 57 are realleged and incorporated herein.

82. Defendants have a duty to issue EIP benefits to all eligible individuals in a timely manner. 26 U.S.C. § 6428. Plaintiffs and the Class have a clear right to such benefits, and Defendants have no lawful basis to refuse them. The issuance of such benefits constitutes discrete agency action.

83. Defendants have unlawfully withheld and/or unreasonably delayed the issuance of EIP benefits to Plaintiffs and the Class despite their clear entitlement to those benefits, all of which violates the Territorial equivalent of the Administrative Procedures Act. See Chapter 35 of Title 3 of the Virgin Islands Code: 3 V.I.C. § 911, *et seq.*

84. The blanket refusal to issue EIPs to incarcerated individuals are "regulations" as that term is defined in 3 V.I.C. § 911(b).

85. The both the BIR and the DOF are agencies as that term is defined in 3 V.I.C. § 911(a).

86. The BIR is, pursuant to 3 V.I.C. § 912, without authority to issue regulations that implicate the Internal Revenue Code.

87. As the USVI, BRYAN, and LEE have not complied with Chapter 35 of Title 3 of the Virgin Islands Code, then its purported rule has no legal force or effect. 3 V.I.C. §§ 913(a) & 933.

88. 3 V.I.C. § 913(a) requires BRYAN to approve any new rule, which has not happened.

89. 3 V.I.C. § 913(b) calls for BRYAN to submit the new rule/regulation to the Legislature, which has not happened.

90. 3 V.I.C. § 933 requires 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, which has not happened.

91. Further, 3 V.I.C. §§ 935-36 requires that the Lieutenant Governor must indorse and approve the regulations, which has not happened.

92. Further, 3 V.I.C. § 913(a)-(b) requires that BRYAN must submit the new rules to the Legislature, which has not happened.

93. Further, 3 V.I.C. § 913(a) requires 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, which has not happened.

94. Further, 3 V.I.C. § 941 requires that copies of the regulation must be distributed to libraries territory-wide so that they are available for public viewing, which has not happened.

95. 3 V.I.C. § 938 provides for exceptions to Section 933, but only when the “Governor and he certifies that because of emergency or other compelling circumstances, including a lengthy delay before publication, the public interest requires that the regulation become effective without the delay of prior publication. In all such cases the Governor shall file a copy of the certification with the Lieutenant Governor. Said certification and regulation shall be published in the next Virgin

Islands Rules and Regulations.” BRYANT has made no certifications as Section 938 calls for, nor has the certification been published in the Virgin Islands Rules and Regulations.

96. The USVI, BIR, and the DOF’s refusal to issue EIP to incarcerated individuals are therefore contrary to law and are not effective and must be set aside pursuant to 3 V.I.C. §§ 912, 913(a), & 933.

97. The Plaintiff and class members have been harmed as a result of the regulation(s) of the USVI, BIR, and/or the DOF as they have not, and apparently will not, received their EIP as required under the CARES Act.

98. Plaintiff and the class members do not have an adequate remedy at law to redress the violation alleged herein, and therefore seek a declaration that the BIR and/or DOF regulation(s) are illegal and, moreover, seeking injunction relief restraining the USVI, BRYAN, LEE, and ELLIOT from continuing to engage in the unlawful policy, practices, procedures, regulations and rules alleged herein.

99. Based on the foregoing allegations, Plaintiffs seek an order setting aside the unlawful agency action and compelling Defendants to issue EIP benefits to them and the Class.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff prays that this Court:

- A. Certify the proposed Class and appoint the Plaintiff and his counsel to represent the Class;
- B. Award damages to Plaintiff and the Class in the amount of each individual’s entitlement under the CARES Act and enter judgment against Defendants in favor of the Plaintiff and the Class;
- C. Order Defendants to determine (or re-determine) the eligibility of Plaintiff and each Class

Member for a CARES Act benefit without taking into consideration their status as incarcerated persons, and to issue benefits to all those who meet the statutory eligibility criteria;

D. Enjoin Defendants from refusing to distribute economic impact payments under the CARES Act for the benefit of Plaintiff and the Class based solely on their status as incarcerated persons;

E. Declare that BRYAN, LEE and ELLIOT have violated the Plaintiff's and Class members' respective rights under the Equal Protection Clause and/or the CARES Act;

F. Enter a Permanent Injunction requiring BRYAN, LEE and ELLIOT to pay the EIP within as rapidly as possible, and no later than the end of 2020;

G. Declare that the policy that incarcerated individuals are not eligible to receive the EIP violates Chapter 35 of Title 3 of the Virgin Islands Code;

H. Set aside the policy that incarcerated individuals are not eligible to receive the EIP as being in violation of Chapter 35 of Title 3 of the Virgin Islands Code;

I. Award Plaintiff and the Class reasonable attorneys' fees and costs of suit, as well as pre-judgment and post-judgment interest as permitted by law; and

J. Grant such additional and further relief as the Court deems proper and just.

Respectfully Submitted,

By: /s/ Joseph A. DiRuzzo, III Digitally signed by /s/ Joseph A. DiRuzzo, III
Date: 2020.11.09 13:00:20 -05'00'

Dated Nov. 9, 2020

Joseph A. DiRuzzo, III
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Notice of with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to counsel of record. Additionally, a paper copy of the foregoing is provided via USPS to:

The USVI & Gov. Bryan
Government House 5047 (21-22) Kongens Gade
St. Thomas, VI 00802

The USVI AG Office
V.I. Department of Justice
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Joel Lee
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Ms. Elliot
USVI DOF
2314 Kronprindsens Gade,
Charlotte Amalie, VI 00802

By: /s/ Joseph A. DiRuzzo, III Digitally signed by /s/ Joseph A. DiRuzzo, III
Date: 2020.11.09 13:00:36 -05'00'
Joseph A. DiRuzzo, III

Dated Nov. 9, 2020