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Counsel for Jamal A. Morton and Araclis N. Ayala, individually and on behalf of all others similarly situated

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

COLIN SCHOLL, <i>et al.</i> ,	:	Case No. 4:20-cv-5309-PJH
Plaintiff,	:	
	:	NOTICE OF MOTION &
v.	:	MOTION TO INTERVENE
	:	
STEVEN MNUCHIN, <i>et al.</i> ,	:	Hr'g Date: TBD
Defendants.	:	Hr'g Time: TBD
	:	Judge: Hon. Phyllis J. Hamilton

NOTICE OF MOTION, MOTION FOR LEAVE TO INTERVENE &
DECLARATION OF JOSEPH A. DiRUZZO, III IN SUPPORT

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that Pursuant to Local Rule 7-1(b), JAMAL A. MORTON and
 3 ARACLIS N. AYALA, individually and on behalf of all others similarly situated, respectfully move to
 4 intervene as Plaintiffs in the above-captioned litigation without oral argument. Alternatively,
 5 MORTON and AYALA notice that on Jan. 20, 2021, at 9:00 a.m., before the Hon. Chief District
 6 Judge Phyllis J. Hamilton, Oakland Courthouse, Courtroom 3 - 3rd Floor, 1301 Clay Street,
 7 Oakland, CA 94612, or as soon thereafter as the Court may order, MORTON and AYALA will and
 8 do hereby move for the same relief.
 9

10 This motion is brought pursuant to Federal Rule of Civil Procedure 24. As more fully set forth
 11 in the accompanying memorandum, the grounds for the motion are: (1) the motion is timely; (2)
 12 MORTON, AYALA, and the incarcerated individuals located in the U.S. Territories & Possessions
 13 have significant protectable interests in the outcome of this case; (3) the disposition of this action
 14 could impede MORTON's, AYALA's, and the incarcerated individuals located in the U.S. Territories
 15 & Possessions' ability to protect those interests; (4) the current parties do not adequately represent
 16 the interests of MORTON, AYALA and the incarcerated individuals located in the U.S. Territories
 17 & Possessions; and (5) MORTON's, AYALA's, and the incarcerated individuals located in the U.S.
 18 Territories & Possessions' position regarding the CARES Act and the Economic Impact Payments
 19 ("EIP") plainly involves common questions of law and fact with this action, and their direct opposition
 20 to Defendants' position satisfies the "common question" requirement for permissive intervention.
 21 This motion is based on the supporting memorandum below; the accompanying Affidavit of United
 22 States Virgin Islands Bureau of Internal Revenue Director Joel A. Lee, CPA, the position taken by the
 23 United States Virgin Islands (the "USVI") in *Morton v. USVI, et al.*, case no. 3:20-cv-109 (D.V.I.), and
 24 any further papers filed in support of this motion, the argument of counsel, and all pleadings and
 25 records on file in this matter.
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1 PLEASE TAKE FURTHER NOTICE that counsel for MORTON and AYALA spoke to
2 counsel for the Defendants, who has indicated that the Defendants object to intervention.

3 PLEASE TAKE FURTHER NOTICE that counsel for MORTON and AYALA spoke to
4 counsel for the Plaintiffs, who has indicated that the Plaintiffs oppose the motion.

5 PLEASE TAKE FURTHER NOTICE that MORTON's and AYALA's proposed complaint
6 in intervention (without exhibits) is attached.

7 PLEASE TAKE FURTHER NOTICE that MORTON's and AYALA's proposed motion for
8 civil contempt (without exhibits) is attached.

MEMORANDUM IN SUPPORT

BACKGROUND

I. THE INSTANT CASE

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. Indeed, IRS Chief Counsel Michael J. Desmond provided a declaration in this case, docket no. 44-1, stating that: "incarcerated individuals do not qualify for the advance payments." *Id.* at ¶5.

On September 24, 2020, this Court granted the *Scholl* plaintiffs a preliminary injunction and class certification. *Scholl v. Mnuchin*, 2020 WL 5702129 (N.D. Cal. Sept. 24, 2020) ("*Scholl I*"). On October 14, 2020, this Court entered an order granting in part and denying in part the *Scholl* plaintiffs' motion for summary judgment, 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*").

The Federal Government appealed this 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. The Ninth Circuit denied the motion to stay, concluding that the Federal Government had not "demonstrated a sufficient likelihood of success on appeal to warrant a stay." *Scholl, et al. v. Mnuchin, et al.*, case no. 20-17077 at ECF No. 9.

Consequently, the injunction remains in place and is fully operative against the Federal Government and its agents, servants, and persons in active concert with the named defendants. See Fed. R. Civ. P. 65(d) (detailing persons to be bound by injunction order).

1 **II. TAXATION IN THE UNITED STATES TERRITORIES & POSSESSIONS**

2 **A. The Internal Revenue Code**

3 The Internal Revenue Code has specific provisions addressing United States taxpayers who
 4 reside and have income “sourced” in the Territories and Possessions. For example, 26 U.S.C. § 937
 5 addresses residency and sourcing rules regarding the Territories and Possessions. 26 U.S.C. § 932(c)
 6 requires that USVI residents file their income tax return with, and pay their tax liability to the USVI.
 7 26 U.S.C. § 933 addresses bona fide residents of Puerto Rico, requiring the filing of an income tax
 8 return with the Puerto Rican tax authority for U.S. citizens residing in Puerto Rico who only received
 9 income from sources within Puerto Rico. See generally, IRS Pub. 1321. Available at
 10 <https://www.irs.gov/pub/irs-pdf/p1321.pdf> (last accessed 11/21/20).
 11

12 **B. Taxation in the U.S. Territories & Possessions**

13 **1. The USVI**

14 The Naval Service Appropriations Act of 1921, codified at 48 U.S.C. § 1397, provides: “[t]he
 15 income-tax laws in force in the United States of America and those which may hereafter be enacted
 16 shall be held to be likewise in force in the Virgin Islands of the United States, except that the proceeds
 17 of such taxes shall be paid into the treasuries of said islands.” “This statutory scheme is known as the
 18 ‘mirror code,’ under which the Internal Revenue Code is applied to the Virgin Islands merely by
 19 substituting ‘Virgin Islands’ for ‘United States’ throughout.” *Vento v. Dir. of Virgin Islands Bureau of*
 20 *Internal Revenue*, 715 F.3d 455, 465 (3d Cir. 2013). Thus, a USVI taxpayer may “not be required to
 21 pay taxes to the federal government, so long as she files a territorial tax return that fully reports her
 22 income and then fully pays her territorial taxes to the [USVI].” *Cooper v. Comm’r*, 718 F.3d 216, 219
 23 (3d Cir. 2013).
 24

25 **2. Guam & the Commonwealth of the Northern Mariana Islands (“CNMI”)**

26 Similar to the USVI,
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the Internal Revenue Code applies in both Guam and the Marianas through a “mirror image” system under which each jurisdiction administers and collects its own taxes. Citizens or residents of either jurisdiction are required to file only one income tax return. Under these “mirroring” provisions, either Guam or CNMI is to be substituted wherever “United States” appears in the Internal Revenue Code, unless such substitution would be “manifestly incompatible” with the Code or Covenant.

Holmes v. Dir. of the Dep’t of Revenue & Taxation, Gov’t of Guam, 937 F.2d 481, 483–84 (9th Cir. 1991) (cleaned up). See also *Sayre & Co. v. Riddell*, 395 F.2d 407, 412 (9th Cir. 1968) (“The general conclusion that we draw ... is that Congress intended that Guam should apply the Internal Revenue Code ... just as the United States applies the Code to persons and income within its territory.”). Consequently, “Guam residents do not pay any income tax to the U.S. federal government; instead, they pay a territorial income tax to the government of Guam.” *Gumataotao v. Dir. of Dep’t of Revenue & Taxation*, 236 F.3d 1077, 1079 (9th Cir. 2001).

3. Puerto Rico

While Puerto Ricans pay most of their income taxes to the local tax authority, see 26 U.S.C. § 933, *supra*, the still pay their federal income taxes to the IRS “on income from sources outside Puerto Rico for which they are liable under the Internal Revenue Code, the regular payment of federal income taxes by all federal employees in Puerto Rico, as well as the full Social Security, Medicare, and Unemployment Compensation taxes[.]” *United States v. Vaello-Madero* (1st Cir. 2020) (cleaned up).

III. THE CARES ACT IN THE TERRITORIES & POSSESSIONS

A. Section 2201 of the CARES Act

Section 2201(c)(1) addresses the payments to U.S. Possessions, and states:

(A) MIRROR CODE POSSESSION.—The Secretary of the Treasury shall pay to each possession of the United States which has a mirror code tax system amounts equal to the loss (if any) to that possession by reason of the amendments made by this section. Such amounts shall be determined by the Secretary of the Treasury based on information provided by the government of the respective possession.

(B) OTHER POSSESSIONS.—The Secretary of the Treasury shall pay to each possession of the United States which does not have a mirror code tax system amounts estimated by the Secretary of the Treasury as being equal to the aggregate benefits (if any) that would have been provided to residents of such possession by reason of the amendments made by this section if a mirror

code tax system had been in effect in such possession. The preceding sentence shall not apply unless the respective possession has a plan, which has been approved by the Secretary of the Treasury, under which such possession will promptly distribute such payments to its residents.

CARES Act, § 2201(c)(1)(A)-(B).

B. The IRS's Position on the CARES Act in the Territories & Possessions

Per the IRS website:

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 Nov. 21, 2020) (emphasis added), (attached hereto as Exhibit 1 to the Declaration of Joseph A. DiRuzzo, III ("JAD Dec.")).

IV. THE USVI CLASS ACTION LITIGATION

On October 27, 2020, counsel for Morton sent the Director of the Virgin Islands Bureau of Internal Revenue ("BIR") correspondence seeking clarification as to whether the BIR shared the same view as the IRS regarding whether the CARES Act in general, and the EIP in particular, applied to incarcerated individuals. Attached hereto as Exhibit 2 to JAD Dec.. Counsel for Morton 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.* JAD Dec. Exhibit 2 at p. 2.

Counsel for Morton received no response to his October 27th correspondence and concluded

1 that the USVI government took the same position as the Federal Government as to the EIP for
 2 incarcerated individuals, i.e., that they are not eligible.

3 Consequently, Morton filed suit, *Morton v. USVI, et al.*, case no. 3:20-cv-109 (D.V.I.),
 4 attempting to obtain his EIP. Morton moved for a preliminary injunction, *id.* at docket no. 5, moved
 5 to expedite, *id.* at docket no. 8, and moved for summary judgment, *id.* at docket no. 18. The District
 6 Court of the Virgin Islands set a hearing on Morton's preliminary injunction motion for November
 7 24th. See *id.* at docket nos. 30 & 32.

8 On November 20th, the USVI filed its opposition (a copy of which is attached hereto as Exhibit
 9 3 to JAD Dec.), and attached the affidavit of Director Joel A. Lee, CPA, in support of the opposition
 10 (a copy of which is attached hereto as Exhibit 4 to JAD Dec.). *Id.* at docket nos. 37 & 37-1.

11 Importantly, in the *Morton* case, the USVI avers that it “merely serve[s] as an intermediary
 12 between eligible Virgin Islands taxpayers on the one hand, and U.S. Treasury on the other. [The
 13 USVI] take[s] no position on the eligibility of incarcerated persons. [The USVI] merely distribute[s]
 14 the federal funds we have been provided in accordance with the conditions that are provided by the
 15 U.S. Treasury.” JAD Dec. Ex. 3 at p. 2.

16 V. TREASURY'S “PLAN” WITH THE USVI

17 As detailed in the sworn statement by Director Lee, “the United States Treasury Department
 18 has advanced federal funds to the USVI BIR to be used to pay the advanced EIPs pursuant to an EIP
 19 Implementation Plan (the “Plan”). Treasury considers the Plan confidential and prohibits its
 20 disclosure.” Lee Aff. at ¶6.¹ The USVI “holds these federal CARES Act funds in trust, pursuant to
 21 the Plan authorized by the United States Treasury Department.” *Id.* at ¶7. “[T]he Plan imposes
 22 restrictions upon the USVI BIR's use of the CARES Act Trust Fund monies.” *Id.* at ¶8. “[O]ne of
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 28 ¹ Morton has moved to unseal the Plan. See *Morton v. USVI, et al.*, case no. 3:20-cv-109 (D.V.I.)
 at docket no. 49.

the Plan restrictions is that CARES Act Trust Fund monies cannot be used to pay EIPs to incarcerated persons.” *Id.* at ¶9 (emphasis added). “[T]he Plan also restricts the USVI BIR’s expenditures of CARES Act Trust Fund monies insofar as no EIPs can be remitted from the CARES Act Trust Fund unless it is are [sic] based on a tax return filed by the taxpayer.” *Id.* at ¶10. “[T]he USVI BIR has not interpreted the CARES Act with respect to eligibility. Instead, EIPs are remitted *solely in conformance with the limitations placed on the funds provided by the United States Treasury Department.*” *Id.* at ¶12 (emphasis added).

APPLICABLE LAW

With respect to intervention as of right,

[o]n timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a).

An applicant seeking to intervene as of right under Rule 24 must demonstrate that four requirements are met: (1) the intervention application is timely; (2) the applicant has a significant protectable interest relating to the property or transaction that is the subject of the action; (3) the disposition of the action may, as a practical matter, impair or impede the applicant’s ability to protect its interest; and (4) the existing parties may not adequately represent the applicant’s interest.

Citizens for Balanced Use v. Montana Wilderness Ass’n, 647 F.3d 893, 897 (9th Cir. 2011). “[T]he requirements are broadly interpreted in favor of intervention.” *Id.*

With respect to permissive intervention, “[o]n timely motion, the court may permit anyone to intervene who ... has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1). Thus, “permissive intervention requires (1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant’s claim or defense and the main action.” *Freedom from Religion Found. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011).

DISCUSSION

I. INTERVENTION AS OF RIGHT

A. The Motion is Timely

“Timeliness is determined by the totality of the circumstances facing would-be intervenors[.]” *Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 854 (9th Cir. 2016), which is a “nuanced, pragmatic approach[.]” *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1303 (9th Cir. 1997). *See also United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984) (listing the three timeliness factors: (1) the stage of the proceeding; (2) the prejudice to other parties, and (3) the reason for and length of the delay; and finding district court abused its discretion in denying intervention in fifteen-year-old litigation where litigant’s actions and court order implicated changed circumstances); *see also United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1182-83 (3d Cir. 1994) (finding intervention in four-year-old litigation timely where intervention was sought 43 days after intervenor became aware its interests were imperiled).

Here, the stage of the proceeding is a mere five weeks since the Court permanently enjoined the Federal Government. “[I]n analyzing the ‘stage of the proceedings’ factor, the mere lapse of time alone is not determinative.” *Smith*, 830 F.3d at 854 (cleaned up). Rather, “[w]here a change of circumstances occurs, and that change is the ‘major reason’ for the motion to intervene, the stage of proceedings factor should be analyzed by reference to the change in circumstances, and not the commencement of the litigation.” *Id.* (citation omitted). The change in circumstance, and sole reason to intervene, is that Morton has just learned of the existence of the Plan, which is the purported justification for the Federal Government’s position that territorial incarcerated individuals are not entitled to the EIP.

There is no prejudice to the other parties as Morton and Ayala seek the following four remedies from this Court.

1 First, to enforce compliance of this Court's injunction on the Federal Government, its agents,
2 servants, and others acting in concert therewith, and to clarify (to the extent needed, though we
3 contend that a reading to the contrary is unsupportable) that the Court's ruling applies to the Federal
4 Government's treatment of the CARES Act to the U.S. Territories & Possessions. Morton, Ayala,
5 and, indeed, all incarcerated individuals in the U.S. Territories & Possessions had no reason to
6 know/believe that their interests were not being adequately represented, and that the Federal
7 Government would apparently carve out those individuals from the relief that this Court provided
8 (i.e., the permanent injunction). Cf. *Smith*, 830 F.3d at 857 ("prospective intervenor's failure to
9 intervene after he knew, or reasonably should have known, that his interests were not being adequately
10 represented"). At bottom, there is no prejudice to the Federal Government with complying with the
11 law and this Court's orders.

14 Second, to have this Court declare that Defendants' policy of conditioning/restricting funding
15 under Section 2201(c)(1) of the CARES Act (and, in turn, requiring the respective U.S. Territories &
16 Possessions to withhold EIP benefits from territorial incarcerated persons based solely on their
17 incarcerated status) exceeds Defendants' statutory authority under Section 2201(c)(1) of the CARES
18 Act, the Uniformity Clause, viz. U.S. Const. Art. I, § 8, cl. 1, and the Due Process Clause of the Fifth
19 Amendment, and to correspondingly set aside all inconsistent actions that have been or are
20 subsequently taken as void *ab initio*.

23 Third, to have this Court declare that (1) the statutory authority of the CARES Act, under
24 which the respective Plans were purportedly entered into between the Federal Government and the
25 respective U.S. Territories & Possessions, does not allow for delegation; (2) if delegation was
26 authorized, no delegation order existed; and/or (3) because the USVI Plan was not actually signed, it
27 is a legal nullity with no force and effect.

1 Fourth, to have this Court declare that Defendants' policy of conditioning/restricting funding
 2 under Section 2201(c)(1) of the CARES Act on the execution of a Plan under Section 2201(c)(1)(B)
 3 to mirror code jurisdictions (for which there is no requirement of a Plan under Section 2201(c)(1)(A))
 4 exceeds Defendants' statutory authority under the Section 2201(c)(1) of the CARES Act (i.e., there is
 5 no statutory authority to enter into a Plan), and to correspondingly set aside all inconsistent actions
 6 that have been or are subsequently taken as void *ab initio*.

8 As to the reason and length of delay, Morton and Ayala have moved to intervene just days
 9 after the existence of the Plan was disclosed and it became apparent that the Federal Defendants have,
 10 and continue to, prohibit payment of the EIP to incarcerated individuals in violation of this Court's
 11 injunction. In all events, the instant motion is timely.

13 **B. Incarcerated Individuals Located in the U.S. Territories & Possessions Have**
 14 **Significant Protectable Interests.**

15 "To demonstrate a significant protectable interest, an applicant must establish that the interest
 16 is protectable under some law and that there is a relationship between the legally protected interest
 17 and the claims at issue." *Citizens for Balanced Use*, 647 F.3d at 897.

18 Morton, Ayala, and, indeed, all incarcerated individuals in the U.S. Territories & Possessions
 19 have protectable interests in obtaining their EIP (*see* 26 U.S.C. § 6428(a)) and having the Federal
 20 Government comply with Section 2201(c) of the CARES Act, through which Congress mandated
 21 funding the respective Territories so that they, in turn, can issue the EIP. *See* CARES Act, Section
 22 2201(c)(1)(A)-(B) ("*shall pay to each possession*"). Thus, Intervenor has a practical interest in this case,
 23 while intervention will obviate needless litigation around the country and will allow a voice to be given
 24 to the incarcerated individuals in the U.S. Territories & Possessions. *Accord Forest Conservation Council*
 25 *v. U.S. Forest Serv.*, 66 F.3d 1489, 1496 n.8 (9th Cir. 1995) (abrogated on other grounds) ("By allowing
 26 parties with a practical interest in the outcome of a particular case to intervene, we often prevent or
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1 simplify future litigation involving related issues; at the same time, we allow an additional interested
 2 party to express its views before the court.”).

3 **C. The Disposition of this Action Could Impede Morton’s and Ayala’s Ability to**
 4 **Protect their (and the Class’s and Sub-Class’s) Interests.**

5 “If an absentee would be substantially affected in a practical sense by the determination made
 6 in an action, he should, as a general rule, be entitled to intervene.” *Southwest Center for Biological*
 7 *Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001). The Ninth Circuit has stated: “[h]aving found
 8 that appellants have a significant protectable interest, [the Circuit had] little difficulty concluding that
 9 the disposition of th[e] case may, as a practical matter, affect it.” *California ex rel. Lockyer v. United States*,
 10 450 F.3d 436, 442 (9th Cir. 2006). Morton and Ayala are affected in a very real sense insofar as the
 11 Federal Government apparently has carved out incarcerated individuals in the U.S. Territories &
 12 Possessions from its response to this Court’s injunction and effectively denied Morton and Ayala the
 13 benefits of their EIP.
 14

15 **D. The Parties Do Not Adequately Represent the Interests of the Incarcerated**
 16 **Individuals Located in the U.S. Territories & Possessions.**

17 As a threshold matter, the fourth element of Rule 24(a) intervention requires only a “minimal”
 18 showing that existing parties’ representation “may be” inadequate.” *Trbovich v. United Mine Workers*
 19 *of Am.*, 404 U.S. 528, 538 n. 10 (1972). In evaluating adequacy of representation, courts examine
 20 three factors: “(1) whether the interest of a present party is such that it will undoubtedly make all of a
 21 proposed intervenor’s arguments; (2) whether the present party is capable and willing to make such
 22 arguments; and (3) whether a proposed intervenor would offer any necessary elements to the
 23 proceeding that other parties would neglect.” *Citizens for Balanced Use*, 647 F.3d at 898. Here, all
 24 three factors militate towards finding inadequacy of representation.
 25

26
 27 First, Morton, Ayala, and the incarcerated individuals in the U.S. Territories & Possessions
 28 have arguments that are unique under the CARES Act that have not been made by the class that this

1 Court certified (i.e., under Section 2201(c)(1)). *Second*, Morton and Ayala believe that the as-certified
2 class may be precluded from raising facts and arguments in that they lack Article III standing and/or
3 may have waived such arguments by failing to bring such to the Court's attention in the first instance.
4 *Third*, Morton and Ayala contend that they bring a necessary element and/or injury to this case as
5 they are litigants with Article III standing (which is also ripe), for the Court's consideration. To that
6 end, Plaintiffs have appeared to neglect to make the arguments that Morton and Ayala are now
7 advancing regarding the U.S. Territories & Possessions.
8

9 **II. ALTERNATIVELY, THE COURT SHOULD PERMIT PERMISSIVE INTERVENTION UNDER RULE**
10 **24(b).**

11 Even if this Court does not grant intervention as of right, the Court should permit Morton
12 and Ayala, the Class, and the Sub-Class leave to intervene permissively pursuant Rule 24(b). "A party
13 seeking permissive intervention ... must establish a basis for federal subject matter jurisdiction
14 independent of the court's jurisdiction over the underlying action." *EEOC v. Nevada Resort Assoc.*, 792
15 F.2d 882, 886 (9th Cir. 1986). As demonstrated in the accompanying complaint in intervention, this
16 Court has independent federal question jurisdiction regarding each of Morton's and Ayala's APA
17 claims, CARES Act claims, and constitutional claims.
18

19 As to timeliness, *see Freedom from Religion Found*, 644 F.3d at 843, for the same reasons that
20 this motion was timely under a Rule 24(a) analysis, it is likewise timely under Rule 24(b).
21

22 As to common questions of fact and law, *see Freedom from Religion Found*, 644 F.3d at 843, such
23 is clearly present. Morton's and Ayala's claim that the Federal Government's position vis-à-vis the
24 CARES Act, in general, and the EIP, in particular, is (similar to the claim of incarcerated individuals
25 located in the Several States) unlawful.
26

27 In sum, all three factors for permissive intervention have been met.
28

1 Finally, in addition to the three prerequisites for permissive intervention outlined, *supra*,
2 practical and equitable considerations play a large role in a court's decision to grant or deny permissive
3 intervention. See *Spangler v. Pasadena City Bd. Of Ed.*, 552 F.2d 1326, 1329 (9th Cir. 1977). As such,
4 whether an intervenor's presence would prejudice the parties or delay the litigation, and whether the
5 intervenor would contribute to the development of the facts and the equitable adjudication of the
6 legal questions, are important considerations. *Spangler*, 552 F.2d at 1329 (citation omitted).
7 Ultimately, "the requirements for intervention are broadly interpreted in favor of intervention."
8 *United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1148 (9th Cir. 2010) (cleaned up).
9

10 As stated above, there is no undue delay and intervention will not prejudice any existing party.
11 Importantly, Morton and Ayala submit that they will contribute to the development of the facts and
12 equitable adjudication as to the Federal Government's position regarding incarcerated individuals in
13 the U.S. Territories & Possessions. This Court should exercise its considerable discretion to permit
14 intervention, which will, in turn, facilitate the orderly resolution of the unique issues Morton's and
15 Ayala's facts present as applied to the CARES Act and the EIP.
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CONCLUSION

WHEREFORE, based on the foregoing, Morton and Ayala respectfully move this Court to grant the motion in full.

Respectfully Submitted,

By: /s/ Edward M. Robbins, Jr.
Edward M. Robbins, Jr.
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Dated Dec. 11, 2020

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Dated Dec. 11, 2020

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.

By: /s/ Edward M. Robbins, Jr.
Edward M. Robbins, Jr.

Dated Dec. 11, 2020

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Counsel for Jamal A. Morton and Araclis N. Ayala, individually and on behalf of all others similarly situated

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

COLIN SCHOLL, <i>et al.</i> ,	:	Case No. 4:20-cv-5309-PJH
Plaintiff,	:	
	:	CLASS ACTION COMPLAINT
JAMAL A. MORTON and ARACLIS N. AYALA,	:	IN INTERVENTION
on behalf of themselves and all others	:	
similarly situated,	:	
Intervenors,	:	
v.	:	
STEVEN MNUCHIN, <i>et al.</i> ,	:	
Defendants.	:	

CLASS ACTION COMPLAINT IN INTERVENTION

INTERVENORS, JAMAL A. MORTON and ARACLIS N. AYALA, by and through their undersigned attorneys, allege as follows:

NATURE OF THE CASE & INTRODUCTION

1. This case is brought on behalf of persons who have been incarcerated under the custody of the U.S. Territories & Possessions (i.e., the United States Virgin Islands (“USVI”), Guam, the Commonwealth of the Northern Mariana Islands (“CNMI”), Puerto Rico, and American Samoa) at any time from March 27, 2020 to the present (“territorial incarcerated persons” or “territorial incarcerated people”) to challenge Defendants’ (A) unauthorized and unlawful withholding of funding under Section 2201(c)(1) of the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act and (B) imposition of blanket restrictions on all of the U.S. Territories & Possessions restricting CARES Act Trust Fund monies from being used to pay Economic Impact Payments (“EIP”), *see* 26 U.S.C. § 6428, to incarcerated people.

JURISDICTION, VENUE, & STANDING

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 702, 28 U.S.C. §§ 1331, 2201, and 2202.

3. Venue is proper under 28 U.S.C. § 1391 in this Court as at least one of the Defendants resides in this venue.

4. MORTON has Article III standing as he is being deprived of the EIP that he is statutorily eligible for under 26 U.S.C. § 6428.

5. AYALA has Article III standing as she is being deprived of the EIP that she is statutorily eligible for under 26 U.S.C. § 6428.

THE PARTIES

6. MORTON 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. MORTON has been continuously under the custody of the USVI since 2009, and is being held in custody at the Golden Grove Correctional Facility on St. Croix, USVI. MORTON has yet to receive his EIP from the USVI.

7. AYALA is an American citizen, a Puerto Rican resident under 26 U.S.C. §§ 933 and 937, and is not claimed as a dependent on anyone else's tax return. AYALA has been continuously under the custody of the federal government since 2016, and is being held in federal custody by the Bureau of Prisons at MDC Guaynabo on Puerto Rico. AYALA has yet to receive her EIP from Puerto Rico.

8. Defendant Steven T. Mnuchin is the Secretary of the Treasury. As such, Defendant Mnuchin exercises full authority to administer and enforce the internal revenue laws and has the power to create an agency to enforce these laws. He is responsible for distributing the EIPs under the CARES Act and, in his official capacity, has unlawfully withheld EIP benefits from incarcerated individuals.

9. Defendant Charles Rettig is the United States Commissioner of Internal Revenue Service. In that capacity, he administers the application of the internal revenue laws. Defendant Rettig reports to Defendant Mnuchin and, as part of his duties, oversees the issuance of EIP benefits under the CARES Act. In his official capacity, he has unlawfully withheld EIP benefits from incarcerated individuals.

10. Defendant U.S. Department of the Treasury is an agency of the United States government. The Department of the Treasury is responsible for, among other things, the disbursement of payments to the American public, including under the CARES Act. The U.S. Department of the Treasury has unlawfully withheld EIP benefits from incarcerated individuals.

11. Defendant U.S. Internal Revenue Service ("IRS") is a bureau of the U.S. Department of the Treasury organized to carry out the responsibilities of the Secretary of the Treasury under 26 U.S.C. § 7801. It was created based on the legislative grant of authority to the Secretary of the Treasury to

1 enforce the internal revenue laws. The IRS calculates and sends recovery payments to eligible persons
2 under the CARES Act.

3 12. Defendant United States of America is sued through its agencies, the U.S. Department of the
4 Treasury, and U.S. Internal Revenue Service.

5 BACKGROUND

6 THE CARES ACT

7
8 13. Beginning in early 2020, the novel coronavirus pandemic created a severe economic hardship
9 on millions of Americans. To address this economic crisis, Congress passed and President Trump
10 signed into law the CARES Act. *See* Pub. L. 116-136, 134 Stat. 281 (Mar. 27, 2020).

11
12 14. Under the CARES Act, eligible individuals may receive an EIP – a payment of up to \$1,200
13 (or \$2,400 in the case of eligible individuals filing a joint return), plus \$500 for each qualifying child.
14 26 U.S.C. § 6428(a). The amount of the credit may be adjusted based on an individual’s adjusted
15 gross income. *Id.* § 6428(c).

16
17 15. The CARES Act defines eligibility for an EIP broadly. The statute defines “eligible individual”
18 to include “any individual other than—(1) any non-resident alien individual, (2) any individual with
19 respect to whom a deduction under section 151 is allowable to another taxpayer . . . , and (3) an estate
20 or trust.” 26 U.S.C. § 6428(d). Congress did not impose any other status-based limitations on the
21 definition of “eligible individual” under 26 U.S.C. § 6428(d).

22 16. The CARES Act applies to the U.S. Territories & Possessions.

23
24 17. Pursuant to the CARES Act, Defendants are required to issue EIP benefits “as rapidly as
25 possible.” 26 U.S.C. § 6428(f)(3)(A).

26 18. Section 2201(c)(1) of the CARES Act addresses the payments to U.S. Territories &
27 Possessions, and states:
28

(A) MIRROR CODE POSSESSION.—The Secretary of the Treasury shall pay to each possession of the United States which has a mirror code tax system amounts equal to the loss (if any) to that possession by reason of the amendments made by this section. Such amounts shall be determined by the Secretary of the Treasury based on information provided by the government of the respective possession.

(B) OTHER POSSESSIONS.—The Secretary of the Treasury shall pay to each possession of the United States which does not have a mirror code tax system amounts estimated by the Secretary of the Treasury as being equal to the aggregate benefits (if any) that would have been provided to residents of such possession by reason of the amendments made by this section if a mirror code tax system had been in effect in such possession. The preceding sentence shall not apply unless the respective possession has a plan, which has been approved by the Secretary of the Treasury, under which such possession will promptly distribute such payments to its residents.

CARES Act, § 2201(c)(1)(A)-(B).

THE IRS'S POSITION ON THE CARES ACT IN THE TERRITORIES & POSSESSION

19. Per the IRS website, a copy of which is attached hereto as Exhibit 1:

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 Nov. 21, 2020) (emphasis added).

THE INSTANT CLASS ACTION LITIGATION

20. 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. Docket no. 1.

21. Indeed, IRS Chief Counsel Michael J. Desmond provided a declaration in this case, docket no. 44-1 stating that: “incarcerated individuals do not qualify for the advance payments.” *Id.* at ¶15.

22. On September 24, 2020, this Court 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.

23. On October 14, 2020, this Court entered an order granting in part and denying in part the *Scholl* plaintiffs’ motion for summary judgement, 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) (“*Scholl II*”).

24. The Defendants in this case take the position that the permanent injunction neither applies to the U.S. Territories & Possessions, nor applies to the respective Plans the Defendants have with the U.S. Territories & Possessions.

THE USVI CLASS ACTION LITIGATION

25. On October 27, 2020, counsel for MORTON sent Joel Lee, CPA (the Director of the USVI

1 Bureau of Internal Revenue (“BIR”) (i.e., the USVI’s version of the IRS)) correspondence seeking
2 clarification as to whether the USVI shares the same view as the IRS regarding the CARES Act in
3 general, and the EIP in particular, as applied to incarcerated individuals. A copy of the October 27th
4 correspondence is attached as Exhibit 2.

5
6 26. Counsel for MORTON expressed that time was of the essence because the EIP must be issued
7 “as rapidly as possible,” 26 U.S.C. § 6428(f)(3), and that “[n]o refund or credit shall be made or
8 allowed under this subsection after December 31, 2020[,]” *id.* Exhibit 2 at p. 2.

9
10 27. Counsel for MORTON received no response to his October 27th correspondence, and
11 concluded that the USVI took the same position as the Federal Government as to the EIP for
12 incarcerated individuals, i.e., that incarcerated individuals are not eligible.

13 28. Consequently, Morton filed suit, *Morton v. USVI, et al.*, case no. 3:20-cv-109 (D.V.I.),
14 attempting to obtain his EIP. Morton moved for a preliminary injunction, *id.* at docket no. 5, moved
15 to expedite, *id.* at docket no. 8, and moved for summary judgment, *id.* at docket no. 18.

16
17 29. The District Court of the Virgin Islands set a hearing on Morton’s preliminary injunction
18 motion for November 24th. *See id.* at docket nos. 30 & 32.

19 30. On November 20th, the USVI filed its opposition (a copy of which is attached hereto as Exhibit
20 3), attaching the affidavit of Director Joel A. Lee, CPA, in support of the opposition (a copy of which
21 is attached hereto as Exhibit 4. *Id.* at docket nos. 37 & 37-1.

22
23 31. Importantly, in the *Morton* case, the USVI avers that it “merely serve[s] as an intermediary
24 between eligible Virgin Islands taxpayers on the one hand, and U.S. Treasury on the other. [The
25 USVI] take[s] no position on the eligibility of incarcerated persons. [The USVI] merely distribute[s]
26 the federal funds we have been provided in accordance with the conditions that are provided by the
27 U.S. Treasury.” Ex. 3 at p. 2.

28 32. An evidentiary hearing was held on November 24, 2002, before the District Court of the

Virgin Islands. At the November 24th hearing, the USVI took the position (and maintains the position) that it cannot pay EIP to incarcerated individuals because the Plan prevents such and that the Defendants have withheld funding from the USVI to issue EIPs to incarcerated individuals.

33. At the November 24th hearing, Director Joel A. Lee testified that each U.S. Territory and Possession has its own respective “Plan” with the federal government.

34. A copy of the Defendants’ unsigned Plan with the USVI was provided to MORTON’s counsel in open court, which the USVI acknowledges is the final plan notwithstanding the fact that it was not signed by any individual representing either the Federal Government or the USVI Government.

CLASS ALLEGATIONS

U.S. Territories & Possessions Class

35. AYALA and MORTON bring this action on behalf of themselves and all others similarly situated (the “U.S. Territories & Possessions Class”), pursuant to Federal Rule of Civil Procedure 23.

The U.S. Territories & Possessions Class is defined as follows:

All residents of the U.S. Territories & Possessions 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 respective Territories and Possessions, 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 under applicable territorial/possession law 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.

36. The exact size of the U.S. Territories & Possessions Class is unknown but, upon information and belief, the number of individuals incarcerated in the U.S. Territories & Possessions is well in

1 excess of 1000 and could very well be in excess of a ten thousand. Thus, joinder of that many people
2 is impractical.

3 37. There are multiple questions of law and fact common to the class including but not limited
4 to: (A) whether Defendants have unlawfully withheld, delayed, or restricted delivery of Section
5 2201(c)(1) funding to the U.S. Territories & Possessions; (B) whether, in turn, the Defendants
6 unlawfully withheld, delayed, or restricted delivery of benefits to Plaintiffs and the U.S. Territories
7 & Possessions Class; (C) whether Defendants' policy treating incarcerated people as ineligible for EIP
8 benefits based on their incarcerated status is *ultra vires*, contrary to law, in excess of statutory authority,
9 and/or arbitrary and capricious; (D) whether Defendants violated the CARES Act by requiring the
10 U.S. Territories & Possessions to withhold EIP checks from Plaintiffs and the U.S. Territories &
11 Possessions Class based solely on their status as territorial incarcerated people; (E) whether Defendants
12 are liable to the Plaintiffs and the U.S. Territories & Possessions Class for the sum of the EIP benefits
13 to which they are entitled under the CARES Act; (F) whether an unsigned Plan has any legal force
14 and effect; (G) whether the Assistant Secretary for Tax Policy has the authority to sign any Plan; and
15 (H) the remedies to which the Plaintiffs and the U.S. Territories & Possessions Class are entitled.

16 38. These and other questions of law and fact are common to the U.S. Territories & Possessions
17 Class, and predominate over any questions affecting only individual members of the sub-Class.

18 39. AYALA's and MORTON's respective claims are typical of the U.S. Territories & Possessions
19 Class, as all Class Members challenge Defendants' authority to require the U.S. Territories and
20 Possessions to withhold EIP checks from them on the sole basis of their status as incarcerated people.
21 The answer to this question is the same for all members of the U.S. Territories & Possessions Class.
22 There are no defenses of a unique nature that may be asserted against the Plaintiffs individually, as
23 distinguished from other members of the U.S. Territories & Possessions Class, and the relief sought
24 is common to the U.S. Territories & Possessions Class.

1 40. Plaintiffs will fairly and adequately protect the interests of the members of the Class. Plaintiffs’
 2 interests are aligned with, and not antagonistic to, those of the other members of the U.S. Territories
 3 & Possessions Class, and the Plaintiffs have retained counsel competent and experienced in the
 4 prosecution of class action litigation to represent them and the U.S. Territories & Possessions Class.

5
 6 41. Certification of the class for injunctive relief is appropriate under Fed. R. Civ. P. 23(b)(1)
 7 because the prosecution of separate actions by individual class members would create a risk of
 8 inconsistent or varying adjudications that would establish incompatible standards of conduct for
 9 Defendants, or would, as a practical matter, be dispositive of the interests of other class members not
 10 parties to the individual adjudications, or would otherwise substantially impair or impede their ability
 11 to protect their interests. Certification for injunctive and declaratory relief is also appropriate under
 12 Rule 23(b)(2) because Defendants have acted on grounds that apply generally to the whole sub-Class.

13
 14 42. Additionally, certification of a class for monetary relief is appropriate under Fed. R. Civ. P.
 15 23(b)(1) and/or 23(b)(2) and/or 23(c)(4) because the common questions of fact and law predominate
 16 over questions specific to individual class members. The common questions of law will determine
 17 Defendants’ liability to every member of the U.S. Territories & Possessions Class. Class-wide
 18 treatment of these common issues in a single forum is a superior means of determining Defendants’
 19 liability to each U.S. Territories & Possessions Class Member than potentially hundreds if not
 20 thousands of other lawsuits. As a result, class-wide adjudication of Defendants’ liability is the most
 21 efficient means of adjudication.
 22

23 **Mirror Code Sub-Class**

24
 25 43. MORTON brings this action on behalf of himself and all others similarly situated (the “Mirror
 26 Code Sub-Class”), pursuant to Federal Rule of Civil Procedure 23. The Mirror Code Sub-Class is
 27 defined as follows:
 28

All residents of the U.S. Territories & Possessions in a mirror code jurisdiction 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 respective Territories and Possessions, 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.

44. The exact size of the Mirror Code Sub-Class is unknown but, upon information and belief, the number of individuals incarcerated in the U.S. Territories & Possessions in mirror code jurisdictions is well in excess of 250 and could very well be in excess of a five hundred. Thus, joinder of that many people is impractical.

45. There are discrete questions of law and fact common to the Mirror Code Sub-Class including but not limited to: (A) whether Defendants have lawfully imposed a Plan under Section 2201(c)(1)(B) on mirror code jurisdictions; and (B) whether the Defendants can lawfully restrict funding under Section 2201(c)(1) on the execution of a Plan under purported authority of Section 2201(c)(1)(B) to mirror code jurisdictions governed by Section 2201(c)(1)(A).

46. These and other questions of law and fact are common to the Mirror Code Sub-Class and predominate over any questions affecting only individual members of the Mirror Code Sub-Class.

47. MORTON's claims are typical of the Mirror Code Sub-Class, as all Mirror Code Sub-Class Members challenge Defendants' authority to impose a Plan under Section 2201(c)(1)(B) on mirror code jurisdictions and whether the purported Plan has any legal force and effect. There are no defenses of a unique nature that may be asserted against MORTON individually, as distinguished from other

1 members of the Mirror Code Sub-Class, and the relief sought is common to the Mirror Code Sub-
2 Class.

3 48. MORTON will fairly and adequately protect the interests of the members of the Mirror Code
4 Sub-Class. MORTON's interests are aligned with, and not antagonistic to, those of the other
5 members of the Mirror Code Sub-Class, and MORTON has retained counsel competent and
6 experienced in the prosecution of class action tax litigation to represent himself and the Mirror Code
7 Sub-Class.
8

9 49. Certification of the class for injunctive relief is appropriate under Fed. R. Civ. P. 23(b)(1)
10 because the prosecution of separate actions by individual class members would create a risk of
11 inconsistent or varying adjudications that would establish incompatible standards of conduct for
12 Defendants, or would, as a practical matter, be dispositive of the interests of other class members not
13 parties to the individual adjudications, or would otherwise substantially impair or impede their ability
14 to protect their interests. Certification for injunctive and declaratory relief is also appropriate under
15 Rule 23(b)(2) because Defendants have acted on grounds that apply generally to the whole sub-Class.
16

17 50. Additionally, certification of a class for monetary relief is appropriate under Fed. R. Civ. P.
18 23(b)(1) and/or 23(b)(2) and/or 23(c)(4) because the common questions of fact and law predominate
19 over questions specific to individual class members. The common questions of law will determine
20 Defendants' liability to every member of the Mirror Code Sub-Class. Class-wide treatment of these
21 common issues in a single forum is a superior means of determining Defendants' liability to each
22 Mirror Code Sub-Class Member than potentially hundreds of other lawsuits. As a result, class-wide
23 adjudication of Defendants' liability is the most efficient means of adjudication.
24
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27
28

CLAIMS FOR RELIEF

COUNT 1

Defendants' Policy of Conditioning Funding of Section 2201(c)(1) of the CARES Act on Incarcerated Status is *Ultra Vires*, Contrary to Law, in Excess of Statutory Authority, and is Arbitrary & Capricious (Administrative Procedure Act ("APA") violation, 5 U.S.C. §§ 702 & 706(2))

51. Paragraphs 1 through 50 are realleged and incorporated herein.

52. MORTON, AYALA, and the U.S. Territories & Possessions Class are all eligible for EIP benefits pursuant to the CARES Act because they meet the statutory requirements.

53. Defendants' policy of conditioning/restricting funding under Section 2201(c)(1) of the CARES Act (and, in turn, requiring the respective U.S. Territories & Possessions to withhold EIP benefits from territorial incarcerated persons based solely on their incarcerated status) exceeds Defendants' statutory authority under the Section 2201(c)(1) of the CARES Act, which is *ultra vires*, contrary to law, arbitrary and capricious, or otherwise unlawful within the meaning of the APA, 5 U.S.C. § 706(2).

54. Defendants' policy of treating territorial incarcerated people differently from incarcerated people in the Several States violates the Uniformity Clause, *viz.* U.S. Const. Art. I, § 8, cl. 1, and is *ultra vires*, contrary to law, arbitrary and capricious, or otherwise unlawful within the meaning of the APA, 5 U.S.C. § 706(2).

55. Defendants' policy of treating territorial incarcerated people differently from incarcerated people in the Several States violates the Due Process Clause of the Fifth Amendment, *see Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973), and is *ultra vires*, contrary to law, arbitrary and capricious, or otherwise unlawful within the meaning of the APA, 5 U.S.C. § 706(2).

56. Defendants' policy of conditioning/restricting funding under Section 2201(c)(1) of the CARES Act (and, in turn, requiring the respective U.S. Territories & Possessions to withhold EIP

benefits from territorial incarcerated persons based solely on their incarcerated status) must be held to be unlawful and set aside under 5 U.S.C. § 706(2).

57. MORTON, AYALA, and the U.S. Territories & Possessions Class have been aggrieved by Defendants' policy of conditioning/restricting funding under Section 2201(c)(1) of the CARES Act (and requiring the respective U.S. Territories & Possessions to withhold EIP benefits from territorial incarcerated persons based solely on their incarcerated status) because they have been denied a statutory benefit to which they are otherwise entitled.

58. Defendants' refusal to authorize EIP benefits under the terms of the respective "Plans" to territorial incarcerated persons reflects Defendants' final, considered position, as evidenced by, among other things, the attached affidavit of Joel Lee. Ex. 4. This policy embodied in the respective Plans constitutes final administrative action under 5 U.S.C. § 704.

59. Based on the foregoing allegations, MORTON, AYALA, and the U.S. Territories & Possessions Class seek monetary relief in an amount equal to each U.S. Territories & Possessions Class Member's benefit under the CARES Act and an order compelling Defendants to cause their agents to issue EIP benefits to MORTON, AYALA, and U.S. Territories & Possessions Class.

60. In the alternative, based on the foregoing violations, MORTON, AYALA, and the U.S. Territories & Possessions Class request injunctive relief ordering Defendants to (1) remove any condition from the respective "Plans" that condition funding under Section 2201(c)(1) of the CARES Act based on incarcerated status, and (2) withdraw any statements/directives/orders, etc. (including but not limited to statements/directives/orders made to the respective U.S. Territories & Possession) which direct that incarcerated individuals are not entitled to CARES Act funds.

COUNT 2

Declaration that Defendants' Actions Violate the Due Process Clause and the Uniformity Clause of the U.S. Constitution (as applied challenge)

61. Paragraphs 1 through 50 are realleged and incorporated herein.

62. MORTON, AYALA, and the U.S. Territories & Possessions Class are eligible for EIP benefits pursuant to the CARES Act because they meet the statutory requirements.

63. Defendants' policy of conditioning/restricting funding under Section 2201(c)(1) of the CARES Act (and, in turn, requiring the respective U.S. Territories & Possessions to withhold EIP benefits from territorial incarcerated persons based solely on their incarcerated status) exceeds Defendants' statutory authority under both Section 2201(c)(1) of the CARES Act, which deprives MORTON, AYALA, and the U.S. Territories & Possessions Class of due process of law (and specifically of equal protection) by creating a *de facto* legislative classification that the Defendants lacked the authority to create, i.e., which is *ultra vires*.

64. Defendants' policy of conditioning/restricting funding under Section 2201(c)(1) of the CARES Act and, in turn, requiring the respective U.S. Territories & Possessions to withhold EIP benefits from territorial incarcerated persons based solely on their incarcerated status exceeds Defendants' statutory authority under the Section 2201(c)(1) of the CARES Act, which deprives MORTON, AYALA, and U.S. Territories & Possessions Class of their rights under the U.S. Constitution and is prohibited by the Uniformity Clause by causing taxes (i.e. Section 2201 of the CARES Act) to apply in a non-uniform manner throughout the United States of America.

65. Based on the foregoing allegations, MORTON, AYALA, and the U.S. Territories & Possessions Class seek a declaration that (1) Defendants' policy of conditioning/restricting funding under Section 2201(c)(1) of the CARES Act and, in turn, requiring the respective U.S. Territories & Possessions to withhold EIP benefits from territorial incarcerated persons based solely on their incarcerated status exceeds Defendants' statutory authority under the Section 2201(c)(1) of the CARES Act; (2) Defendants' policy violates the Uniformity Clause; (3) Defendants' policy violates the Due Process Clause.

COUNT 3

Declaration that Respective Plans Have No Legal Force & Effect

66. Paragraphs 1 through 50 are realleged and incorporated herein.

67. Assuming that Section 2201(c)(1)(B) of the CARES Act applies in the first instance to the respective U.S. Territory & Possessions (a point MORTON, AYALA, and the U.S. Territories & Possessions Class contest regarding the USVI, Guam, and CNMI, i.e. mirror code jurisdictions, *see* Count 4 *infra*), Section 2201(c)(1)(B) does not allow for the delegation of authority from the Secretary of the Treasury.

68. Accordingly, absent a statutory grant of authority by Congress to the Secretary of the Treasury to delegate the Secretary of the Treasury's authority, the only person that could enter into the Plan is the Secretary of the Treasury, at all times relevant, Steven Mnuchin.

69. A cursory review of the Plan purportedly entered into with the USVI indicates that it was purportedly approved by David J. Kautter, the Assistant Secretary of Tax Policy. Mr. Kautter is not the Secretary of the Treasury; thus, he lacked the authority under Section 2201(c)(1)(B) to enter into the Plan, and the Plan is a legal nullity.

70. Because Kautter lacked authority under Section 2201(c)(1)(B) he cannot bind the Federal Government.

71. Assuming one could read into Section 2201(c)(1)(B) a delegation provision (a point MORTON, AYALA, and the U.S. Territories & Possessions Class contest), 26 C.F.R. § 301.7701-9 requires the delegation to be "duly authorized by the Secretary (directly, or indirectly by one or more redelegations of authority)[.]" Here there was no delegation.

72. Of the publicly available Treasury Orders, *see* <https://www.treasury.gov/about/role-of-treasury/orders-directives/Pages/orders-numeric.aspx>, only two are to the Assistant Secretary of Tax

1 Policy, to wit: Orders 111-01 & 111-02.¹ A copy of Order 111-01 is attached as Exhibit 5; Order 111-
2 02 is attached as Exhibit 6.

3 73. Neither Order 111-01 nor Order 111-02 address the CARES Act, nor the ability of the
4 Assistant Secretary of Tax Policy to enter into a “Plan” with the U.S. Territories & Possessions. Thus,
5 there was no delegation that authorized the Assistant Secretary of Tax Policy to “sign” any Plan.
6

7 74. Because Kautter lacked delegated authority to “sign” any Plan, he cannot bind the Federal
8 Government.

9 75. Additionally, because a governmental document must be signed by a person with sufficient
10 legal authority to execute the document, the failure to sign the document renders it a legal nullity.
11

12 76. Based on the foregoing allegations, MORTON, AYALA, and the U.S. Territories &
13 Possessions Class seek a declaration that (1) any Plan entered into with a U.S. Territory or Possession
14 that is not signed by Secretary of the Treasury Steven Mnuchin is a legal nullity that has no force and
15 effect; (2) any Plan entered into with a U.S. Territory or Possession that is signed by David J. Kautter,
16 the Assistant Secretary of Tax Policy, is a legal nullity that has no force and effect; and (3) any Plan
17 entered into with a U.S. Territory or Possession that is not “signed” is a legal nullity that has no force
18 and effect.
19

20 COUNT 4

21 **Defendants’ Policy of Imposing a Plan under purported authority of Section 2201(c)(1)(B) on**
22 **Mirror Code Jurisdictions is *Ultra Vires*, Contrary to Law, in Excess of Statutory Authority, and**
Arbitrary & Capricious (APA violation, 5 U.S.C. §§ 702 & 706(2))

23 77. Paragraphs 1 through 50 are realleged and incorporated herein.

24 78. MORTON and the Mirror Code Sub-Class are all eligible for EIP benefits pursuant to the
25 CARES Act, 26 U.S.C. § 6428 (as mirrored), because they meet the statutory requirements.

26 79. Defendants’ policy of conditioning/restricting funding under Section 2201(c)(1) of the
27

28 ¹ Available at <https://www.treasury.gov/about/role-of-treasury/orders-directives/Pages/to111-01.aspx>; <https://www.treasury.gov/about/role-of-treasury/orders-directives/Pages/to111-02.aspx>.

1 CARES Act on the execution of a Plan under Section 2201(c)(1)(B) by mirror code jurisdictions (for
2 which there is no requirement of a Plan under Section 2201(c)(1)(A)) exceeds Defendants' statutory
3 authority under Section 2201(c)(1) of the CARES Act (i.e., there is no statutory authority to enter
4 into a Plan), which is *ultra vires*, contrary to law, arbitrary and capricious, or otherwise unlawful within
5 the meaning of the APA, 5 U.S.C. § 706(2).
6

7 80. The respective Plans entered into with mirror code jurisdictions must be held to be unlawful
8 and set aside under 5 U.S.C. § 706(2).

9 81. MORTON and the Mirror Code Sub-Class have been aggrieved by Defendants' policy of
10 conditioning funding under Section 2201(c)(1) of the CARES Act with the execution of a Plan under
11 Section 2201(c)(1)(B) for mirror code jurisdictions, because absent a Plan there would be nothing to
12 restrict the respective U.S. Territories & Possessions from issuing EIP benefits to territorial
13 incarcerated persons based solely on their incarcerated status.
14

15 82. The conditions imposed by the Defendants in the respective "Plans" constitutes final
16 administrative action under 5 U.S.C. § 704.
17

18 83. Based on the foregoing allegations, MORTON and the Mirror Code Sub-Class seek monetary
19 relief in an amount equal to each Mirror Code Sub-Class Member's benefit under the CARES Act
20 and an order compelling Defendants to cause their agents to issue EIP benefits to MORTON and the
21 Mirror Code Sub-Class.
22

23 84. In the alternative, based on the foregoing violations, MORTON and the Mirror Code Sub-
24 Class request injunctive relief ordering Defendants to (a) vacate/annul any Plan with a U.S. Territory
25 or Possession that uses a mirror code, and (b) provide funding to mirror code jurisdictions under
26 Section 2201(c)(1)(A) without restrictions.
27
28

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs pray that this Court:

- A. Certify the proposed U.S. Territories & Possessions Class, appoint AYALA and MORTON as class co-representatives, and appoint their counsel to represent the U.S. Territories & Possessions Class.
- B. Certify the proposed Mirror Code Sub-Class, appoint MORTON as sub-class representative, and appoint his counsel to represent the Mirror Code Sub-Class.
- C. Award damages to AYALA and MORTON and the U.S. Territories & Possessions Class in the amount of each individual's entitlement under the CARES Act and enter judgment against Defendants in favor of AYALA and MORTON and the U.S. Territories & Possessions Class.
- D. Award damages to MORTON and the Mirror Code Sub-Class in the amount of each individual's entitlement under the CARES Act and enter judgment against Defendants in favor of MORTON and the Mirror Code Sub-Class.
- E. Order/enjoin Defendants to (1) remove any provision from the respective "Plans" that conditions funding under Section 2201(c)(1) of the CARES Act based on incarcerated status, (2) withdraw any statements/directives/orders, etc. (including but not limited to statements/directives/orders made to the respective U.S. Territories & Possession) which direct that incarcerated individuals are not entitled to CARES Act funds, and (3) immediately authorize the U.S. Territories & Possessions to issue EIP benefits to all territorial incarcerated persons under the custody of the respective U.S. Territories & Possessions without regard to their incarcerated status.
- F. Declare that the policy that territorial incarcerated people are not eligible to receive the EIP is (1) arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; or (3) *ultra vires*, in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

1 G. Set aside the policy that territorial incarcerated people are not eligible to receive the EIP as
 2 being (1) arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law;
 3 (2) contrary to constitutional right, power, privilege, or immunity; or (3) *ultra vires*, in excess of
 4 statutory jurisdiction, authority, or limitations, or short of statutory right.

5
 6 H. Declare that Defendants have violated AYALA's, MORTON's, and the U.S. Territories &
 7 Possessions Class Members' respective rights under the Due Process Clause, the Uniformity Clause,
 8 and/or the CARES Act.

9 I. Declare that: (1) any Plan entered into with a U.S. Territory or Possession that is not signed
 10 by Secretary of the Treasury Steven Mnuchin is a legal nullity that has no force and effect; (2) any Plan
 11 entered into with a U.S. Territory or Possession that is signed by David J. Kautter, the Assistant
 12 Secretary of Tax Policy, is a legal nullity that has no force and effect; and (3) any Plan entered into
 13 with a U.S. Territory or Possession that is not "signed" is a legal nullity that has no force and effect.

14
 15 J. Declare that any Plan issued under the purported authority of Section 2201(c)(1)(B) by a
 16 mirror code jurisdiction is *ultra vires* and a legal nullity, which has no legal force and effect.

17
 18 K. Declare that funding under Section 2201(c)(1)(A) cannot be conditioned upon the execution
 19 of a Plan under Section 2201(c)(1)(B) and order the Defendants to provide funding to mirror code
 20 jurisdictions under Section 2201(c)(1)(A) without restrictions.

21 L. Award Plaintiffs, the Class, and the Sub-Class reasonable attorneys' fees and costs of suit, as
 22 well as pre-judgment and post-judgment interest as permitted by law. And,

23
 24 M. Grant such additional and further relief as the Court deems proper and just.

25 //

26 //

27 //

28 //

1 Respectfully Submitted,

2
3 By: _____
4 Edward M. Robbins, Jr.
5 California Bar No. 82696
6 HOCHMAN SALKIN TOSCHER PEREZ, PC
7 9150 Wilshire Blvd., Suite 300
8 Beverly Hills, California 90212
9 310.281.3247 (O)
10 310.859.5129 (F)
11 edr@taxlitigator.com

Dated Dec. __, 2020

8 By: _____
9 Joseph A. DiRuzzo, III
10 Fla. Bar No. 0619175
11 DIRUZZO & COMPANY
12 401 East Las Olas Blvd., Suite 1400
13 Ft. Lauderdale, Florida 33301
14 954.615.1676 (O)
15 954.827.0340 (F)
16 jd@diruzzolaw.com

Dated Dec. __, 2020

14 **CERTIFICATE OF SERVICE**

15 I hereby certify that I electronically filed the foregoing Notice of with the Clerk of Court using the
16 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:

17 By: _____
18 Edward M. Robbins, Jr.

Dated Dec. __, 2020

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Counsel for Jamal A. Morton and Araclis N. Ayala, individually and on behalf of all others similarly situated

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

COLIN SCHOLL, <i>et al.</i> ,	:	Case No. 4:20-cv-5309-PJH
Plaintiff,	:	
	:	NOTICE OF MOTION &
JAMAL A. MORTON and ARACLIS N. AYALA,	:	MOTION FOR CIVIL CONTEMPT
on behalf of themselves and all others	:	
similarly situated,	:	
Intervenors,	:	
v.	:	
	:	Hr'g Date: TBD
STEVEN MNUCHIN, <i>et al.</i> ,	:	Hr'g Time: TBD
Defendants.	:	Judge: Hon. Phyllis J. Hamilton

NOTICE OF MOTION & MOTION FOR CIVIL CONTEMPT

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that Pursuant to Local Rule 7-1(b), JAMAL A. MORTON and
 3 ARACLIS N. AYALA, individually and on behalf of all others similarly situated, respectfully move,
 4 without oral argument, to hold the named Defendants and agents thereof (including but not limited
 5 to the United States Virgin Islands (the "USVI")) in civil contempt for willfully disobeying this Court's
 6 October 14, 2020 order. Alternatively, Morton and Ayala notice that on _____, 2020, at
 7 9:00 a.m., before the Hon. Chief District Judge Phyllis J. Hamilton, Oakland Courthouse, Courtroom
 8 3 - 3rd Floor, 1301 Clay Street, Oakland, CA 94612, or as soon thereafter as the Court may order,
 9 Morton and Ayala will and do hereby move for the same relief.
 10

11 This motion is based on the supporting memorandum below; the accompanying Affidavit of
 12 the USVI Bureau of Internal Revenue ("BIR") Director Joel A. Lee, CPA, the position taken by the
 13 USVI in *Morton v. USVI, et al.*, case no. 3:20-cv-109 (D.V.I.), any further papers filed in support of this
 14 motion, the argument of counsel, and all pleadings and records on file in this matter.
 15

16 Intervenors Jamal A. Morton and Araclis N. Ayala, individually and on behalf of all others
 17 similarly situated, respectfully submit this Memorandum in support of their Motion for Civil
 18 Contempt Against Defendants Steven Mnuchin, Charles Rettig, the U.S. Department of the Treasury,
 19 the Internal Revenue Service, and the United States of America (collectively, the "Federal
 20 Government") and agents thereof (i.e., the U.S. Territories & Possessions including, but not limited
 21 to, the heads of the respective local taxation authorities that are facilitating the Federal Government's
 22 willful disobedience of this Court October 14th injunction).
 23
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MEMORANDUM IN SUPPORT

INTRODUCTION

Since this Court entered its October 14th permanent injunction against the Federal Government it has appeared, from the face of the injunction order and the related moving papers of the Plaintiffs and the Defendants, that the Court's October 14th injunction applied to the United States of America (i.e., everywhere under the American flag) and not merely the "United States" as legal term of art, *see* 26 U.S.C. § 7701(a)(9) (defining that the "[t]erm 'United States' when used in a geographical sense includes only the States and the District of Columbia."). Thus, October 14th injunction applies to the Federal Government's actions including, by necessary extension under Fed. R. Civ. P. 65(d)(2), actions by the Federal Government's agents (i.e., the U.S. Territories & Possessions that are complying with their respective Plans).

If the Intervenor's are correct (and they believe that the text of the October 14th order taken together with the procedural history of this case demonstrates that they are), then the Federal Government's actions in continuing to instruct the U.S. Territories & Possessions to deny the Economic Impact Payment ("EIP") to incarcerated individuals violates this Court's permanent injunction.

Further, the Federal Government's continued instance of imposing the condition, that funding under Section 2201(c)(1) of the CARES Act will be withheld from the U.S. Territories & Possessions if the U.S. Territories & Possessions issue the EIP to incarcerated individuals, likewise violates this Court's permanent injunction.

The Court should exercise its considerable discretion and hold the Federal Government in contempt.

BACKGROUND

I. THE INSTANT CASE

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. Indeed, IRS Chief Counsel Michael J. Desmond provided a declaration in this case, docket no. 44-1, stating that: "incarcerated individuals do not qualify for the advance payments." *Id.* at ¶5.

On September 24, 2020, this Court granted the *Scholl* plaintiffs a preliminary injunction and class certification. *Scholl v. Mnuchin*, 2020 WL 5702129 (N.D. Cal. Sept. 24, 2020) ("*Scholl I*"). On October 14, 2020, this Court entered an order granting in part and denying in part the *Scholl* plaintiffs' motion for summary judgment, 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*").

The Federal Government appealed this 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. The Ninth Circuit denied the motion to stay, concluding that the Federal Government had not "demonstrated a sufficient likelihood of success on appeal to warrant a stay." *Scholl, et al. v. Mnuchin, et al.*, case no. 20-17077 at ECF No. 9.

Consequently, the injunction remains in place and is fully operative against the Federal Government and its agents, servants, and persons in active concert with the named defendants. See Fed. R. Civ. P. 65(d) (detailing persons to be bound by injunction order).

1 **II. TAXATION IN THE UNITED STATES TERRITORIES & POSSESSIONS**

2 **A. The Internal Revenue Code**

3 The Internal Revenue Code has specific provisions addressing United States taxpayers who
 4 reside and have income “sourced” in the Territories and Possessions. For example, 26 U.S.C. § 937
 5 addresses residency and sourcing rules regarding the Territories and Possessions. 26 U.S.C. § 932(c)
 6 requires that USVI residents file their income tax return with, and pay their tax liability to the USVI.
 7 26 U.S.C. § 933 addresses bona fide residents of Puerto Rico, requiring the filing of an income tax
 8 return with the Puerto Rican tax authority for U.S. citizens residing in Puerto Rico who only received
 9 income from sources within Puerto Rico. See generally, IRS Pub. 1321. Available at
 10 <https://www.irs.gov/pub/irs-pdf/p1321.pdf> (last accessed 11/21/20).
 11

12 **B. Taxation in the U.S. Territories & Possessions**

13 **1. The USVI**

14 The Naval Service Appropriations Act of 1921, codified at 48 U.S.C. § 1397, provides: “[t]he
 15 income-tax laws in force in the United States of America and those which may hereafter be enacted
 16 shall be held to be likewise in force in the Virgin Islands of the United States, except that the proceeds
 17 of such taxes shall be paid into the treasuries of said islands.” “This statutory scheme is known as the
 18 ‘mirror code,’ under which the Internal Revenue Code is applied to the Virgin Islands merely by
 19 substituting ‘Virgin Islands’ for ‘United States’ throughout.” *Vento v. Dir. of Virgin Islands Bureau of*
 20 *Internal Revenue*, 715 F.3d 455, 465 (3d Cir. 2013). Thus, a USVI taxpayer may “not be required to
 21 pay taxes to the federal government, so long as she files a territorial tax return that fully reports her
 22 income and then fully pays her territorial taxes to the [USVI].” *Cooper v. Comm’r*, 718 F.3d 216, 219
 23 (3d Cir. 2013).
 24

25 **2. Guam & the Commonwealth of the Northern Mariana Islands (“CNMI”)**

26 Similar to the USVI,
 27
 28

the Internal Revenue Code applies in both Guam and the Marianas through a “mirror image” system under which each jurisdiction administers and collects its own taxes. Citizens or residents of either jurisdiction are required to file only one income tax return. Under these “mirroring” provisions, either Guam or CNMI is to be substituted wherever “United States” appears in the Internal Revenue Code, unless such substitution would be “manifestly incompatible” with the Code or Covenant.

Holmes v. Dir. of the Dep’t of Revenue & Taxation, Gov’t of Guam, 937 F.2d 481, 483–84 (9th Cir. 1991) (cleaned up). See also *Sayre & Co. v. Riddell*, 395 F.2d 407, 412 (9th Cir. 1968) (“The general conclusion that we draw ... is that Congress intended that Guam should apply the Internal Revenue Code ... just as the United States applies the Code to persons and income within its territory.”). Consequently, “Guam residents do not pay any income tax to the U.S. federal government; instead, they pay a territorial income tax to the government of Guam.” *Gumataotao v. Dir. of Dep’t of Revenue & Taxation*, 236 F.3d 1077, 1079 (9th Cir. 2001).

3. Puerto Rico

While Puerto Ricans pay most of their income taxes to the local tax authority, see 26 U.S.C. § 933, *supra*, the still pay their federal income taxes to the IRS “on income from sources outside Puerto Rico for which they are liable under the Internal Revenue Code, the regular payment of federal income taxes by all federal employees in Puerto Rico, as well as the full Social Security, Medicare, and Unemployment Compensation taxes[.]” *United States v. Vaello-Madero* (1st Cir. 2020) (cleaned up).

III. THE CARES ACT IN THE TERRITORIES & POSSESSIONS

A. Section 2201 of the CARES Act

Section 2201(c)(1) addresses the payments to U.S. Possessions, and states:

(A) MIRROR CODE POSSESSION.—The Secretary of the Treasury shall pay to each possession of the United States which has a mirror code tax system amounts equal to the loss (if any) to that possession by reason of the amendments made by this section. Such amounts shall be determined by the Secretary of the Treasury based on information provided by the government of the respective possession.

(B) OTHER POSSESSIONS.—The Secretary of the Treasury shall pay to each possession of the United States which does not have a mirror code tax system amounts estimated by the Secretary of the Treasury as being equal to the aggregate benefits (if any) that would have been provided to residents of such possession by reason of the amendments made by this section if a mirror

code tax system had been in effect in such possession. The preceding sentence shall not apply unless the respective possession has a plan, which has been approved by the Secretary of the Treasury, under which such possession will promptly distribute such payments to its residents.

CARES Act, § 2201(c)(1)(A)-(B).

B. The IRS's Position on the CARES Act in the Territories & Possessions

Per the IRS website:

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 Nov. 21, 2020) (emphasis added), (attached hereto as Exhibit 1).

IV. THE USVI CLASS ACTION LITIGATION

On October 27, 2020, counsel for Morton sent the Director of the USVI BIR correspondence seeking clarification as to whether the BIR shared the same view as the IRS regarding whether the CARES Act in general, and the EIP in particular, applied to incarcerated individuals. Attached hereto as Exhibit 2. Counsel for Morton 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 2 at p. 2.

Counsel for Morton received no response to his October 27th correspondence and concluded that the USVI government took the same position as the Federal Government as to the EIP for incarcerated individuals, i.e., that they are not eligible.

1 Consequently, Morton filed suit, *Morton v. USVI, et al.*, case no. 3:20-cv-109 (D.V.I.),
 2 attempting to obtain his EIP. Morton moved for a preliminary injunction, *id.* at docket no. 5, moved
 3 to expedite, *id.* at docket no. 8, and moved for summary judgment, *id.* at docket no. 18. The District
 4 Court of the Virgin Islands set a hearing on Morton's preliminary injunction motion for November
 5 24th. See *id.* at docket nos. 30 & 32.

7 On November 20th, the USVI filed its opposition (a copy of which is attached hereto as Exhibit
 8 3), and attached the affidavit of Director Joel A. Lee, CPA, in support of the opposition (a copy of
 9 which is attached hereto as Exhibit 4. *Id.* at docket nos. 37 & 37-1.

11 Importantly, in the *Morton* case, the USVI avers that it “merely serve[s] as an intermediary
 12 between eligible Virgin Islands taxpayers on the one hand, and U.S. Treasury on the other. [The
 13 USVI] take[s] no position on the eligibility of incarcerated persons. [The USVI] merely distribute[s]
 14 the federal funds we have been provided in accordance with the conditions that are provided by the
 15 U.S. Treasury.” Ex. 3 at p. 2.

17 V. TREASURY'S “PLAN” WITH THE USVI

18 As detailed in the sworn statement by Director Lee, “the United States Treasury Department
 19 has advanced federal funds to the USVI BIR to be used to pay the advanced EIPs pursuant to an EIP
 20 Implementation Plan (the “Plan”). Treasury considers the Plan confidential and prohibits its
 21 disclosure.” Lee Aff. at ¶6.¹ The USVI “holds these federal CARES Act funds in trust, pursuant to
 22 the Plan authorized by the United States Treasury Department.” *Id.* at ¶7. “[T]he Plan imposes
 23 restrictions upon the USVI BIR's use of the CARES Act Trust Fund monies.” *Id.* at ¶8. “[O]ne of
 24 the Plan restrictions is that CARES Act Trust Fund monies cannot be used to pay EIPs to incarcerated
 25 persons.” *Id.* at ¶9 (emphasis added). “[T]he Plan also restricts the USVI BIR's expenditures of CARES
 26

28 ¹ Morton has moved to unseal the Plan. See *Morton v. USVI, et al.*, case no. 3:20-cv-109 (D.V.I.) at docket no. 49.

1 Act Trust Fund monies insofar as no EIPs can be remitted from the CARES Act Trust Fund unless it
 2 is are [sic] based on a tax return filed by the taxpayer.” *Id.* at ¶10. “[T]he USVI BIR has not interpreted
 3 the CARES Act with respect to eligibility. Instead, EIPs are remitted *solely in conformance with the*
 4 *limitations placed on the funds provided by the United States Treasury Department.*” *Id.* at ¶12 (emphasis
 5 added).
 6

7 APPLICABLE LAW

8 “[A] district court has the inherent power to enforce its orders.” *Nikko Materials USA, Inc. v.*
 9 *R.E. Serv. Co., Inc.*, 2006 WL 1749550 at *2 (N.D. Cal. June 22, 2006); *see also Spallone v. United States*,
 10 493 U.S. 265, 276 (1990). This power is derived “not only from statute, 18 U.S.C. § 401, but more
 11 broadly from the implied powers ‘necessarily vested in courts to manage their own affairs as to achieve
 12 the orderly and expeditious disposition of cases.’” *Nikko Materials USA*, 2006 WL 1749550 at *2
 13 (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962)).
 14

15 To that end, district courts have the inherent power to enforce their orders through civil
 16 contempt. *Spallone*, 493 U.S. at 276; *Cal. Dep’t of Soc. Servs. v. Leavitt*, 523 F.3d 1025, 1033 (9th Cir.
 17 2008). “Civil contempt ... consists of a party’s disobedience to a specific and definite court order by
 18 failure to take all reasonable steps within the party’s power to comply.” *Inst. of Cetacean Research v. Sea*
 19 *Shepherd Conservation Soc’y*, 774 F.3d 935, 945 (9th Cir. 2014) (citing *In re Dual-Deck Video Cassette*
 20 *Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993)); *see also In re Crystal Palace Gambling Hall,*
 21 *Inc.*, 817 F.2d 1361, 1365 (9th Cir. 1987) (“A person fails to act as ordered by the court when he fails
 22 to take all the reasonable steps within his power to insure compliance with the court’s order.”) (cleaned
 23 up). “The contempt ‘need not be willful,’ and there is no good faith exception to the requirement of
 24 obedience to a court order.” *In re Dual-Deck Video*, 10 F.3d at 695 (citing *In re Crystal Palace*, 817 F.2d
 25 at 1365).
 26
 27
 28

1 “Civil contempt sanctions ... are employed for two purposes: to coerce the defendant into
 2 compliance with the court’s order, and to compensate the complainant for losses sustained.” *Whittaker*
 3 *Corp. v. Execuair Corp.*, 953 F.2d 510, 517 (9th Cir. 1992) (citing *United States v. United Mine Workers*
 4 *of Am.*, 330 U.S. 258, 303-04 (1947)). “Generally, the minimum sanction necessary to obtain
 5 compliance is to be imposed.” *Id.* (citations omitted). “Unlike the punitive nature of criminal
 6 sanctions, civil sanctions are wholly remedial.” *Id.* (citation omitted). “A court has wide latitude in
 7 determining whether there has been contemptuous defiance of its order.” *Gifford v. Heckler*, 741 F.2d
 8 263, 265–66 (9th Cir. 1984) (citing *Neebars, Inc. v. Long Bar Grinding, Inc.*, 438 F.2d 47, 48 (9th Cir.
 9 1971)). Trial courts also have power to award reasonable attorneys’ fees and costs against the
 10 contemnor as a sanction for disobedience of its orders. *Perry v. O’Donnell*, 759 F.2d 702, 705 (9th Cir.
 11 1985).

14 “It is well-settled that a court’s contempt power extends to non-parties who have notice of the
 15 court’s order and the responsibility to comply with it.” *United States v. Montgomery Glob. Advisors V*
 16 *LLC*, 2006 WL 950102, at *2 (N.D. Cal. Mar. 2, 2006) (citing *Chicago Truck Drivers v. Brotherhood*
 17 *Labor Leasing*, 207 F.3d 500, 506-07 (8th Cir. 2000)); *see also Inst. of Cetacean Research*, 774 F.3d at 949
 18 (“It has long been settled law that a person with notice of an injunction may be held in contempt for
 19 aiding and abetting a party in violating it.”). In the Ninth Circuit, a non-party can be liable for
 20 contempt where the non-party has notice of the order and (1) aids the party in violating the court
 21 order or (2) is legally identified with him. *Montgomery Glob. Advisors V LLC*, 2006 WL 950102, at *2
 22 (citing *Peterson*, 140 F.3d at 1323). “The party alleging civil contempt must demonstrate that the
 23 alleged contemnor violated the court’s order by ‘clear and convincing evidence,’ not merely a
 24 preponderance of the evidence.” *In re Dual-Deck Video*, 10 F.3d at 695 (quoting *Vertex Distrib., Inc. v.*
 25 *Falcon Foam Plastics, Inc.*, 689 F.2d 885, 889 (9th Cir. 1982)).

1 The Federal Rules of Civil Procedure specifically “provide for enforcement of judgments
 2 against non-parties in limited circumstances.” *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1323
 3 (9th Cir. 1998). Pursuant to Federal Rule of Civil Procedure 65(d), an injunction is “binding only
 4 upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon
 5 those persons in active concert or participation with them who receive actual notice of the order by
 6 personal service or otherwise.” Fed. R. Civ. P. 65(d). This is because “[a] command to a corporation
 7 is in effect a command to those who are officially responsible for the conduct of its affairs.” *N.L.R.B.*
 8 *v. Sequoia Dist. Council of Carpenters*, 568 F.2d 628, 633 (9th Cir. 1977).

11 DISCUSSION

12 I. THE COURT SHOULD HOLD THE FEDERAL GOVERNMENT IN CIVIL CONTEMPT

13 Contempt is a remedy for defying a judgment. See *SEC v. Goldfarb*, 2012 WL 2343668 (N.D.
 14 Cal. June 20, 2012). “If the party seeking civil contempt makes a *prima facie* showing that a defendant
 15 did not comply with the judgment, the burden of production shifts to the defendant to show inability
 16 to comply with the judgment.” *Id.* at *4 (citing *United States v. Rylander*, 460 U.S. 752, 757 (1983)).
 17 “To satisfy this burden, a defendant must show ‘categorically and in detail’ why it was unable to
 18 comply.” *Id.* (citing *NLRB v. Trans. Ocean Export Packing, Inc.*, 473 F.2d 612, 616 (9th Cir. 1973)). “A
 19 defendant cannot avoid civil contempt if its inability to pay was self-induced.” *Id.* (quoting *United*
 20 *States v. Asay*, 614 F.2d 655, 660 (9th Cir. 1980)).

23 As counsel for the Federal Government has made clear to counsel for the Intervenor, the
 24 Federal Government does not consider this Court’s October 14th permanent injunction to apply to
 25 the U.S. Territories & Possessions nor to apply to the Federal Government’s actions in respect to the
 26 U.S. Territories & Possessions. In other words, the Federal Government believes that it can continue
 27 to enforce the conditions in the respective Plans that prohibit the U.S. Territories & Possessions from
 28 paying incarcerated individuals the EIP. The Federal Government’s actions are particularly troubling

1 as the Department of the Treasury is holding the sword of Damocles over the respective U.S.
 2 Territories & Possessions' heads when it threatens to withhold much-needed CARES Act funding.

3 Applying the contempt rubric set forth above, the Intervenor has demonstrated, *see Goldfarb*,
 4 *supra*, that the Federal Government has not complied (and indeed continues to not comply) with this
 5 Court's October 14th injunction. *See* Ex. 4 (detailing the Plan's EIP restrictions vis-à-vis incarcerated
 6 individuals). The Federal Government cannot show inability to comply (indeed it has been
 7 complying, but only in respect to those incarcerated individuals in the 50 States), *see id.* At bottom,
 8 the Federal Government's insistence that this Court's injunction does not apply to the U.S.
 9 Territories & Possessions is purely a situation of its own making, i.e., it was absolutely self-induced,
 10 *see Asay, supra*.

11 Consequently, the Federal Government's intransigence requires that this Court hold the
 12 Federal Government in contempt to coerce compliance with the Court's permanent injunction. *See*
 13 *Whittaker Corp.*, 953 F.2d at 517. The contempt order should be issued forthwith.

14 II. THE COURT SHOULD HOLD THE U.S. TERRITORIES & POSSESSIONS IN CIVIL CONTEMPT

15 Sanctions for civil contempt are properly imposed against non-parties. *See, e.g., Methuen &*
 16 *Assocs. Prof'l Corp. v. Kelley*, 669 F. App'x 923, 924 (9th Cir. 2016) (recognizing "findings of civil
 17 contempt against non-parties"); *David v. Hooker, Ltd.*, 560 F.2d 412, 416 (9th Cir. 1977 (same). Also,
 18 Federal Rule of Civil Procedure 71 allows the limited enforcement of judgments against non-parties.
 19 *See, e.g., Westlake North Property Owners Ass'n v. Thousand Oaks*, 915 F.2d 1301, 1304 (9th Cir. 1990)
 20 ("Rule 71 was intended to assure that process be made available to enforce court orders in favor of
 21 and against persons who are properly affected by them, even if they are not parties to the action.").

22 Courts have long recognized that contempt sanctions against non-party corporate officers are
 23 appropriate means to address a corporation's/entity's willful disobedience of a court order. *See*
 24 *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1323 (9th Cir. 1998) (holding non-party corporate
 25

1 president in contempt where he “flagrantly and deliberately aided and abetted [the defendants] in
2 violating the express terms of the judgment”). As the Supreme Court recognized in 1911, those
3 responsible for a corporation’s conduct can be punished for contempt for failing to take appropriate
4 action within their power: “A command to the corporation is in effect a command to those who are
5 officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the
6 corporation, prevent compliance or fail to take appropriate action within their power for the
7 performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience,
8 and may be punished for contempt.” *Wilson v. United States*, 221 U.S. 361, 376 (1911). *See also Bd.*
9 *of Trustees of the Ohio Carpenters’ Pension Fund v. Eskay Floor Covering, Inc.*, 2010 WL 2990166, at *3
10 (N.D. Ohio July 29, 2010) (“A corporate officer may be held in contempt personally for the
11 corporation’s failure to follow a court order when there is knowledge of the court’s order, and
12 responsibility combined with the officer’s power to take appropriate action, even though the corporate
13 officer is not personally identified in the order.”). “[T]o be held liable in contempt, it is necessary that
14 a non-party respondent must either abet the defendant [in violating the court’s order] or must be
15 legally identified with him,” and have “actual notice” of the order. *NLRB v. Sequoia District Council of*
16 *Carpenters*, 568 F.2d 628, 633 (9th Cir. 1977).

17
18 In this case, the USVI BIR, including but not limited to its Director, Joel A. Lee, CPA, have
19 been put on notice (by virtue of being sued by Morton in the District Court of the Virgin Islands,
20 which extensively references the litigation in this case) that the Federal Government has been
21 permanently enjoined. There can be no credible argument to the contrary.

22
23 Moreover, the USVI admits that it is the agent for the Federal Government. *See* Ex. 3 at p.
24 16 (the USVI “merely act as payment *agent* for the United States of America), and it is black letter law
25 that an *agent* is subject to a duty to its principal not to act in the principal’s affairs except in accordance
26 with the principal’s manifestation of consent. *Restat. 2d of Agency*, § 383.”) (emphasis added). Thus,
27
28

1 under the plain text of Fed. R. Civ. P. 65(d)(2)(B) the USVI is bound to this Court's injunction in
2 the same manner as the Federal Government.

3 Additionally, there is an independent basis for the Court to hold the USVI (including but not
4 limited to Director Lee) in contempt – Rule 71. Rule 71 succinctly states: “[w]hen an order grants
5 relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is
6 the same as for a party.” “Rule 71 permits a district court to use the same processes for enforcing
7 obedience to the order as if he were a party, such as holding him in contempt for violating it.” *Irwin*
8 *v. Mascott*, 370 F.3d 924, 931 (9th Cir. 2004) (cleaned up). “Rule 71 was intended to assure that
9 process be made available against persons who are properly affected by them, even if they are not
10 parties to the action.” *Westlake North Property Owners Ass’n v. Thousand Oaks*, 915 F.2d 1301, 1304 (9th
11 Cir. 1990). *See also United States v. Crookshanks*, 441 F. Supp. 268, 270 (D. Or. 1977) (“[A] court can
12 enjoin non-parties whose actions threaten to interfere with compliance with prior orders of the
13 court.”).

14 This Court should, in the alternative to Rule 65(d), use Rule 71 to enforce the USVI's
15 compliance (including but not limited to Director Lee) as if they were a party to the October 14th
16 injunction and hold them in contempt. Given the USVI's recognition that it was acting in a manner
17 consistent with the terms of the Plan, knowing full well that the provisions in the Plan addressing
18 incarcerated individuals were addressed by this Court's injunction, it should stand on equal footing
19 as the Federal Government and likewise be held in contempt.

20 In respect to the other U.S. Territories & Possessions (i.e., Puerto Rico, Guam, CNMI, and
21 American Samoa), the Intervenor believe the IRS and/or Department of the Treasury to have been
22 in contact with the other U.S. Territories & Possessions regarding the applicability of the injunction
23 entered in this case against the Federal Government. The Intervenor further believe,
24 notwithstanding the injunction entered in this case, the IRS and/or Department of the Treasury to

1 have instructed the other U.S. Territories & Possessions to continue to withhold EIP to incarcerated
 2 individuals. The Intervenor's admit, as they must, that they lack visibility into the communication
 3 between the IRS and/or Department of the Treasury and the U.S. Territories & Possessions, but if
 4 the Intervenor's are correct (and indeed Occam's Razor indicates that they are), then under Rule 65(d)
 5 and Rule 71 they, like the USVI, must be held in contempt.

7 **III. REQUESTED RELIEF**

8 **A. Issuance of the EIP**

9 The relief the Intervenor's seek is quite simple, they request that this Court enter an order (1)
 10 compelling Defendants to cause its agents to issue EIP benefits to MORTON, AYALA, and the U.S.
 11 Territories & Possession Class, and (2) enter an order requiring the Federal Government to remove
 12 any condition from the respective "Plans" that condition funding under Section 2201(c)(1) of the
 13 CARES Act based on incarcerated status, and withdraw any statements/directives/orders, etc.
 14 (including but not limited to statements/directives/orders made to the respective U.S. Territories &
 15 Possessions), which direct that incarcerated individuals are not entitled to CARES Act funds.

17 This modest requested relief is the minimum sanction needed to obtain compliance, *see*
 18 *Whittaker Corp.*, 953 F.2d at 517, under the circumstances. The civil contempt order should be issued
 19 forthwith.

21 **B. Attorneys' Fees**

22 "All Federal Courts are vested with inherent powers enabling them to manage their cases and
 23 courtrooms effectively and to ensure obedience to their orders.... As a function of this power, courts
 24 can ... award attorney's fees and assess fines." *Aloe Vera of Am., Inc. v. United States*, 376 F.3d 960, 964-
 25 65 (9th Cir. 2004) (cleaned up).

27 Given the obstinate position of the Federal Government and its agents, and given the
 28 Herculean efforts that Morton, Ayala, and members of the U.S. Territories & Possessions Class have

1 needed to exert to obtain their much needed CARES Act EIPs, this Court should award attorneys'
2 fees and costs in this case.²

3
4 **CONCLUSION**

5 **WHEREFORE**, based on the foregoing, Morton and Ayala respectfully move this Court to
6 grant the motion in full.

7 Respectfully Submitted,

8 By: _____
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Dated Dec. __, 2020

18 **CERTIFICATE OF SERVICE**

19 I hereby certify that I electronically filed the foregoing Notice of with the Clerk of Court using the
20 CM/ECF system, which will send a notification of such filing (NEF) to counsel of record.

21 By: _____
22 Edward M. Robbins, Jr.

Dated Dec. __, 2020

23
24
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26
27 ² Should the Court provide the Intervenor with substantive relief, counsel for the Intervenor
28 intends to broach the issue of attorneys' fees with counsel for the Federal Government. Only if the
Federal Government denies in whole, or in part, any request for attorneys' fees will counsel for the
Intervenor seek relief from this Court. A loadstar calculation will be provided at that time.