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9 **IN THE SECOND JUDICIAL DISTRICT COURT OF**  
10 **WASHOE COUNTY, NEVADA**

11 AMETHYST PAYNE, IRIS PODESTA-  
12 MIRELES, ANTHONY NAPOLITANO,  
13 ISAAH PAVIA-CRUZ, VICTORIA  
14 WAKED, CHARLES PLOSKI, DARIUSH  
15 NAIMI, TABITA ASARE, SCOTT  
16 HOWARD, RALPH WYNCOOPON,  
ELAINA ABING, and WILLIAM  
TURNLEY, on behalf of themselves and  
others similarly situated,

17 Plaintiff-Petitioners,

18 vs.

19 STATE OF NEVADA ex rel NEVADA  
20 DEPARTMENT OF EMPLOYMENT,  
21 TRAINING AND REHABILITATION  
22 (DETR), HEATHER KORBULIC, in her  
official capacity only as Nevada Director  
of Employment, Training and  
23 Rehabilitation, DENNIS PEREA, in his  
official capacity only as Deputy Director  
of DETR, and KIMBERLY GAA, in her  
24 official capacity only as the  
25 Administrator for the Employment  
26 Security Division (ESD) and DOES 1-  
100, inclusive,

27  
28 Defendants-Respondents.

Case No. CV20-00755

Dept. No. 8

**RESPONDENTS' OPPOSITION TO**  
**PETITIONERS' PETITION**  
**FOR WRIT OF MANDAMUS**

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1 COMES NOW, Respondents, State of Nevada, Department of Employment, Training  
2 and Rehabilitation (“DETR”), its former Director, Heather Korbolic, in her official capacity  
3 as Director only, Dennis Perea, in his official capacity as DETR Deputy Director only, and  
4 Kimberly Gaa, in her official capacity as the Administrator for ESD only, through their  
5 attorneys, State of Nevada Attorney General Aaron D. Ford, through his Deputies, Senior  
6 Deputy Attorney General Greg Ott and Deputy Attorney General Robert A. Whitney, and  
7 hereby file Respondents’ Opposition to Petitioners; Petition for Writ of Mandamus  
8 (“Opposition”). This Opposition is based on all of the papers and pleadings on file in this  
9 matter and any oral arguments ordered by the Court.

10  
11 **INTRODUCTION**

12 Nevada had the single highest unemployment rate of any State recorded since the  
13 Great Depression last May. **Everyone** within Nevada’s government and this proceeding  
14 agrees that any and all eligible recipients should be paid benefits. Everyone in this case  
15 agrees that this is an important issue for Nevada’s health and economic welfare to do so.

16 This dispute centers on **eligibility**. Congress and the federal Department of Labor  
17 require Nevada to confirm eligibility on a monetary and non-monetary basis before  
18 distributing benefits for any of these unemployment programs, whether new or old.  
19 Petitioners’ efforts to argue otherwise are simply wrong. Failure to do so risks the end of  
20 payment by the federal government to **all** who qualify and potential repayment from  
21 Nevada to the federal government of wrongfully paid benefits. It is in this context that  
22 Petitioners seek a writ of mandamus from this court.

23 Because Nevada’s actions must comply with Department of Labor guidance to  
24 determine eligibility prior to any payment, there is no “clear duty” for Nevada to do the  
25 contrary. At this early stage, where there are many disputed, unauthenticated facts  
26 without any opportunity for discovery or confrontation, Petitioners’ writ must be denied.

1 I.

2 **FACTS**

3 On March 27, 2020, the Coronavirus Aid, Relief and Economic Security Act (“CARES  
4 Act”) was signed into law. DETR then voluntarily entered into a written agreement with  
5 the United States Department of Labor on March 28, 2020 to implement the CARES Act.<sup>1</sup>

6 **DOL’s Ability To Terminate the Agreement with DETR**

7 As previously explained, DETR is only able to provide PUA, FPUC, and PEUC  
8 pursuant to its agreement with the Department of Labor.<sup>2</sup> The Agreement requires DETR,  
9 when administering the PUA program, to administer the program in accordance with the  
10 Disaster Unemployment Assistance regulations at 20 CFR 625 **including follow[sic] the**  
11 **provisions for fraud and overpayments.**<sup>3</sup> (emphasis added) DETR’s contract,  
12 authorizing the administration of PUA, FPUC and PEUC specifically requires it to follow  
13 fraud and overpayment regulations.

14 Additionally, DOL can terminate the Agreement when it determines that “the state  
15 did not comply with all of the requirements of such provision or provisions of the Act  
16 identified in paragraph XIV, or any applicable guidance or operating instructions issued  
17 by the Department of Labor.”<sup>4</sup> DETR’s agreement with DOL is terminable by DOL upon a  
18 DOL determination that DETR has not complied with all requirements of the CARES Act  
19 and paragraph XIV of the Agreement. Paragraph XIV of the Agreement requires DETR  
20 to follow addendum 1 regarding PUA and provisions for fraud and overpayment. In  
21 short, Petitioners’ proposed mandate could result in DOL termination, in which case “no  
22 further benefits will be payable.”

23 The CARES Act authorized three separate and distinct new types of compensation:

- 24 • The Pandemic Unemployment Insurance (“PUA”);

25  
26 <sup>1</sup> See Agreement between DETR and DOL attached as Exhibit 3 to this Opposition. This agreement was  
27 resigned on March 31, 2020, due to the United States Department of Labor being unable to read the entire  
28 agreement and determine if Nevada agreed to all of the applicable programs.

<sup>2</sup> See Agreement attached as Exhibit 3.

<sup>3</sup> See Id Addendum number 1, page 5, paragraph 1.

<sup>4</sup> See Id at Paragraph III

- The Pandemic Emergency Unemployment Compensation (“PEUC”); and
- The Federal Pandemic Unemployment Compensation (“FPUC”).

Each is explained in further detail below.

#### PUA

PUA allows up to 39 weeks of payments of between \$181 dollars per week to \$469 dollars to week to eligible persons. Eligibility for PUA requires that a claimant be ineligible for other unemployment compensation and meet additional criteria set forth in section 2102(a)(3)(A)(2) of the CARES Act. Petitioners’ claim rests largely on the mistaken contention that ineligibility for traditional unemployment insurances guarantees eligibility for PUA compensation. However, many persons are not eligible for traditional unemployment insurance and PUA.<sup>5</sup> For example, an individual who was unemployed and ineligible for regular UI at the start of the pandemic and had no *bona fide* job offer to start is not unemployed due to COVID-19, and would therefore not be eligible for benefits under either program.

#### PEUC

PEUC provides for 13 week of extended regular unemployment benefits at the same compensation amount for those whose regular unemployment benefits have expired.

#### FPUC

FPUC provides a flat \$600 per week benefit on top of any other unemployment benefits for which an eligible individual may qualify. FPUC eligibility relies on qualification for unemployment insurance, PEUC, PUA, and several other types of compensation.

#### Disputed Factual Contentions

Petitioners make numerous, unsupported factual contentions. To the extent Petitioners seek extraordinary relief premised on unsupported fact contentions, this alone warrants denial by this court. Further, under this expedited timeframe, it would be

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<sup>5</sup> See Declaration of David Schmidt, Paragraph 16 attached as Exhibit 1 to this Opposition

1 impossible to address each and every misstatement of fact within Petitioners' filing.  
2 Respondents will attempt what Petitioners seem to believe are the key facts.

3 For instance, Petitioners allege that payments to gig workers were due on April 11,  
4 2020.<sup>6</sup> PUA payments were never expected to be paid as early as April 11, 2020 in Nevada.  
5 In fact, according to Petitioners' own cited website, 39 of 50 states were not even accepting  
6 PUA applications by April 13.<sup>7</sup> In fact, no state had commenced PUA payments by April  
7 11, 2020.<sup>8</sup> Recipients who had already qualified for unemployment insurance began  
8 receiving FPUC payments on April 12, but DETR has consistently advised the public and  
9 the Nevada Legislature that PUA applications would not be able to be submitted until mid-  
10 May at the earliest, after implementation of a new computer system to process this new  
11 program.<sup>9</sup>

12 Petitioners also make inaccurate statements pertaining to the number of claims, the  
13 number of payments and the potential for overpayment. Petitioners argue that only 15.6%  
14 of gig worker claims had been paid on June 5.<sup>10</sup> However, Petitioners completely failed to  
15 mention similar press briefings from June 12 and June 19, each of which contradict their  
16 assertion that DETR is paying less than one in six claims, which were publicly available  
17 when their Complaint was amended and filed.<sup>11</sup> At the June 12 and June 19 press  
18 briefings, Director Korbolic provided detailed information on the PUA program, stating the  
19 number of claims paid, number of PUA applications received, number of PUA applications  
20 that were automatically ineligible for failure to file a required weekly claim, and the  
21 amount of PUA claims paid. On June 26 (after the filing of the writ petition, Administrator

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22 <sup>6</sup> See P&A's i/s/o ORDER TO SHOW CAUSE WHY WRIT OF MANDAMUS SHOULD NOT ISSUE Page 6,  
23 Line 7, page 21, line 12, page 27, lines 8-19, among other places.

24 <sup>7</sup> See P&A's i/s/o ORDER TO SHOW CAUSE WHY WRIT OF MANDAMUS SHOULD NOT ISSUE  
25 Footnote 32 on Page 28. Respondents cannot verify the accuracy of the information on this website, and  
26 only reference it because of Petitioners' reliance on it.

27 <sup>8</sup> See Exhibit 1, pages 9 and 10.

28 <sup>9</sup> See press conference of April 14 indicating PUA applications would be available early to mid may  
(<https://www.youtube.com/watch?v=HxLvus056h4>); and DETR testimony to IFC on April 30 (<https://sg001-harmony.sliq.net/00324/Harmony/en/PowerBrowser/PowerBrowserV2/20200430/-1/?fk=6202&viewmode=1>)

<sup>10</sup> See P&A's i/s/o ORDER TO SHOW CAUSE WHY WRIT OF MANDAMUS SHOULD NOT ISSUE Page 6,  
Lines 1-3.

<sup>11</sup> June 12, 2020 press briefing (<https://www.youtube.com/watch?v=4Bgsth5KXEY>), June 19, 2020 Press  
briefing (<https://www.youtube.com/watch?v=4Bgsth5KXEY>)

1 Kimberly Gaa provided similar numbers).<sup>12</sup> The numbers are summarized in the below  
2 chart.

			Eligible for					
5	Date	PUA Claims	No Weekly Claims	determination	Paid	%	\$/Paid	\$/Claimant
6	12-Jun	116,996	35,600	81,396	47,582	58.46	355,000,000.00	7,460.80
7	19-Jun	147,460	40,793	106,667	78,734	73.81	658,000,000.00	8,357.25
8	26-Jun	190,262	48,479	141,783	95,490	67.35	860,000,000.00	9,006.18

9 Most significantly, the publicly available information shows that DETR had paid  
10 more claims than the number which were eligible for determination just two weeks earlier.  
11 In short, in an unprecedented situation with significant new programs, the numbers show  
12 DETR has paid a majority of the claims eligible for determination.

13 Petitioners also speculate that the PUA program has a relatively low risk of fraud.<sup>13</sup>  
14 DETR disagrees. More importantly, the Department of Labor's Office of the Inspector  
15 General, which is tasked with reviewing the unemployment program, disagrees that fraud  
16 is unlikely and limited. "For the last eight years, the Department's Office of the Inspector  
17 General (OIG) has determined that the UI program is out of compliance with the Improper  
18 Payment Elimination and Recovery Act of 2010 due to an improper payment rate over 10  
19 percent."<sup>14</sup>

20 Additionally, DETR has publicly stated that, similar to other states, it is seeing an  
21 unusually high level of potential fraud in the PUA program compared with Unemployment  
22 Insurance Program.<sup>15</sup> For instance, despite the first COVID -19 case in Nevada being  
23 reported on March 5, 2020, DETR has received approximately thirty-four thousand (34,000)

24 <sup>12</sup> June 26 press briefing ([https://www.youtube.com/watch?v=xGLEcHdm3\\_I](https://www.youtube.com/watch?v=xGLEcHdm3_I))

25 <sup>13</sup> See P&A's i/s/o ORDER TO SHOW CAUSE WHY WRIT OF MANDAMUS SHOULD NOT ISSUE Page 11,  
26 Footnote 17 and Page 14, Footnote 22 both of which characterize fraud as unlikely and limited to a few  
thousand dollars without any attempt at evidentiary support.

27 <sup>14</sup> See UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 23-20 (UIPL 23-20), page 1, found online  
at ([https://wdr.doleta.gov/directives/attach/UIPL/UIPL\\_23-20.pdf](https://wdr.doleta.gov/directives/attach/UIPL/UIPL_23-20.pdf))

28 <sup>15</sup> DETR's June 26 Press Conference  
([https://www.youtube.com/watch?v=xGLEcHdm3\\_I&feature=emb\\_rel\\_pause](https://www.youtube.com/watch?v=xGLEcHdm3_I&feature=emb_rel_pause)) and Declaration of David  
Schmidt Para. 17. Declaration of Kim Gaa, page 12

1 PUA claims for the preceding week of February 29, 2020.<sup>16</sup> DETR is unable to divulge  
2 further details of its sources and methods for fraud detection in a public hearing. During  
3 the great recession of 2009 and 2010, the incidence of overpayments due to benefit fraud in  
4 the regular unemployment benefit program was 4.9%, while the incidence of nonfraud  
5 overpayments was 12.9% of all initial claims, for a total rate of 17.5%.<sup>17</sup> If this court orders  
6 payment of all claims without any review for fraud (as Petitioners have requested) and the  
7 Fraud and overpayment levels are commensurate with 2009-2010, the requested writ  
8 would compel up to eight and half Million dollars (\$8,500,000) of improper payments each  
9 week.<sup>18</sup> Roughly Two Million Four-Hundred thousand dollars (\$2,400,000) of those  
10 payments would be to fraudulent applicants.<sup>19</sup> As DETR has stated, the level of PUA fraud  
11 is believed to be higher than the Unemployment Insurance program, given the nature of  
12 work performed and paid to potential claimants.<sup>20</sup>

13 Mere publicity surrounding this filing resulted in significant increased submittals  
14 for the program.<sup>21</sup> Elimination of eligibility review by this court could be a significant  
15 magnet for improper filings.

## 16 II.

### 17 ARGUMENT

#### 18 A. Writ Standard

19 NRS 34.160 indicates when the Court may issue Writs of Mandate/Mandamus. It  
20 states:

21 The writ may be issued by the Supreme Court, the Court of Appeals, a  
22 district court or a judge of the district court, to compel the performance

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23 <sup>16</sup> This is not an assertion that all claims from February are fraudulent.

24 <sup>17</sup> Declaration of David Schmidt, Paragraph 15.

25 <sup>18</sup> DETR reported 46,293 unprocessed PUA claims in its most recent June 26 public briefing, if 17.5 percent  
26 are improper, that is 8101 claims entitled to be paid \$469 of PUA each week, plus \$600 of FPUC each week  
for up to a total of \$8,659,969 dollars each week. The first week would likely be substantially higher because  
of weeks of claimed back pay. If all claims were improper, the writ could cause the court to order \$49,4847,217  
of improper payments in the first week.

27 <sup>19</sup> If 4.9% of claims are fraudulent, that calculates to 2,268 claims to be paid \$469 of PUA each week, plus  
\$600 of FPUC each week for a total of \$2,424,492 dollars each week.

28 <sup>20</sup> Declaration of David Schmidt at Paragraph 18

<sup>21</sup> See Declaration of David Schmidt Paragraph 20

1 of an act which the law especially enjoins as a duty resulting from an  
2 office, trust or station; or to compel the admission of a party to the use  
3 and enjoyment of a right or office to which the party is entitled and from  
4 which the party is unlawfully precluded by such inferior tribunal,  
5 corporation, board or person. When issued by a district court or a judge  
6 of the district court it shall be made returnable before the district court.

7 Thus, writs of mandate are properly issued when there is a “clear, present duty to  
8 act.” *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 603, 637 P.2d 534, 536 (1981).  
9 Furthermore, pursuant to NRS 34.170, writs should only be issued “where there is not a  
10 plain, speedy and adequate remedy in the ordinary course of law.” Additionally, as noted  
11 previously, writs of mandamus are extraordinary remedies. *Valley Health Sys., LLC v.*  
12 *Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 127 Nev. 167, 170, 252 P.3d 676,  
13 678 (2011).

14 “Mandamus is an extraordinary remedy. The normal judicial process is trial and  
15 appeal, not final adjudication on pre-trial writs. Generally, a petitioner must show that  
16 continuation of the proceedings would be an exercise in futility, and that the litigation,  
17 irrespective of what may transpire at trial, is foreordained to its inevitable conclusion.”  
18 *Bottoroff v. O'Donnell*, 96 Nev. 606, 608 (1980). Mandamus is normally only appropriate  
19 where the relevant facts are not in dispute and a clear question of law is presented. *See,*  
20 *e.g., Bottoroff; Ash Springs Dev. v. O'Donnell*, 95 Nev. 846, 603 P.2d 698 (1979). Here the  
21 Petitioners present essentially a question of law: is the Department of Training and  
22 Rehabilitation (“DETR”) required by law to pay out applicants for various unemployment  
23 related claims prior to the completion of the administrative process to determine eligibility  
24 for such programs?<sup>22</sup>

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25 <sup>22</sup> See Order to Show Cause why a Writ of Mandamus should not enter page 2, line 21-24 requesting a writ  
26 ordering DETR to make payment at the earlier of “a) two weeks after April 11, 2020, if the gig class member  
27 would have been entitled to payment of unemployment compensation if he or she had applied on April 11,  
28 2020; b) at the time the gig worker class member first presents a prime facia[sic] valid application for  
unemployment compensation to Defendant-Respondent DETR; c) at the first time a letter of Unemployment  
Qualifying Determination letter in which the claim is approved, regardless of any other subsequent  
determinations.”

1 Writs of mandate should not be issued in order to control discretionary acts unless  
2 the discretion is abused or exercised in an arbitrary and capricious manner. *Round Hill*  
3 *Gen. Imp. Dist.*, 97 Nev. at 603. Additionally, NRS 34.160 states in relevant part:

4 The writ may be issued by the Supreme Court, the Court of Appeals, a  
5 district court or a judge of the district court, to compel the performance  
6 of an act which the law especially enjoins as a duty resulting from an  
7 office, trust or station; or to compel the admission of a party to the use  
8 and enjoyment of a right or office to which the party is entitled and from  
9 which the party is unlawfully precluded by such inferior tribunal,  
10 corporation, board or person.

11 A petitioner has the burden of demonstrating that the issuance of a writ of mandate  
12 is warranted. *Burgess v. NDOC Grievances Coordinator*, 127 Nev. 1122, 373 P.3d 899  
13 (2011). The standard of review is abuse of discretion, as the Court has the discretion as to  
14 whether or not it will issue a writ of mandate. *See Hickey v. District Court*, 105 Nev. 729,  
15 731, 782 P.2d 1336, 1338 (1989) (mandamus and prohibition); *State ex rel. Dep't Transp. v.*  
16 *Thompson*, 99 Nev. 358, 361, 662 P.2d 1338, 1339 (1983). Here, Petitioners must establish  
17 DETR has a clear, present duty to act to commence PUA and FPUC payments prior to  
18 completing the eligibility review. Because Congress and the Department of Labor require  
19 completion of the eligibility review prior to paying any benefits, the writ must be denied.

### 18 PUA CLAIMS

19 What Petitioners are asking for is that DETR pay out PUA and FPUC benefits prior  
20 to DETR's determination that each claimant is eligible for benefits.<sup>23</sup> This ignores  
21 Department of Labor ("DOL") Guidance, which DETR is required to follow if it wants to  
22 ensure federal responsibility for benefit payments. The DOL issues its Guidance through  
23 its Unemployment insurance Program Letters ("UIPL").

24 DOL Guidance explicitly requires DETR to "maintain a steadfast focus on UI  
25 functions and activities that ensure program integrity and the prevention and detection of  
26

---

27 <sup>23</sup> Order to Show Cause Why Writ of Mandamus Should Not Issue, Page 2, line 23 requesting and order to  
28 pay claims upon a prima facie valid application, seeking to ignore federal law requiring eligibility  
determinations set forth in sections 2102, 2104, and 2107 of the CARES Act. See also UPL 23-20 generally

1 improper payments and fraud across all UI programs.”<sup>24</sup> Lest there be any confusion, DOL  
2 mandates that:

3 **States must continue to operate their programs, both new and**  
4 **existing, in conformity and compliance with federal laws and**  
5 **guidance.**<sup>25</sup>

6 Several states have requested relief from certain compliance requirements. DOL  
7 denied them. “A number of states have requested relief from conformity and compliance  
8 activities to support more expedited processing of claims. While the Department  
9 understands the rationale behind these requests, UI mandates . . . remain fundamental  
10 requirements . . . which must be adhered to. . .”<sup>26</sup> Similarly here, DETR cannot “simply  
11 pay the benefits” because DOL Guidance still requires the complained-of compliance  
12 requirements.<sup>27</sup> Because DETR has no clear and present duty to simply pay the benefits,  
13 a writ of mandamus must not issue.

14 PUA covers claimants who are self-employed, looking for part time work, or who  
15 otherwise would not qualify for regular unemployment compensation, extended benefits  
16 under State or federal law, PEUC, or if the claimant has exhausted all his or her rights “to  
17 regular UC or EB under state or federal law, or PEUC.”<sup>28</sup> To be a PUA “covered individual,”  
18 the individual must also self-certify that she is otherwise able to work and available for  
19 work, as provided under state law, except that the individual is unemployed, partially  
20 unemployed, unable to work or unavailable for work due to at least one of COVID-19  
21 related reason as outlined in UIPL 16-20.<sup>29</sup>

22 CARES Act Section 2102(a)(3)(A)(ii)(II) extends PUA eligibility to claimants “whom  
23 otherwise would not qualify for regular UC or EB under state or federal law or Pandemic  
24 Emergency Unemployment Compensation (PEUC) under section 2107.” As noted above,  
25 coverage also includes individuals who have exhausted all rights to regular UC or EB under

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26 <sup>24</sup> UIPL 23-20 Page 2.

27 <sup>25</sup> Id.

28 <sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> UIPL 16-20, page I-3.

<sup>29</sup> CARES Act Section 2102(a)(3)(A)(ii)

1 state or federal law, or PEUC. The core question that must be determined is whether a  
2 claimant for PUA is *eligible* to receive benefits under PUA, and not whether the claimant  
3 is actually receiving monetary benefits from the other program. In short, whether a PUA  
4 claimant is currently receiving unemployment compensation does not determine whether  
5 the PUA claimant is currently eligible for unemployment compensation. This requires  
6 DETR to make eligibility determinations prior to paying PUA benefits<sup>30</sup>.

7 Also UIPL 14-20, page 2, states:

8 **Importance of Program Integrity.** The programs and provisions in  
9 the CARES Act operate in tandem with the fundamental eligibility  
10 requirements of the Federal-State UI program, which remain in place.  
11 In addition, some of the programs include new eligibility requirements.  
12 These requirements include that individuals are only entitled to benefits  
if they are no longer working through no fault of their own and that  
individuals must be able and available to work.

13 Thus, DETR generally must determine a claimant's eligibility before making  
14 payments to protect the public's money from potential fraudulent claims. This is not an  
15 idle risk, as detailed above.<sup>31</sup>

16 UIPL 16-20, which discusses the processing of PUA claims, is informative. Section  
17 7 of UIPL- 16-20, titled "Processing of PUA Claims" on page I-9 states:

18 a. Applicability of State Law Provisions. Under Section 2102(h) of the  
19 Act, 20  
20 C.F.R. Part 625 applies to the administration of this program except as  
21 otherwise provided in Section 2102. Consistent with 20 C.F.R 625.11,  
22 the terms and conditions of the state law of the applicable state for an  
23 individual which apply to claims for, and the payment of, regular  
24 compensation **apply to the payment of PUA to individuals**. The  
provisions of the applicable state law that apply to claims for PUA  
include, but are not limited to:

25 Claim Filing and Reporting; Information and Due Process to  
26 individuals; Notices to individuals and employers, as appropriate,  
27 including notice to each individual of each determination and  
redetermination of eligibility for or entitlement to PEUC;

28 <sup>30</sup> UIPL 14-20, page 6

<sup>31</sup> Declaration of Schmidt at Paragraph 15

1           **Determinations, redeterminations, appeals, and hearings;**  
2           **Disqualification, including disqualifying income provisions;**  
3           **Ability to work and availability for work, absent a COVID-19**  
4           **related circumstance listed above;**

5           The Interstate Benefit Payment Plan; and The Interstate Arrangement  
6           for Combining Employment and Wages.

7           b. Claims for PUA. In processing claims for PUA, states **must verify**  
8           **that individuals have no regular UI entitlement.** If the individual  
9           is not eligible for regular UI because there are insufficient covered wages  
10          or the individual has an active UI claim with a definite or indefinite  
11          disqualification, then a state does not need to require the individual to  
12          file a regular UI initial claim. However, the state must have an  
13          established process whereby the individual’s ineligibility for regular UI  
14          is documented on the application.

15          c. If the individual’s eligibility for regular UI is questionable (for  
16          example, there are wages in the base period but no claim is filed, or a  
17          job separation that has not been adjudicated), then the state must first  
18          require the individual to file a **regular UI initial claim.** If the  
19          individual is subsequently disqualified then the state may consider the  
20          individual for PUA eligibility.

21          (Emphasis added)

22          Section 7(c) states, among other things, that if there is any kind of question  
23          concerning a claimant’s eligibility for unemployment, the individual is required to file for  
24          unemployment insurance first. “[S]tates **must verify** that individuals have no regular UI  
25          entitlement.” *Id.* at § 7(b) (emphasis added). If eligibility is “questionable,” “the state **must**  
26          first require the individual to file a regular UI initial claim.” *Id.* at § 7(c)(emphasis added).  
27          Only after the individual is disqualified may DETR consider the individual for PUA. *Id.*

28          To do what Petitioners seek this court to mandate, DETR would have to violate DOL  
Guidance. Simply put, DOL’s guidance prohibits DETR from simply paying people on the  
front end, as Petitioners request, and then recovering any payments made that should not  
have been made. Section 7 of UIPL 16-20 quoted above, states:

1 Applicability of State Law Provisions. Under Section 2102(h) of the Act,  
2 20 C.F.R. Part 625 applies to the administration of this program except  
3 as otherwise provided in Section 2102. Consistent with 20 C.F.R 625.11,  
4 the terms and conditions of the state law of the applicable state for an  
5 individual which apply to claims for, and the payment of, regular  
6 compensation apply to the **payment** of PUA to individuals. The  
7 provisions of the applicable state law that apply to claims for PUA  
8 include, but are not limited to:

9 Claim Filing and Reporting; Information and Due Process to  
10 individuals; Notices to individuals and employers, as appropriate,  
11 including notice to each individual of each determination and  
12 redetermination of eligibility for or entitlement to PEUC;  
13 Determinations, redeterminations, appeals, and hearings;  
14 Disqualification, including disqualifying income provisions; Ability to  
15 work and availability for work, absent a COVID-19 related circumstance  
16 listed above; The Interstate Benefit Payment Plan; and  
17 The Interstate Arrangement for Combining Employment and Wages.

18 (emphasis added)

19 Additionally, 20 CFR § 625.11 states:

20 The terms and conditions of the State law of the applicable State for an  
21 individual, which apply to claims for, and the payment of regular  
22 compensation, shall apply to applications for, and the payment of, DUA  
23 to each such individual, only as specifically set forth in the provisions of  
24 this part.

25 In short, DETR must follow the procedures set out on NRS/NAC Chapter 612 and  
26 appropriate federal guidance when claimants make claims under PUA, and when DETR  
27 actually makes payments. Although contract workers and self-employed workers have  
28 different eligibility requirements, nothing in NRS/NAC Chapter 612 allows DETR to pay  
claimants prior to making an eligibility determination. Nevada law requires the  
determination of claimant eligibility before benefit payment.

Additionally, pursuant to NRS 612.460, DETR, by law, must go through certain  
procedures after receiving a claim and then making a determination, such as notifying the  
last employing unit or in some cases the next to last employing unit, and those entities are  
allowed to protest the payment of benefits and also submit information to DETR pursuant

1 to NAC 612.120. Nothing under Nevada law, by contrast, allows DETR in the normal  
2 course of events just pay claimants up front and then, if it is later determined that a  
3 claimant was improperly paid, to go back and recover that money. As noted in Section 7 of  
4 UIPL 16-20, State law applies to PUA payments, such that an eligibility determination  
5 must be made first.

6 DETR has no clear duty to pay PUA benefits until after it has made an eligibility  
7 determination. A writ of mandamus should not issue under these circumstances.

### 8 **FPUC**

9 The CARES Act also authorized the Federal Pandemic Unemployment  
10 Compensation (FPUC) program (Section 2104). The FPUC program provides for an  
11 additional \$600.00 per week to claimants “who are collecting regular UC (including  
12 Unemployment Compensation for Federal Employees (UCFE) and Unemployment  
13 Compensation for Ex-Service members (UCX)), PEUC, PUA, EB, STC, Trade  
14 Readjustment Allowances (TRA), Disaster Unemployment Assistance (DUA), and  
15 payments under the Self Employment Assistance (SEA) program.” UIPL 14-20 PAGE 4.  
16 In short, a FPUC claimant must already be collecting benefits under one of the eligible  
17 programs to receive benefits pursuant to FPUC.

18 However, the claimant must first be determined to be eligible by DETR for the  
19 particular program that qualifies for PFUC. Some applicants may qualify for none of the  
20 underlying programs. In fact, based on DOL guidance, DETR believes that numerous  
21 FPUC applicants are ineligible. Even if the applicants have claimed PUA.<sup>32</sup>

22 Further, Petitioners’ position is directly contrary to UIPL 23-20, which at page 7  
23 states in pertinent part:

24 The additional \$600 payment offered through the FPUC program under  
25 section 2104 of the CARES Act is also contingent on an individual being  
26 eligible for one of a list of unemployment benefit programs. Each of these  
27 benefit programs requires the individual to be eligible on a weekly basis.  
Therefore, if a state suspends weekly certifications, it will not be able to  
properly determine if an individual is eligible for FPUC.

28 

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<sup>32</sup> See Schmidt Declaration Paragraph 15.

1 The CARES Act only allows the Secretary to provide the assistance in  
2 section 2102 “through agreements with States which ... have an  
3 adequate system for administering such assistance through existing  
4 State agencies.” See Sec. 2102(f)(1), CARES Act. Failure to determine  
5 eligibility of claimants prior to paying benefits suggests that the state’s  
6 system is not adequate. Similarly, the “Agreement Implementing the  
7 Relief for Workers Affected by Coronavirus Act” executed between the  
8 state and the Secretary of Labor provides that the state’s workforce  
9 agency “will make payments of benefits in accordance with the  
10 provisions of the Act.”

11 If the Department were to determine that the state does not have an  
12 adequate system for administering these programs, it would be  
13 obligated to terminate its agreement with the state to administer the  
14 PUA program under section 2102 of the CARES Act. The Department  
15 would have authority to terminate its agreements pursuant to the terms  
16 of the agreements for operating PEUC, PUA, and FPUC, based upon the  
17 state’s failure to adequately ensure that individuals receiving benefits  
18 are eligible for such benefits.

19 Thus, DETR’s “clear duty” is “to determine eligibility of claimants prior to paying  
20 benefits,” not to pay FPUC benefits automatically. DETR cannot simply “deduct” the FPUC  
21 money received improperly after the fact, as suggested by Petitioners on page 30 of their  
22 memorandum. Many applicants will be denied PUA and still be ineligible for FPUC.  
23 Rather, UIPL 14-20, page 4, is clear that FPUC claimants must already be “collecting  
24 regular UC (including Unemployment Compensation for Federal Employees (UCFE) and  
25 Unemployment Compensation for Ex-Service members (UCX)), PEUC, PUA, EB, STC,  
26 Trade Readjustment Allowances (TRA), Disaster Unemployment Assistance (DUA), and  
27 payments under the Self Employment Assistance (SEA) program.”

28 Doing as Petitioners suggest threatens termination of the entire program, stopping  
ongoing payments to Nevadan families and potentially subjecting Nevada to potentially  
repay all wrongfully spent federal funds at a time of great governmental fiscal distress.

1           Cancellation After Approval

2           Petitioners allege that DETR engages in a systematic practice of approving and then  
3 later retroactively denying benefits.<sup>33</sup> This is simply not true, premised on a  
4 misunderstanding. Claimants received a monetary determination only, not a benefit  
5 payout statement. To receive compensation under any program, claimants must first be  
6 found to be eligible, on both monetary and non-monetary issues.

7           Review of the alleged approval letter clearly reveals that this monetary  
8 determination will only result in payment provided the recipient meets the program  
9 deadlines and eligibility requirements during the week(s) claimed. What some of  
10 Petitioners were in fact receiving, the monetary determination letter, was a calculation of  
11 a monetary payment amount. This is a simple notification of the weekly benefit amount  
12 the claimant is eligible to receive upon a finding of eligibility. Indeed the monetary  
13 determination states “PROVIDED YOU MEET ALL PROGRAM DEADLINES AND  
14 ELIGIBILITY REQUIREMENTS DURING THE WEEK(S) CLAIMED YOU ARE  
15 ELIGIBLE FOR A WEEKLY BENEFIT AMOUNT OF... It is in no way a guarantee that  
16 the claimant is APPROVED FOR PAYMENT as alleged by Petitioner. DETR must, as  
17 outlined above, review every claim for monetary and non-monetary eligibility. Petitioners’  
18 arguments simply ignore the plain language of the letter (and the law).

19           Because a claimant is *monetarily* eligible for benefits does not mean that a gig worker  
20 is eligible for benefits under PUA or unemployment, and DETR is required by DOL to  
21 determine if the claimant meets other eligibility requirements for the applicable  
22 programs.<sup>34</sup> Thus, Petitioners are wrong to state otherwise. As DETR’s letter states, it  
23 was simply notifying claimants of their monetary/financial eligibility while continuing to  
24 evaluate additional eligibility factors as required by DOL.<sup>35</sup> Thus, no due process violation

25 \_\_\_\_\_  
26 <sup>33</sup> P&A’s i/s/o ORDER TO SHOW CAUSE WHY WRIT OF MANDAMUS SHOULD NOT ISSUE page 2, line  
18

27 <sup>34</sup> For instance persons who are still employed, persons who voluntarily quit work, persons, who reside and  
work out of state or out of country are all monetarily eligible, but would not meet other programmatic  
requirements that would ultimately results in a denial of the claim.

28 <sup>35</sup> NRS 612.265 makes individual claimant information confidential thus DETR has refrained from including  
any information regarding any individual claimants in this public pleading. Should the court determine that

1 has occurred, as no benefits had yet been awarded to create a property right, and  
2 Petitioners who have actually been approved for benefits have been paid.

3 Petitioners also argue that a simple decline in revenue allows a gig worker to collect  
4 the \$600.00 FPUC payment. However, the CARES Act does not guarantee benefits to a gig  
5 worker who faces declining revenue. FPUC again is tied to the claimant's underlying  
6 program eligibility, not suffering economic harm. Since gig workers are referenced by  
7 Petitioner, and assuming that is a reference to PUA, UIPL 16-20 I-3 through I-6 indicate  
8 that program eligibility must be connected to a COVID-19 related reason. Specifically, on  
9 page I-6, Section k, it is stated that:

10 The Secretary has determined that, in addition to individuals who  
11 qualify for benefits under the other criteria described above, an  
12 individual who works as an independent contractor with reportable  
13 income may also qualify for PUA benefits if he or she is unemployed,  
14 partially employed, or unable or unavailable to work because the  
15 COVID-19 public health emergency has severely limited his or her  
16 ability to continue performing his or her customary work activities, and  
17 has thereby forced the individual to suspend such activities.

18 With respect to independent contractors/gig workers such as Petitioners, in order to  
19 collect PUA benefits the claimant must have been, because of the COVID-19 emergency, so  
20 severely limited in his or her ability to continue performing customary work activities that  
21 the gig worker had to "suspend such activities." US DOL again used the word "suspend"  
22 in its example in Section K, when it referred to activities, rather than using another word,  
23 such as decline, which would have indicated that a decline/reduction in revenue would have  
24 made a claimant eligible for PUA. Thus, it is clear that a reduction in revenue will not  
25 make a gig worker eligible for PUA benefits, but rather the suspension of activities by the  
26 gig worker/independent contractor is required.

27 Petitioners argue that Nevada should do better, because this was not the first time  
28 a state has administered an unemployment compensation system that was federally

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the named plaintiffs have waived confidentiality DETR can provide individual specific information at the hearing.

1 financed and so heavily relied upon<sup>36</sup>. Petitioners cite to different events, such as various  
2 hurricanes, and the 2001 World Trade Center attack.

3 However, DETR is faced with the single highest unemployment rate ever recorded  
4 in a state since the Great Depression. Prior to March 2020, the largest-number of initial  
5 claims in a single week was 8,962.<sup>37</sup> With respect to the Great Recession, DETR Chief  
6 Economist David Schmidt states that “[w]eekly unemployment insurance claims peaked in  
7 May 2009 at 80,429 in the regular unemployment insurance program.<sup>38</sup>” In contrast, Mr.  
8 Schmidt stated in his declaration that in the week of March 21, 2020, “took 92,309 claims.”  
9 More important to note is the fact that for the week of March 7, 2020, 2,317 initial  
10 unemployment claims were taken in by DETR. Two weeks later, DETR took in  
11 approximately 89,000 more claims, or approximately 44 times the amount of initial  
12 unemployment claims DETR was taking in just two weeks earlier. DETR has also stood up  
13 three new compensation programs (PUA, FPUC and PEUC). DETR continues to work to  
14 address eligibility determinations for all applicants and everyone agrees that expediting  
15 payments whenever allowed by federal law is important for Nevadan families.<sup>39</sup> However,  
16 Nevada is required to do these eligibility determinations to ensure it can pay all program  
17 recipients through this continuing public health emergency. Independent media analysis  
18 has confirmed that while DETR is paying claims fast than most other states, Nevadans  
19 have been hit harder by these emergencies than other states.

20 Petitioners have alleged that Defendant breached its duty to pay unemployment  
21 benefits “when due” pursuant to 42 USC § 503(a)(1), citing to *California Dept. of Human*  
22 *Resource Development v. Java*, 402 U.S. 121 (1971). However, contrary to Petitioners’  
23 assertions, benefits in this case were not due as a matter of law because eligibility  
24 determinations had not been completed, making *Java* inapplicable here because it

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25 <sup>36</sup> Page 15 and 16 of Memorandum of Points and Authorities in Support of Ex Parte Writ of Mandamus

26 <sup>37</sup> See Declaration of David Schmidt, Paragraph 7

27 <sup>38</sup> See Declaration of David Schmidt Paragraph 5

28 <sup>39</sup> Independent media analysis has confirmed that while DETR is paying claims faster than most other  
states, Nevadans have been more impacted by these emergencies than other states.

<https://www.reviewjournal.com/business/nevada-paying-unemployment-claims-faster-than-many-states-data-shows-2059502/>

1 concerned the treatment of claimants who had already been determined eligible for  
2 benefits. *Id.* Furthermore, the word ‘due’ in § 303(a)(1), when construed in light of the  
3 purposes of the Act, means the time when payments are first administratively allowed as  
4 a result of a hearing of which both parties have notice and are permitted to present their  
5 respective positions; any other construction would fail to meet the objective of early  
6 substitute compensation during unemployment. *Gary v. Nichols*, 447 F. Supp. 320, 328 (D.  
7 Idaho 1978) (emphasis added).

8 Also, UIPL 04-01 section 4 states:

9 As well as promptness, the Department has always interpreted "when  
10 due" in Section 303(a)(1), SSA, to require accuracy in order to ensure  
11 that payments are not made when they are not due. See 20 CFR  
12 602.11(a) and 602.21(c). Proper application of Section 303(a)(1) requires  
13 an appropriate balancing of the dual concerns of promptness and  
14 accuracy in the "when due" provision.

15 (Emphasis added)

16 Thus, claimant must first be determined eligible for benefits to “be due” pursuant  
17 to 42 USC § 503(a)(1).

#### 18 Commencement of Payments

19 Petitioners also argue that benefits became due on April 11, 2020, and that DETR  
20 did not begin accepting PUA claims until over a month after that date. It is unclear why  
21 Petitioners believe that benefits were due on April 11, 2020, as that date is not mentioned  
22 in any UIPL, nor is it provided in the agreement between DETR and US DOL.<sup>40</sup>

23 Unfortunately, it was impossible for DETR to begin making payments prior to April  
24 11, 2020. While Administrator Gaa’s submission of the DOL agreement on March 28  
25 allowed Nevadans to become eligible for certain CARES Act programs beginning on March  
26 29, it did not require that Nevada immediately have the systems in place to accurately  
27 process these programs, nor could Nevada define detailed requirements for program design  
28 or implementation until detailed guidance containing operating instructions was issued

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<sup>40</sup> See Care Act State Agreement between Nevada DETR and USDOL attached as Exhibit 3

1 one week later. In fact, 39 of the 50 states were not even accepting applications for PUA  
2 two days after Petitioners alleges that payments should have commenced.<sup>41</sup> To further  
3 expedite PUA benefit payments, DETR had to purchase and install a new computer  
4 system.<sup>42</sup> Even in emergency circumstance, DETR was not able to instantly purchase and  
5 integrate the new computer system.

6 While retired DETR employee Steve Zuelke expressed his opinion on the  
7 capabilities of DETR's computer system, he lacks first-hand knowledge for his opinion. He  
8 was in the Fraud Department when employed with DETR, did not handle the processing  
9 of benefits, and to the best of DETR's knowledge, never worked in IT. DETR was able to  
10 install its computer system within a reasonable time under the emergency circumstances.  
11 As the Department of Labor notes, "States are in the midst of managing extraordinary  
12 workloads due to the effects of the spread of the COVID-19 virus. The UI system is facing  
13 historically high levels of claims in the regular UI program while simultaneously  
14 implementing the newly-created temporary programs authorized by the CARES Act  
15 (FPUC, PUA, and PEUC)."<sup>43</sup> The unprecedented volume of claims for different kinds of  
16 benefits impacts the processing of PUA benefits, and means that not all claimants are going  
17 to be paid as quickly as anyone would hope. However, the Department of Labor has been  
18 explicitly clear that states must take appropriate steps in order to protect the integrity of  
19 the programs, including determining that claimants are eligible for benefits prior to  
20 making payment.

21 Finally, the Secretary of Labor did not require that states begin issuing PUA, FPUC  
22 or PEUC payments by April 11, 2020 in any UIPL. UIPL 15-20, page I-5, which deals with  
23 FPUC, UIPL 16-20, page I-11, which deals with PUA, and UIPL 17-20, page I-10, which  
24 deals with PEUC, all state in substance that payment is due as soon as it is

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25 <sup>41</sup> <http://dmitrikoustas.com/pua> previously relied on by Petitioners at P&A's i/s/o ORDER TO SHOW  
26 CAUSE WHY WRIT OF MANDAMUS SHOULD NOT ISSUE Footnote 32 on Page 28. Respondents cannot  
27 verify the accuracy of the information on this website, but reference it because of Petitioners' reliance on it.

28 <sup>42</sup> Board of Examiners Meeting May 19, 2020 meeting  
[http://budget.nv.gov/uploadedFiles/budgetnvgov/content/Meetings/Board\\_of\\_Examiners/2020/May%2019.%202020%20Packet.pdf](http://budget.nv.gov/uploadedFiles/budgetnvgov/content/Meetings/Board_of_Examiners/2020/May%2019.%202020%20Packet.pdf)

<sup>43</sup> UIPL 23-20, page 2.

1 administratively feasible, and there are no specific bright line dates by which claimants  
2 are required to be paid.

3 Section 1983 is inapplicable to the current action as unemployment benefits are not  
4 a constitutional right.

5 Petitioners alleged that “Pursuant to 42 U.S.C. Section 1983, this Court jurisdiction  
6 to issue a mandamus against DETR.” However, this is not the case.

7 42 USC Section 1983 states:

8 Every person who, under color of any statute, ordinance, regulation,  
9 custom, or usage, of any State or Territory or the District of Columbia,  
10 subjects, or causes to be subjected, any citizen of the United States or  
11 other person within the jurisdiction thereof to the deprivation of any  
12 rights, privileges, or immunities secured by the Constitution and laws,  
13 shall be liable to the party injured in an action at law, suit in equity, or  
14 other proper proceeding for redress, except that in any action brought  
15 against a judicial officer for an act or omission taken in such officer's  
16 judicial capacity, injunctive relief shall not be granted unless a  
17 declaratory decree was violated or declaratory relief was unavailable.  
18 For the purposes of this section, any Act of Congress applicable  
19 exclusively to the District of Columbia shall be considered to be a statute  
20 of the District of Columbia.

21 Unemployment benefits, however, have their roots in legislative enactments, and  
22 are not inherent rights of Nevada residents. *Scott v. Nevada Employment Sec. Dep't*, 70  
23 Nev. 555, 557, 278 P.2d 602, 603 (1954). In fact, the Legislature has been called the parent  
24 of unemployment benefits. *Kame v. Employment Sec. Dep't*, 105 Nev. 22, 26, 769 P.2d 66,  
25 68 (1989). Since Nevada unemployment benefits do not implicate rights, privileges, or  
26 immunities secured by the Constitution and laws then an action pursuant to 42 USC § 1983  
27 is inapplicable to the present action.

## 28 CONCLUSION

During an unprecedented global pandemic, Nevada seeks to pay all eligible citizens  
under the prior and new programs to ensure economic survival for them and our State.  
However, to continue doing so, Nevada is required to comply with federal requirements.  
Otherwise, all benefit recipients risk the federal government withdrawing future  
payments, to the greater harm to us all.

1 Under such circumstances, this court cannot find that DETR has a “clear duty” to  
2 disobey DOL Guidance. Accordingly, this court must deny this writ petition, allowing the  
3 parties to proceed with this case.

4 DATED: July 1, 2020.

5 AARON D. FORD  
6 Attorney General

7 By:     /s/ Robert A. Whitney  
8 ROBEERT A. WHITNEY (Bar No. 8726)  
9 Deputy Attorney General

10 **AFFIRMATION**

11 The undersigned affirms that the foregoing document does not contain the Social  
12 Security Number of any person.

13 DATED: July 1, 2020.

14 AARON D. FORD  
15 Attorney General

16 By:     /s/ Robert A. Whitney  
17 ROBEERT A. WHITNEY (Bar No. 8726)  
18 Deputy Attorney General  
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**CERTIFICATE OF SERVICE**

I certify that I am an employee of the State of Nevada, Office of the Attorney General and that on the 1<sup>st</sup> day of July, 2020 I filed the foregoing document via this Court’s Electronic Filing System and that it was served via email as follows per this Court’s June 24, 2020 Order:

THIERMAN BUCK LLP  
[info@thiermanbuck.com](mailto:info@thiermanbuck.com)

/s/ Marilyn Millam  
An employee of the Office of the Attorney General

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Exhibit 1 – Declaration of David Schmidt	11 pages
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