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8 IN THE SECOND JUDICIAL DISTRICT COURT OF
9 THE STATE OF NEVADA IN AND FOR THE
10 COUNTY OF WASHOE

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

19 Plaintiffs-Petitioners,

20 v.

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

Defendants-Respondents

Case No.: CV20-00755

PLAINTIFFS-PETITIONERS' REPLY TO
DEFENDANTS-RESPONDENTS'
OPPOSITION TO ISSUANCE OF A WRIT
OF MANDAMUS

1 COMES NOW Plaintiffs-Petitioners AMETHYST PAYNE, IRIS PODESTA-
2 MIRELES, ANTHONY NAPOLITANO, ISIAH PAVIA-CRUZ, VICTORIA WAKED,
3 CHARLES PLOSKI, DARIUSH NAIMI, TABITHA ASARE, SCOTT HOWARD, RALPH
4 WYNKOOP, ELAINA ABING, and WILLIAM TURNLEY behalf of themselves and all others
5 similarly situated, and hereby replies to Defendants-Respondents’ STATE OF NEVADA ex rel
6 NEVADA DEPARTMENT OF EMPLOYMENT, TRAINING AND REHABILITATION
7 (DETR) HEATHER KORBULIC in her official capacity only as Nevada Director of
8 Employment, Training and Rehabilitation, and KIMBERLY GAA in her official capacity only
9 as the Administrator for the Employment Security Division (ESD) opposition to issuance of a
10 writ of mandamus for the following reasons.

11 **I. INTRODUCTION**

12 The purpose of the March 27, 2020 Coronavirus Aid, Relief, and Economic Security
13 (“CARES”) Act of 2020, was to provide *immediate relief* to all American workers adversely
14 impacted by the Covid-19 Pandemic. The Social Security Act, 42 U.S.C. § 503(a)(1)(3), requires
15 payment “when due.” DETR has failed to meet even minimum federal guidelines by failing to
16 pay or process approximately one third of all “gig worker” claims, and one half of all PUA claims
17 after almost 13 weeks—even after entering into an agreement to do so with the United States
18 Department of Labor (“DOL”) on March 31, 2020—and more than six weeks after finally
19 beginning to initially accept applications on May 16, 2020. In addition to the tragic harm DETR’s
20 breach of duty has caused at some 46,293 individual gig worker claimants, and some 48,479 other
21 claimants—whose applications DETR will not even accept—to needlessly suffer with this delay,
22 this State agency has also caused immeasurable long-term harm to Nevada’s economy. There is
23 a distinct possibility that the federal funding of this program will cease by the end of this month,
24 causing further irreparable harm. For these reasons, Plaintiffs-Petitioners urge this Court to issue
25 an order mandating that DETR perform its clear duty to pay “when due” all claims for
26 unemployment compensation by self-employed workers filed on or after May 16, 2020, in the
27 form previously submitted, or in such form as the Court deems just and proper for an Order of
28 this Court.

1 DETR’s excuse of its failure to pay benefits when due on the grounds of “*eligibility*” is a
2 woefully insufficient response¹ in that its task has been made impossible by DOL guidelines and
3 regulations, combined with an unfounded suspicion of massive fraud based upon undisclosed
4 statistical techniques not directly applicable to any particular applicant. DETR’s says it must
5 follow DOL program guidance to deny half a billion dollars of much needed federal relief to
6 approximately 50,000 needy applicants and/or a total of one billion dollars of much needed federal
7 relief to approximately 100,000 needy applicants in order to prevent 2.4 to 24 million dollars of
8 suspected, potential fraud by a few, dishonest applicants. As more fully set forth herein, the DOL
9 regulations and program guidance provide no justification for DETR’s failure to perform its clear
10 duty, but instead set forth benchmarks for timely claims payment that DETR has completely
11 missed and continues to miss by a large margin.²

14 ¹ DETR’s argument that “[a]t this early stage” Plaintiffs’ request for an OSC is offensive and
15 does not excuse DETR’s failure to pay federally mandated benefits. *See* DETR’s Opposition to
16 Plaintiffs’ Writ at p. 1:23, hereinafter “Opp. to Writ.” DETR admits in the Declarations
17 supporting its Opp. that it has been preparing “since the onset of the pandemic-driven shutdown”
18 (Schmidt Dec., Exhibit 1 at ¶ 2); argues that there is an “economic and workload” excuse as to
19 what is “administratively feasible” (*id.* at ¶ 3); admitted to entering into an Agreement with the
20 DOL on March 31, 2020 (Response at p. 2:5) but did not start paying claims until May 22, 2020
(Schmidt Dec. at p. 11), which is equal to 52 days or 7.5 claims weeks, all part of a delay,
according to DETR to set up a new computer system (Opp. to Writ at p. 4:9-11) is contradictory,
legally untenable, and does not shield DETR from performing its duty to provide CARES Act
benefits to Nevada citizens.

21 ² There is nothing special or unique contained in the DOL regulations for fraud under the PUA
22 program and none of the regulations support a witch hunt that jeopardizes the welfare of tens of
23 thousands of innocent claimants. According to Exhibit 3 of the Schmidt Declaration, Section IV
24 the investigation should be limited to instances where DETR has reasonable basis to believe the
25 claimant “an individual *knowingly* has made, or caused to be made by another, a false statement
26 or representation of a material fact, or *knowingly* has failed, or caused another to fail, to disclose
27 a material fact, and as a result of such false statement or representation or of such nondisclosure
28 such individual has received an amount of Federal Pandemic Unemployment Compensation to
which such individual was not entitled. . .” The DOL specifies that the remedy for such fraud is
future ineligibility of the claimant, repayment by the claimant, and criminal prosecution for fraud
“under section 1001 of title 18, United States Code.” To date, DETR has not subjected a single
claimant to such a remedy. A generalized fear of fraud by some individuals is not a legal reason
to punish 50,000 to 100,000 others who must be presumed innocent.

1 The only way to save DETR from being disqualified by the DOL and to fulfill its duty to
2 pay claims when due in a timely manner, is to:

3 (1) Order DETR to pay all categorically undisputable claims immediately. For
4 example, since the longest period of UI program disqualification is sixteen weeks
5 of subsequent earnings, DETR should be required to pay immediately all
6 applicants who have 16 weeks or more of gig revenue before the date of their
7 claim regardless of what, if any, prior UI disqualifications they may or may not
8 have.

9 (2) DETR should be ordered to pay all those claims for which it has issued a letter
10 of determination in favor of eligibility (*see* Exhibit 1 to the Jennifer Edison-
11 Strekal Declaration attached hereto as “Sample of Favorable Eligibility Emails”),
12 because DETR must continue to pay all claims for which it has issued a favorable
13 notice of determination of eligibility, until an administrative law judge determines
14 after a fair hearing that such claims should not be paid.

15 And since DETR has the burden prove disqualification, payments should have been made as soon
16 as the application for assistance showed on its face that the applicant was entitled on any
17 application pending more than 28 days without a formal denial of benefits letter with statement
18 of rights and methods for appeal. *See, Clark County Sch. Dist. v. Bundley*, 122 Nev. 1440, 1445
19 (Nev. 2006) (“To further this purpose, the unemployment compensation law, NRS Chapter 612,
20 presumes that an employee is covered by the system. . .”)

21 Contrary to the assertions of DETR, the DOL regulations do ***not*** require any investigation
22 beyond the four corners of the application and applicant self-attestation under Section 719.280³
23 of NRS Chapter 719⁴ is sufficient verification to enable payment immediately. *See, United States*

24 _____
25 ³ NRS 719.280 states: “If a law requires a signature or record to be notarized, acknowledged,
26 verified or made under oath, the requirement is satisfied if the electronic signature of the person
27 authorized to perform those acts, together with all other information required to be included by
28 other applicable law, is attached to or logically associated with the signature or record.”

⁴⁴ NRS Chapter 719 allows for an electronic signature of declarations using programs like
DocuSign, HelloSign, Adob Sign or others. These vendors actually provide a better and more

1 Department of Labor UIPL 16-20, dated 4/5/20, at subsection 7 (b) and (c) (attached as Exhibit
2 to the JES Declaration), which states with emphasis and parenthetical supplied:

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

12 c. If **and only if** the individual's eligibility for regular UI **is**
13 **questionable** (for example, there are wages in the base period but no
14 claim is filed, or a job separation that has not been adjudicated), then
15 the state must first require the individual to file a regular UI initial
16 claim. If the individual is subsequently disqualified, then the state
17 may consider the individual for PUA eligibility.⁵

18 **II. STATEMENT OF UNDISPUTED FACT**

19 For purposes of this motion, Plaintiffs-Petitioners accept the data contained in the chart
20 on page 5 of Defendants-Respondents Opposition to Petitioners' Petition For Writ Of Mandamus
21 filed with this court on July 1, 2020 (hereinafter which Opp.to Writ).⁶ This chart shows that as

22 _____
23 reliable authentication process than a traditional notary by encrypting and recording the entire
24 document as a whole (thereby preventing substituting pages later), and eliminating any
25 possibility of collusion between the notary and the person seeking notarization. In addition, these
26 programs contain identity authentication procedures, thus eliminating a common cause for delay
27 in payment not directly at issue in this litigation.

28 ⁵ This last sentence means that a disqualifying event under the regular Unemployment Insurance
program, DETR is not an automatic disqualifier for PUA benefits. DETR has been misapplying
this sentence incorrectly to automatically carry forward old disqualifying events.

⁶ DETR admits that the exact numbers of Nevada workers not being paid varies depending on
dates reported, but the latest available data seems to be summarized on the chart at line 3-7 on
page 5 of its Opp. To Writ. In any event, the order of magnitude of unpaid applicants is so great,
one-third to one-half, that it matters not the exact numbers by week. DETR's position can be
calculated to represent that it must deny half a billion dollars of much needed federal relief to
approximately 50,000 needy applicants or one billion dollars of much needed federal relief to
approximately 100,000 needy applicants in order to prevent 2.4 or 24 million dollars of fraud is

1 July 1, 2020, DETR has failed to pay approximately 50,000 gig workers over 13 weeks of
2 unemployment compensation, and over six weeks from date of initial application.⁷ It is obvious
3 that DETR has unequivocally failed to pay 94,772 out of the 190,262 individuals, 50% of those
4 who have applied for benefits under the Pandemic Unemployment Assistance or “PUA” program
5 of the CARES Act of 2020 with two or three weeks of application and/or 46,293 out of the
6 141,783 individuals, 33% of those who DETR says are eligible for determination within the same
7 time period. This is totally unacceptable under federal DOL minimum payment “when due”
8 standards which are published at 20 C.F.R. §§ 640.4, 640.5.

9 Impossibility of performance caused by following DOL guidance and looking for
10 bogeyman/bogeywoman committing fraud can’t be the cause of DETR’s failure to perform its
11 duty to pay benefits when due because other states, who must also follow the same DOL
12 Guidelines and who must also prevent fraud, have paid 95% of the PUA applicants within two
13 weeks of initial application. As stated in the opening brief, with further examples herein, DETR
14 has bogged itself down with unnecessary and unauthorized procedures, causing an administrative
15 paralysis which continues to delay payment of half a billion dollars of PUA relief to gig workers,
16 and/or a billion dollars to all PUA applicants, in breach of DETR’s clear duty to pay
17 unemployment compensation when due. Governor Sisolak stated publicly that DETR can only
18 adjudicate each outstanding claim individually, which means that the 8 adjudicators will complete
19 processing the approximately 50,000 outstanding gig worker application sometime in late 2023,
20 or about three years from now. As more fully set forth herein, DETR must be ordered to pay all
21 claims that are in several categories of claims that are surely eligible for payment, including the
22

23 equally ridiculous and no less a failure to perform DETR’s clear duty than if the numbers were
24 doubled that a few weeks before.

25 ⁷ On March 28, 2020, Nevada Employment Security Division Administrator Kimberly Gaa
26 signed the “Agreement Implementing the Relief for Workers Affected by Coronavirus Act” with
27 the United States Department of Labor. Exhibit 3 and adopted by reference in the July 1, 2020
28 declaration of Ms. Gaa when, at lines 4 through 6 of the sixth (unnumbered) of Exhibit 2, wherein
she states: “On Saturday, March 28th I signed the documents with the DOL to enter into an
agreement to accept funds from the CARES act for the aforementioned sections of 6 benefits for
Nevadans.” The Court is requested to take judicial notice that March 28 is more than 13 weeks
ago from July 1, 2020.

1 unattached claims for \$600 a week in FPUC, in order to perform its clear duty to pay promptly
2 “when due” the 50,000 or so gig workers whose claims have been pending for six weeks without
3 payment.

4 **III. ARGUMENT**

5 **A. The Proposed Writ of Mandate Is Proper**

6 In their proposed order for the writ of mandate, Plaintiffs-Petitioners have identified three
7 gig worker sub-groups which are entitled to immediate payment automatically. The first group
8 are all those who claim to have at least 16 weeks of self-employment revenue prior to their
9 application for benefits on or after May 16, 2020. Apparently, DETR is denying thousands of
10 claims for PUA from individuals who quit a W-2 job (often years ago) to become self-employed.
11 Not only is quitting one job to take a better job *per se* **not** a disqualifying event (*see, e.g. Harding*
12 *v. Indust. Comm*, 183 Colo. 52 (Colo. 1973)), if the Claimant has ten weeks of income subsequent
13 to the termination of the old job, which by definition is not less than ten weeks of income from
14 self-employment, then the disability disappears. NRS 612.380⁸ Likewise, if an individual is
15 terminated for misconduct, the disability period is sixteen weeks. NRS 612.385. For those
16 discharged for crimes under NRS 612.383, the disqualification applies only to credit for wages
17 earned from the employer who was the victim of the crime, and since PUA is not dependent on
18 prior W-2 earnings at all, is not a disability at all to self-employed individuals. The CARES Act

19 ⁸ NRS 612.380 Leaving last or next to last employment without good cause or to seek other
20 employment.

21 1. Except as otherwise provided in subsection 2, a person is ineligible for benefits for the
22 week in which the person has voluntarily left his or her last or next to last employment: (a)
23 Without good cause, if so found by the Administrator, and until the person earns remuneration
24 in covered employment equal to or exceeding his or her weekly benefit amount in each of 10
25 weeks. (b) To seek other employment and for all subsequent weeks until the person secures other
26 employment or until he or she earns remuneration in covered employment equal to or exceeding
27 his or her weekly benefit amount in each of 10 weeks, if so found by the Administrator.

28 2. A person is not ineligible for benefits solely because he or she left employment which
was not suitable to enter training approved pursuant to 19 U.S.C. § 2296.

3. As used in subsection 2, employment is “suitable” if the work is of a substantially
equal or higher level of skill than the person’s past adversely affected employment, and the wages
are not less than 80 percent of the person’s average weekly wage at his or her past adversely
affected employment.

1 waives disability to benefits for self-employed applicants who fail to seek or accept regular
2 employment under NRS 612.390 and 612.392. So, for all those ‘gig workers’ who show sufficient
3 income⁹ from self-employment in each week for at least sixteen weeks prior to their application
4 for PUA there are no disabilities for past sins under regular unemployment insurance that could
5 delay or deny payment under the PUA program. Therefore, the first group should be paid
6 immediately upon application to DETR for PUA and FPUC assistance.

7 The second “fail safe” sub-group of gig workers that should be paid immediately are those
8 who have a favorable eligibility determination letter from DETR, and who were not yet paid.
9 This is just a straightforward application of the rule in *California Department of Human*
10 *Resources Development v. Java*, 402 U.S. 121 (1971) that once an initial determination of
11 eligibility to unemployment compensation has been made by the state agency (in this case DETR),
12 then the payment is a mechanical act that follows automatically. The right to those payments in
13 the future becomes a vested property right of the applicant which cannot be taken away without
14 due process. Before the initial determination, the property right is vested in DETR, but once
15 DETR sends a letter of determination of benefit eligibility, then the property right vests in the
16 claimant.

17 In this case, DETR sent letters of favorable initial eligibility determinations to thousands
18 of gig workers but failed to pay the money due. *See* Exhibit 1, to the JES Declaration “Sample
19 of Favorable Eligibility Emails.” Then, DETR re-considered its initial eligibility decision, with
20 or without notice to the applicant, and withheld money on the basis that its reconsideration is
21 retroactive. In many cases, there is no actual decision in the file, but a mere statement of
22 unresolved issues, with and without further explanation. *See* Exhibit 3, to the JES Declaration,
23 “Sample Unresolved Issues Emails.” If DETR can avoid the Supreme Court decision in *EDD v.*
24 *Java* by simply re-characterizing a subsequent denial as a retroactive reconsideration of
25 ineligibility, then EDD could refrain from paying benefits if an employer filed an appeal until the

26
27 ⁹ The amount of qualifying income necessary is proportional to the benefit amounts entitled, but
28 in no case more than \$1,000 a week. People entitled to less weekly benefits now will need to
show proportionally less earnings during the disqualification period.

1 appeal was ultimately decided. There is no DOL guidance or opinion overruling the United States
2 Supreme Court, nor could there ever be. The same is true for DETR. NRS 612.465.¹⁰ Once a
3 claim is deemed eligible, it should be paid continuously until after a fair hearing, an administrative
4 law judge determines otherwise.

5 There is no better bright line test for eligibility than a favorable eligibility determination
6 by DETR. NRS 612.485(1)¹¹ In this case there is no employer supplying new information, so
7 DETR has all records at the time a favorable determination is made and there is no new
8 information justifying a redetermination under NRS 612.480. Therefore, due process requires
9 that all applicants who have had a favorable eligibility determination for PUA benefits receive
10 and continue to receive their payments until and unless an administrative law judge rules to the
11 contrary after a full fair hearing. At the very least, the applicant who has received a favorable
12 determination must be paid at least until the applicant is given notice of and the right to appeal
13 from any unfavorable subsequent re-determination, and if the applicant does file an appeal from
14 the redetermination, DETR must continue to pay benefits until there is a final adjudication.¹² As
15 stated at VII of Addendum No. 2, ¶ VI Emergency Increase in Unemployment Compensation
16 Benefits - Federal Pandemic Unemployment Compensation in Exhibit 3 of DETR's Opposition:

17 **Opportunity for Hearing** - No repayment shall be required, and no
18 deduction shall be made, until a determination has been made, notice
19 thereof and an opportunity for a fair hearing has been given to the
individual, and the determination has become final.

20 ¹⁰ NRS 612.465 Effective period of initial determination; payment of benefits. 1. An initial
21 determination that an individual is an insured worker shall remain in effect throughout the benefit
22 year for which it is made, unless modified by a redetermination or as the result of an Appeal
23 Tribunal, Board of Review, or court decision, and in the absence of an appeal benefits shall be
24 paid or denied in accordance therewith. 2. If, under the determination, benefits in any amount
are payable as to which there is no dispute, such benefits shall be promptly paid regardless of
such appeal.

25 ¹¹ NRS 612.485(1) states: Any determination or redetermination is final 11 days after the date
26 of notification or mailing of the notice of determination or redetermination unless a request for
reconsideration or an appeal is filed within the 11-day period.

27 ¹² NRS 612.465(2) states that "If, under the determination, benefits in any amount are payable as
28 to which there is no dispute, such benefits shall be promptly paid regardless of such appeal."

1 For many, DETR issues a favorable determination, then simply does not pay for weeks,
2 and then decide not to pay retroactively without notice and a mechanism for appeal because there
3 are unresolved issues, often unspecified.¹³ This group is entitled to payment immediately. As
4 stated by the Nevada Supreme Court in *Glaser v. Emp't Sec. Div.*, 373 P.3d 917 (Nev. 2011):

5 Due process protections of the Fourteenth Amendment of the U.S.
6 Constitution and Article I, Section 8 of the Nevada State
7 Constitution apply to unemployment benefit hearings. *Whitney v.*
8 *State, Employment Security Dep't*, 105 Nev. 810, 813, 783 P.2d 459,
9 460 (1989). Due process requires a state to give a person an
10 opportunity to be heard in a meaningful manner and at a meaningful
11 time. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). It also requires
12 that one have the opportunity to establish any fact which, "according
13 to the usages of common law or the provisions of the constitution
14 would be a protection to himself or property." *Wright v.*
15 *Cradlebaugh*, 3 Nev. 341, 349 (1867).

16 The third "fail safe" group entitled to benefit payments immediately are those gig workers
17 who have applications pending for excessive length of time where on the face of the application
18 it is apparent they qualify for PUA benefits, they have not been paid, and there is no appeal
19 process, or none is explained to the applicant as required by NRS 612.485(3). NRS 612.470
20 requires DETR to give the applicant "prompt" notice of denial of any claim for unemployment
21 compensation. Such notice must contain a written statement of the reasons for disqualification
22 from insurance. In this case, most claims filed on May 16, 2020 are still pending with no official
23 notice of any denial or appeal rights. DETR admits that even today, it has not paid or processed
24 at least one third of the gig workers applications. As stated by the Court of Appeals for the Seventh
25 Circuit in *Burtton v. Johnson*, 538 F.2d 765, 768 (7th Cir. 1976)

26 Section 303(a)(1) of the Social Security Act, 42 U.S.C. § 503(a)(1),
27 requires that the Secretary of Labor make no certification for
28 payment to any state unless he finds that such state has developed
methods of administration for its unemployment compensation
program which are "reasonably calculated to insure full payment of
unemployment compensation *when due*." (Emphasis added.) The
Supreme Court in *California Department of Human Resources*
Development v. Java, 402 U.S. 121, 91 S.Ct. 1347, 28 L.Ed.2d 666

¹³ NRS 612.480 must be read to endorse this procedure, or it is clearly unconstitutional under
California Department of Human Resources Development v. Java, supra.

1 (1971), held that this requirement applies to state programs not only
2 when the Secretary of Labor certifies the programs, but that this
3 requirement is also a general standard that state programs must
4 meet. The Court also held that the requirement is an appropriate one
5 for court enforcement. Cf. *Rosado v. Wyman*, 397 U.S. 397, 420-22,
6 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970) (rejecting the argument that
7 federal courts are without power to review state welfare programs
8 because Congress lodged in the Department of HEW the power to
9 cut off federal funds from non-complying programs).

10 20 C.F.R. § 640.4 requires that states provide methods of administration which “will
11 reasonably ensure the full payment of employment compensation to eligible claimants with the
12 greatest promptness that is administratively feasible.” Under DOL regulations prescribing the
13 timely processing of UI claims, a state is in substantial compliance with the federal timeliness
14 requirements if at least 87 percent of benefit payments are made within 14 days following the end
15 of the first compensable week after filing (20 C.F.R. § 640.5), and the responsible state agency
16 resolves “at least 60 percent of all first level benefit appeal decisions within 30 days of the date
17 of appeal, and at least 80 percent of all first level benefit appeal decisions within 45 days.” (20
18 C.F.R. § 650.4(b).) *Acosta v. Brown*, 213 Cal.App.4th 234, 239 (Cal. Ct. App. 2013). In this case,
19 DETR’s own statistics show that DETR is in violation of these minimum Federal DOL standards
20 for payment “when due”.

21 On March 28, 2020, DETR agreed with the Department of Labor to follow federal
22 guidelines for payment of unemployment compensation to self-employed individuals. DETR
23 admits that it has not processed 32% of initial claims in a timely manner, which is a violation of
24 these same federal guidelines. To remedy this situation, and to keep DETR in DOL compliance,
25 DETR must immediately pay all claims overdue. Since DETR did not provide most of these
26 claimants a mechanism for appeal, they share no blame in DETR’s delay. Therefore, if DETR
27 paid all unpaid claims pending over 28 days, it would return to compliance. In order to discourage
28 fraud, DETR can make a quick, computer generated determination from the face of the claim to
be eligible for payment. If DETR provides an appeal mechanism for those claims actually denied
for failure to meet eligibility on the face of the application, it can safely move to the second step
of the analysis of conforming to the standards for payment when due contained in 20 C.F.R. §
650.4(b) and 650.5.

1
2 **DETR’S Claim Of Impossibility Of Performance Is Not A Proper**
3 **Defense To A Writ Of Mandamus And Is Not True As A Matter Of**
4 **Fact**

5 Defendants-Respondents’ theory of impossibility is not relevant at this stage of the
6 proceedings, and even if it were relevant, DETR’s claim of impossibility of performance is not
7 true factually. DETR has a clear duty to provide each and every member of the gig worker class
8 (as hereinafter defined¹⁴) unemployment benefit compensation “when due,” as required by 42
9 U.S.C. § 503(a)(1) (3) (a) (1) and the March 31, 2020 agreement between Defendant-Respondent
10 DETR and the United States Department of Labor. DETR’s response to the people of the State
11 of Nevada’s request to be paid money promised to them by the federal government “when due”
12 rather than two years later, is no better than that of Marie-Antoinette (bride of France’s King
13 Louis XVI) who, when in 1789 was told that the people of Paris had no bread, stated “*Qu’ils*
14 *mangent de la brioche*”—“Let them eat cake.”

15 DETR’s statement that it cannot pay claims faster than its doing or is projected to do is
16 unacceptable and legally untenable. For example, more than 2.2 million people filed for
17 unemployment in Michigan between March 15 and 23. So far, Michigan had paid 95% of claims

18
19
20 ¹⁴ The gig worker class is defined as “All self-employed individuals, independent contractors
21 and/or the owners of sole proprietorships who do not pay their own wages as a W-2 employee
22 (also referred to hereinafter as “gig workers”) and who worked within the State of Nevada
23 immediately prior to March 15, 2020, and who have suffered a significant reduction of income,
24 revenue and/ or earnings from said work as a result of Governor Sisolak’s Declaration of
25 Emergency For COVID_19 dated March 12, 2020 and effective March 15, 2020 or the presence
26 of Coronavirus 19 Pandemic in the State of Nevada, and who have on or after May 16, 2020
27 submitted to Defendant-Respondents DETR a prime facie eligible claim for unemployment
28 compensation pursuant to Coronavirus Aid, Relief, and Economic Security Act (“CARES” Act)
 but who have not yet been paid the applicable amount of PUA program funding, which is not
 more than 39 weeks of unemployment benefits on the same basis as regular W-2 workers for
 every week unemployed or suffering economic harm due to the COVID-19 Pandemic, retroactive
 to January 27, 2020 and ending on or before December 31, 2020, plus an additional \$600 per
 week to all eligible gig workers for every week after March 15, 2020 until July 31, 2020 (for a
 total of 24 weekly payments.)”

1 within two weeks.¹⁵ And as of April 28, 2020, New York had only a 12% backlog of claims
2 whereas Maryland reports that as of June 24, 2020 that it has paid on more than 405,000 claims
3 and has whittled the number of pending applications down to about 34,000 or about 6.5% of
4 those filed. Maryland Daily Record, [https://thedailyrecord.com/2020/06/24/md-says-its-
5 whittled-down-unemployment-claims-backlog-to-34k/](https://thedailyrecord.com/2020/06/24/md-says-its-whittled-down-unemployment-claims-backlog-to-34k/). But in the June 12, 2020 press
6 conference DETR says that “47,582 people who have filed for the Pandemic Unemployment
7 Assistance program for independent workers have been paid so far” of the “116,996 PUA claims
8 that had been filed as of that Friday morning” This means Nevada has paid only 40.6% of claims
9 filed; a 60% unpaid rate. If other states can pay between 90 and 95% of claims for PUA
10 submitted, and Nevada can only pay 40%, *res ipsa loquitur*, DETR must be doing something
11 wrong.

12 One of DETR’s main arguments boils down to a “manpower” or staffing shortage
13 argument which is of DETR’s own making and in DETR’s immediate ability to correct. In fact,
14 DOL Program Letter No 14-20 dated, April 2, 2020 at section 4.d specifically provides for
15 flexibility in emergency staffing. *See* Exhibit 2 to the Declaration of Jennifer Edison-Strekal Dec.
16 to Plaintiffs’ Writ of Mandamus. Pursuant to Emergency Flexibility for State Staffing, the DOL,
17 through the CARES Act provides for “**temporary and limited emergency flexibility regarding
18 the suspension of required merit personnel standards**” so that DETR can “**engage[]
19 temporary staff, rehiring of retirees or former employees on a non-competitive basis, and
20 other temporary action to quickly process applications and claims.**” (Emphasis in original.)

21 Moreover, funding provided under the CARES Act to the states can be used for the following:

22 *Q: May recipients use Fund payments to cover employment and training programs
23 for employees that have been furloughed due to the public health emergency?*

24 ¹⁵ More than 2.2 million people filed for unemployment in Michigan between March 15 and 23.
25 So far, they have approved 95% of the claims. But, 11,824 people who applied before May 1 are
26 still waiting. The state has set a goal to either pay those people or to determine if they are
27 ineligible before the end of next week. *See*, “How are other states handling unemployment
28 claims backlog?” by By: Joyce Lupiani of KTNV, Posted at 9:37 AM, Jun 25, 2020 and last
updated 12:13 PM, Jun 25, 2020 [https://www.ktnv.com/rebound/coronavirus-
investigations/how-are-other-states-handling-unemployment-claims-backlog](https://www.ktnv.com/rebound/coronavirus-investigations/how-are-other-states-handling-unemployment-claims-backlog) last visited June
29, 2020.

1 *A: Yes, this would be an eligible expense if the government determined that the*
2 *costs of such employment and training programs would be necessary due to the*
3 *public health emergency.*

4 *Q: May Fund payments be used for expenditures related to the administration of*
5 *Fund payments by a State, territorial, local, or Tribal government?*

6 *A: Yes, if the administrative expenses represent an increase over previously*
7 *budgeted amounts and are limited to what is necessary. For example, a State may*
8 *expend Fund payments on necessary administrative expenses incurred with respect*
9 *to a new grant program established to disburse amounts received from the Fund.*

10 See Exhibit 4 to the JES Declaration, FAQs Updated June 24, 2020 and accessed on 7/2/2020 at:
11 [https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Frequently-Asked-](https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Frequently-Asked-Questions.pdf)
12 [Questions.pdf](https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Frequently-Asked-Questions.pdf)

13 **C. DOL Guidelines Are Not The Cause Of Delay In FPUC Payment**

14 DETR says it may delay paying PUA money because the claimant might be eligible for
15 regular UI payments. Even if this were true, then DETR should start paying the \$600 FPUC
16 money immediately. The FPUC program provides for an additional \$600.00 per week to
17 claimants “who are collecting regular UC (including Unemployment Compensation for Federal
18 Employees (UCFE) and Unemployment Compensation for Ex-Service members (UCX)), PEUC,
19 PUA, EB, STC, Trade Readjustment Allowances (TRA), Disaster Unemployment Assistance
20 (DUA), and payments under the Self Employment Assistance (SEA) program.” UIPL 14-20
21 PAGE 4. DETR says that the claimant must be actually collecting the UI or PUA money before
22 the FPUC money can be paid. But this interpretation of the word “collecting” is clarified in UIPL
23 23-20, at page 7 to include *eligible* to collect, which states: “The additional \$600 payment offered
24 through the FPUC program under section 2104 of the CARES Act is also contingent on an
25 individual being eligible for one of a list of unemployment benefit programs.”

26 DETR claims that the United States Department of Labor guidelines require DETR to
27 separately investigate beyond the four corners of the application of each individual’s prior
28 unemployment compensation history to determine eligibility. But the DOL guidance does not
say that. The DOL guidance only requires further investigation if there is a question of potential
duplicate payments, which question can be easily eliminated by a careful solicitation of
information by the claimant as well as some administrative policies and presumptions as

1 explained below. And as previously stated, the DOL guidance prohibits duplicate payments, not
2 mere membership in a program, when it uses the terms “compensation” and “benefits” in UIPL
3 16-20:10, which states:

4 “Covered Individual” means an individual who is not eligible for
5 regular compensation or extended benefits under State or Federal
6 law or pandemic emergency unemployment compensation under
7 section 2107 of the Act, including an individual who has exhausted
8 all rights to regular unemployment or extended benefits under State
9 or Federal law or pandemic emergency unemployment
10 compensation under section 2107; and provides self-certification
11 that the individual meets the requirements in Section C.1, below.

12 **D. DETR’S Administrator Has Great Flexibility To Create And Modify**
13 **Workflow Processes To Make Payment Quicker; Nonetheless That Person**
14 **Lacks Discretion To Refuse To Pay Claims When Due**

15 NRS612.185(2) grants the administrator of DETR great discretion to implement new
16 regulations impacting the workflow processes necessary for the payment of benefits. “The
17 Administrator shall adopt regulations applicable to unemployed persons, making such
18 distinctions in the procedures as to total unemployment, partial unemployment of persons who
19 were totally unemployed, partial unemployment of persons who retain their regular employment
20 and other forms of part-time work, as the Administrator deems necessary.” To speed payment
21 to those most in need, DETR’s Administrator is empowered by statute to unilaterally implement
22 workflow process changes without the delay inherent in adopting new regulations. DETR’s
23 administrator “[h]as full administrative authority with respect to the operation and functions of
24 the Division.” NRS 612.215 (b). DETR’s administrator “[h]as power and authority to adopt,
25 amend or rescind such rules and regulations, to employ, in accordance with the provisions of this
26 chapter, such persons, make such expenditures, require such reports, make such investigations,
27 and take such other action as the Administrator deems necessary or suitable to that end.”

28 NRS612.220(3) (emphasis supplied). As stated in NRS 612.220(4):

The Administrator . . .[s]hall determine his or her own organization
and methods of procedure for the Division in accordance with the
provisions of this chapter.

1 This would also include the ability of DETR to allow for payment to claimants who have
2 issues in their UI record, and/or no traditional UI eligibility of more than two years based on NRS
3 11.190 4(b), which states: “Within 2 years an action upon a statute for a penalty or forfeiture,
4 where the action is given to a person or the State, or both, except when the statute imposing it
5 prescribes a different limitation.” This could be easily accomplished by setting up a query in the
6 application process.

7 This plenary power extends to DETR’s administration of federal funds as well. DETR’s
8 power to administrator the PUA funds comes from NRS 612.295, which is entitled “Reciprocal
9 arrangements with state and federal agencies.” NRS 612.285(3) requires DETR to “[c]ooperate
10 to the fullest extent consistent with the provisions of this chapter with the Department of Labor.”
11 And DETR must “[c]omply with the regulations prescribed by the Department of Labor
12 governing the expenditures of such sums as may be allotted and paid to this State by the Federal
13 Government for the purpose of assisting in the administration of this chapter.” NRS 612.285(4).
14 In addition, NRS 612.290 provides that the Department of Labor’s regulations take precedence
15 over state regulations when it comes to payment of federal PUA funds.

16 DETR spends a great deal of time unnecessarily checking each PUA program application
17 with other unemployment compensation programs databases in order to avoid duplicate program
18 coverage, confirming that there are no outstanding issues or orders (such as a disqualifying period
19 before any new application for unemployment can be submitted) in a prior program that would
20 prevent payment under the PUA program. While automated interfaces between UInv and the
21 PUA stand-alone systems should establish whether or not the person has sufficient Nevada wages
22 to LIKELY qualify for a basic UI claim, it may not reveal that disqualifying conditions have been
23 met (basically expunged as a block on future payments) or that there are no out of state
24 Unemployment Compensation credits or disqualifying orders that would impact the payment of
25 PAU in Nevada. Cross checking every application slows down the payment process
26 significantly.

27 Another way that DETR can greatly increase the speed of payment of claims *en mass*
28 without individual adjudicatory review, is to maximize reliance on “Self-attestation” or self-

1 certification. A simple statement under oath by the applicant in the initial application form or
2 subsequent clarification documentation, can be used to establish three things: 1) that the
3 applicant does not believe he or she is eligible for benefits under any other program of
4 unemployment compensation, 2) that in the last three months prior to the initial eligibility date
5 of April 11, 2020, the claimant has not worked or earned wages from working “out of state” and
6 3) that the applicant is not precluded from obtaining PUA funds by any prior disqualifying events
7 in any other program of unemployment compensation which disqualification has not been
8 remedied by at least six weeks of income (from wages or self-employment) sufficient to
9 reestablish entitlement to compensation. This statement of self-attestation can be preceded by a
10 series of questions, all answered under oath, to factually support this conclusion, and a jurat
11 based upon the above answered questions that would be sufficient to enable the computer to make
12 an initial determination of eligibility based upon the face of the application almost
13 instantaneously. The use of third party identification verification like that used by the United
14 States Social Security System would reduce the number of fraudulent submissions even more.¹⁶
15 DETR could then pay PAU program funds to the claimant immediately, except in the few cases
16 where the face of the application causes the computer to flag the claim for further review.

17 **IV. CONCLUSION**

18 For the reasons stated herein, Plaintiffs-Petitioners ask this court to issue a writ of mandate
19 commanding DETR to perform its clear duty to pay “when due” by paying immediately
20 applicable amounts of PUA program benefits to all members of the gig-worker class, as
21 hereinafter defined, who 1) have had more than sixteen weeks of revenue from self-employment
22 immediately before the date of their application for PUA assistance, and /or 2) who have had a
23 determination of eligibility letter issued by DETR in their favor at any time since application for
24 benefits after May 16, 2020, and/or 3) who have had an application for PUA benefits pending for
25 more than 28 days, with no letter of denial issued containing notice of and a method for appealing

26 _____
27 ¹⁶ Frequently, these third-party document signing programs also include identity verification
28 based upon uploaded official government documents compared to a cell phone or computer
picture of the applicant as well as warnings about misuse prior to submission. This would
eliminate the “identity” issue now popping up as an excuse to not pay benefits.

1 such denial. In addition, Plaintiff-Petition ask this court to for an order commanding DETR to
2 pay \$600 per week of benefits due under the FPUC program to all class members described above,
3 as well as any gig worker class member who was denied or refused payment of PUA benefits on
4 the grounds of eligibility for regular Unemployment insurance benefits, regardless of which
5 program (PUA or UI) is ultimately determined applicable to that gig worker class member, or
6 such other order as the court deems just.

7 **AFFIRMATION**

8 *The undersigned does hereby affirm that the proceeding document to be filed in the*
9 *Second Judicial District Court in the State of Nevada, County of Washoe, does not contain the*
10 *social security number of any person.*

11 DATED: July 2, 2020

Respectfully Submitted,

12 **THIERMAN BUCK LLP**

13 */s/Mark R. Thierman*

14 Mark R. Thierman

15 Joshua D. Buck

16 Leah L. Jones

17 Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

I certify that I am an employee of Thierman Buck LLP, and that on this 2nd day of July 2020 I certify that I electronically filed PLAINTIFFS-PETITIONERS' REPLY TO DEFENDANTS-RESPONDENTS' OPPOSITION TO ISSUANCE OF A WRIT OF MANDAMUS with the Clerk of the Court by using the electronic filing system.

/s/ Jennifer Edison-Strekal

Jennifer Edison-Strekal
An Employee of Thierman Buck, LLP