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Clerk of Supreme Court

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10 **NRAP 27(e) Certificate of Counsel**

11 State of Nevada)
12) ss
13 County of Washoe)

14 I, Mark R. Thierman, hereby declare and state:

15 1. I am an attorney at law licensed to practice before all Courts located in Nevada
16 and California. I am the senior partner of the law firm of Thierman Buck, LLP. Thierman Buck
17 is counsel of record to Appellants herein.

18 2. I hereby certify to this court the facts upon which immediate relief is requested
19 pursuant to the Nevada Rules of Appellate Procedure Rule 27(e), or if such relief is not available,
20 in support of a motion for expedited briefing scheduled in this case.

21 **NRAP 27(e) (3) A: PARTIES AND COUNSEL OF RECORD**

22 3. Appellants AMETHYST PAYNE, IRIS PODESTA-MIRELES, ANTHONY
23 NAPOLITANO, ISIAAH PAVIA-CRUZ, VICTORIA WAKED, CHARLES PLOSKI,
24 DARIUSH NAIMI, TABITHA ASARE, SCOTT HOWARD, RALPH WYNCOOP, ELAINA
25 ABING, and WILLIAM TURNLEY (“Appellants”) are represented by Mark R. Thierman,
26 Joshua Buck, Leah Jones, and Joshua R. Hendrickson of the law firm of Thierman Buck LLP,
27 with offices are located at 7287 Lakeside Drive, Reno, Nevada 89511 (group email
28 internal@thiermanbuck.com). The firm telephone number is (775) 284-1500.

1 4. Appellees STATE OF NEVADA *ex rel* NEVADA DEPARTMENT OF
2 EMPLOYMENT, TRAINING AND REHABILITATION (DETR), HEATHER KORBULIC¹ in
3 her official capacity only as Nevada Director of Employment, Training and Rehabilitation,
4 DENNIS PEREA in his official capacity as Deputy Director of DETR, and KIMBERLY GAA
5 in her official capacity only as the Administrator for the Employment Security Division (ESD)
6 were represented in the District Court by Greg D. Ott, Senior Deputy Attorney General of the
7 State of Nevada, whose office is located at 100 North Carson Street Carson City, NV 89701
8 (email: Gott@ag.nv.gov, telephone: (775) 901-3640) and Robert A. Whitney, Deputy Attorney
9 General for the State of Nevada whose offices are located at 555 E. Washington Ave., Suite 3900
10 Las Vegas, NV 89101 (email rwhitney@ag.nv.gov and telephone (702) 328-7309). Upon
11 information and belief, counsel for Appellee will remain the same on appeal.

12 5. The District Court has not granted any pro se litigant permission to intervene or
13 join in this lawsuit.

14 **NRAP 27(e) (3) B: FACTS SHOWING THE EXISTENCE AND NATURE OF THE**
15 **CLAIMED EMERGENCY**

16 **A. Evidence of Irreparable Harm to Many from DETR's Continued Payment Delay**

17 1. All Parties, including the District Court, acknowledged that the COVID-19
18 pandemic caused great levels of unemployment and terrible economic consequences for
19 Nevadans in the last eight months. In every hearing on this matter, the District Court has
20 acknowledged the seriousness of the problem.

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23 ¹ DETR has had a revolving door of personnel over the course of the last six months. When
24 Plaintiffs first filed their lawsuit on 5/13/20, the named Defendants were State of Nevada/DETR,
25 Heather Korbulic in her official capacity only as Director of DETR, Kimberly Gaa in her official
26 capacity only as Administrator for the Employment Security Division and DOES 1-100. Ms.
27 Korbulic took over for previous interim Director Tiffany Tyler-Garner, who was appointed by
28 Governor Sisolak 1/17/20 but resigned in April 2020. Ms. Korbulic resigned 6/19/20. Ms. Gaa
was placed on extended leave with no reason given on 9/4/20. Previous Deputy Administrator
of the Employment Security Division, Jeffrey Frischmann, joined Elisa Cafferata on 9/4/20 to
take over the leadership of DETR. See <https://www.ktnv.com/13-investigates/detr-to-announce-leadership-changes-in-the-coming-days-insiders-say-a-top-administrator-is-out> Accordingly,
the Complaint has yet to be amended to update the named Defendants in this action.

1 2. Since filing of this lawsuit, I or my firm have received several thousand emails,
2 Facebook “messenger” texts, web messages, in person pleas, and other communications from
3 claimants or their family members speaking on their behalf, complaining about dire financial and
4 social consequences to them, personally, resulting from Appellees’ failure to pay Unemployment
5 Compensation benefits in a timely manner. My office has supplied the Special Master with
6 copies of more than five thousand pages of such emails and there are numerous postings on
7 Facebook groups and web pages detailing the impact of Appellees’ failure to pay unemployment
8 benefits promptly.² Attached hereto as Exhibit A are a tiny fraction of very recent unsolicited
9 emails we received after this office submitted emails to the Special Master and after Appellants
10 filed supporting emails to the second motion for contempt, which were not included in his report.
11 These emails describe the effect on individuals resulting from the delay in receiving
12 unemployment compensation benefits from DETR during this pandemic. Emails and calls
13 continue to come in daily. The several Facebook pages and discussion groups like “Nevada -
14 Pandemic Unemployment Assistance (PUA),” “Nevada PUA” and “PUA- HELP FOR
15 NEVADA” contain similar remarks, with the largest group containing over 17,600 members.
16 See <https://www.facebook.com/groups/nevadapua/about> (last visited 10/9/20).

17 3. Of the many emails received by this office and the Special Master concerning this
18 case, the majority are from claimants who have endured eight months or more without a paycheck
19 and are in imminent danger of becoming homeless/foreclosed upon, loosing child custody for
20 failure to provide adequate housing, unable to pay credit card bills/ruined credit, losing their
21 means of making a living should they be allowed to return to work because they are unable to
22 make car payments/repossessions, and many who are suffering severe depression, loss of self-
23 esteem, and even suicidal ideation. As Uber and Lyft drivers return their cars for lack of loan re-
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25 ² The Court can take judicial notice of the findings of the Special Master, and/or these emails and
26 other unsolicited communications from the public, if not for the truth of the individual claims,
27 then for the fact that so many individual Nevadans perceive that they are suffering economic
28 distress as a result of being unemployed and without income for a long period (now 22 weeks
and counting) of time and have not yet received from DETR the unemployment compensation
that they feel entitled to under the 2020 Coronavirus Aid, Relief and Economic Security Act
(CARES Act).

1 payment, they also loose the tools of their trade. As individuals fail to pay credit card bills, their
2 credit ratings are decreased. If people are sent notices of evictions, whether or not eviction
3 proceedings are begun, their credit scores are reduced, and it becomes even more difficult to rent.
4 And if the individual has a poor credit report, future employers will not hire. Entertainers lose
5 their audiences, others their customer base. Thus, begins the spiral down to perpetual
6 unemployment and poverty.

7 4. It is a fact not in dispute that hundreds of thousands of Nevadans are suffering
8 economic stress and DETR has not actually paid them unemployment compensation under the
9 CARES Act. DETR’s claim of generalized fraud, based solely on unconfirmed non-specified
10 indicia, is not specific to any claimant, is miniscule compared to the amount of money being
11 withheld from so many people, and often has a true, verifiable, non-fraud explanation once the
12 claimant is contacted to explain and/or to provide additional evidence (such as uploading a copy
13 of their Nevada real driver’s license, front and back of social security card, utility or some other
14 bill, as well as tax documents, repeatedly, in response to identity verification requests).³

15 5. Appellees are unsure if there will be any federal money available to pay the extra,
16 retroactive \$600 per week of Federal Pandemic Unemployment Compensation if funds are not
17 claimed before the time this case can be resolved in the normal course, especially since the
18 President has just signed an executive order which top White House economic advisor Larry
19 Kudlow announced on CNN cable television on Sunday August 9, 2020, would be funded from
20 “re-purposed” unclaimed money.

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26 ³ For example, DETR issued over 50,000 mass denials for “fraud” automatically based upon “out
27 of state” or “out of Country” IP addresses. Not only do federal Department of Labor guidelines
28 prohibit automatic mass denials for fraud (UILP 01-16 change 1, supra), but all cell phones and
tablets (Ipads, etc) use a dynamic IP address, randomly assigned, which typically shows an out
of area location that is not related to the place where the phone is located. VPN’s installed for
security (like for Zoom meetings) use a dynamic IP address as well.

1 6. DETR has also indicated that the federally mandated four to six week \$300
2 weekly unemployment boost, which was approved in August 2020, will not be paid out by DETR
3 for eligible claimants until sometime the end of October.⁴

4 7. According to DETR’s Research and Analysis Bureau, Nevada had, at one point
5 the highest unemployment rate in the nation. As subheading C on pages 18 through 23 of the
6 July 27, 2020 Special Master’s Report entitled “Impact on jobs and economy” states:

7 In fact, Nevada Department of Employment, Training &
8 Rehabilitation (DETR) chief economist David Schmidt said that the
9 State’s April unemployment rate was 30.1 %, which is the highest
10 unemployment rate ever recorded for any state in any month,
11 including in the Great Depression.

12 *See also* May 22, 2020 article by RGJ, “Nevada’s 28.% unemployment rate eclipses entire U.S.
13 It’s worse than the Great Depression” at [https://www.rgj.com/story/news/2020/05/22/nevada-](https://www.rgj.com/story/news/2020/05/22/nevada-unemployment-rate-soars-28-2-state-down-244-800-jobs/5243949002/)
14 [unemployment-rate-soars-28-2-state-down-244-800-jobs/5243949002/](https://www.rgj.com/story/news/2020/05/22/nevada-unemployment-rate-soars-28-2-state-down-244-800-jobs/5243949002/) (last visited 10/9/20);
15 <https://www.bls.gov/web/laus/lauhsthl.htm> (last visited 10/9/20) stating Nevada’s rate of 13.2%
16 is the historically highest in the U.S.

17 8. As found by the Special Master Report at p. 19, the largest impact was felt in Las
18 Vegas, with an unemployment rate over 33% and a decline in employment near 21%. However,
19 no area of the state has been unaffected; the Reno and Carson City MSAs saw employment
20 declines near 10% and unemployment rates near 20%, while the rural micropolitan areas of the
21 state saw unemployment rates broadly ranging between 10% and 20%.

22 9. According to the Small Business Administration Office of Advocacy, as of 2020,
23 Nevada had 184,246 Small Businesses without Employees, *i.e.* self-employed individuals who
24 would be entitled to benefits by the Pandemic Unemployment Assistance program if they
25 suffered a loss of income as a result of the COVID-19 Pandemic. In 2016, there were 220,786
26 “nonemployer firms” in Nevada, according to the SBA Office of Advocacy, Nevada small

27 ⁴ *See*
28 [https://cms.detr.nv.gov/Content/Media/FEMA%20LWA%20Update%209_11_20%20PR%20FI](https://cms.detr.nv.gov/Content/Media/FEMA%20LWA%20Update%209_11_20%20PR%20FIN.pdf)
 [N.pdf](https://cms.detr.nv.gov/Content/Media/FEMA%20LWA%20Update%209_11_20%20PR%20FIN.pdf) (last visited 10/9/20).

1 business profile, Table 2 based upon the 2016 statistics of US Businesses, U.S. Census Bureau.
2 By 2019, I estimate that this number increased significantly as Nevada’s worker population
3 increased overall. If Nevada follows national averages, 40% of its working population is self-
4 employed.

5 10. According to DETR there have been nearly 1.19 million initial claims for
6 unemployment benefits filed in Nevada⁵ in a state with a workforce of about 1.49 million and a
7 general population of 3.08 million; during the pandemic Nevada’s unemployment compensation
8 benefit claims rate is 79.8% of the workforce, or 38.6% of Nevada’s total population during the
9 pandemic.

10 11. Despite DETR’s claims to the contrary, the number of applicants for
11 unemployment compensation benefits in Nevada is totally consistent with the report of the Labor
12 Force Statistics from the Current Population of the United States Bureau of Labor Statistics as of
13 Friday, October 2, 2020 which estimates that nationally, “The employment- population ratio, at
14 56.6 percent, changed little over the month but is 4.5 percentage points lower than in February.”⁶
15 Interestingly, DETR’s latest report *does not* provide any data on pending claims, claims eligible
16 for the appeal process, or claims that have been rejected due to DETR misinterpretations of the
17 law – the dispositive number in this litigation. Since that time, Appellants estimate there are
18 about 400,000 or more unresolved pending application to DETR for unemployment
19 compensation benefits.

20 12. The exact numbers of backlogged claims and length to resolution are in dispute,
21 because DETR excludes every denial of benefits as “resolved” even if under appeal (no matter
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24 ⁵ See Oct. 9, 2020 press release stating that since March 14, 2020, 710,347 UI claims have been
25 filed and 483,572 PUA claims have been filed, which equates to 1,193,919 claims. See
26 [http://nevadaworkforce.com/Portals/197/UI%20Monthly%20Claims%20Press%20Release/2020](http://nevadaworkforce.com/Portals/197/UI%20Monthly%20Claims%20Press%20Release/2020/UI_Current_Release.pdf)
27 [/UI_Current_Release.pdf](http://nevadaworkforce.com/Portals/197/UI%20Monthly%20Claims%20Press%20Release/2020/UI_Current_Release.pdf) (last visited 10/9/20) a copy of which is attached as Exhibit B, “DETR
28 2020.10.09 Report”.

⁶ See <https://www.bls.gov/charts/employment-situation/employment-population-ratio.htm> (last
visited 10/9/20).

1 how frivolous a blanket denial may be).⁷ But using DETR’s most favorable official
2 pronouncements, DETR indicates it will take more than 266 days or more than 8 months to
3 resolve these claims, most of which were pending for 6 to 8 months already, assuming no new
4 claims are filed, which is a highly unlikely scenario. Even drinking DETR’s statistical Kool-
5 Aid, for 80,000 unemployed Nevada citizens, eight more months of delay on top of 6 to 8 months
6 of previous delay, is simply intolerable. In other states, it takes 8 weeks to process of claim for
7 unemployment benefits during the onslaught of this pandemic, while Nevada has already taken
8 6 to 8 months, and seeks to delay yet another 8 months. *See* Patrick McGeehan, “I Cry Night
9 and Day”: How It Took One Woman 8 Weeks to Get Unemployment, (New York Times, May
10 8, 2020),⁸ cited in *Islam v. Cuomo*, 20-CV-2328 (LDH), at *11 (E.D.N.Y. July 28, 2020).

11 13. Plaintiff-Appellant RALPH WYNCOOP, a 70+ year old veteran, who used to
12 make over \$70,000 a year as a Lyft driver is being sued for re-possession of his car, thereby
13 destroying his only chance to climb his way back to middle class after this pandemic is over and
14 tourists return to Las Vegas. He has uploaded his identity and other documentation repeatedly
15 and still can’t get a hearing on a denial based on “claim could not be validated with the
16 information provided”, whatever that may mean. Prior, the original claim was pending almost 8
17 months without a decision.

18 14. Plaintiffs-Appellants ELAINA ABING and TABITHA ASARE both initially did
19 not receive benefits, then did, and now the benefits have ceased, without DETR stating a reason.
20 Ms. Asare has been threatened by DETR that she must pay back her benefits without any appeal
21 mechanism presently available.

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24 ⁷ Since DETR’s appeal mechanism was not even partially operational until July 18, 2020, and is
25 still plagued with issues, most of the cases not appealed would be eligible for court review as
26 having exhausted all administrative remedies. DETR typically only allows for 11 days to appeal,
27 and almost all the denials prior to August 1, 2020 did not have an 11 days to appeal specified in
28 the notice of determination.

⁸ <https://www.nytimes.com/2020/05/08/nyregion/unemployment-benefits-ny-coronavirus.html>
last visited October 3, 2020.

15. These three named plaintiffs-appellants have an active claim against DETR.⁹ In addition, all the remaining plaintiff-appellants were experiencing the harm expressed in the and one or more has standing to seek redress for each of the proposed orders herein.¹⁰

16. The State of Nevada unemployment compensation insurance trust fund has almost no reserves remaining.¹¹ There is a resurgence of COVID-19 cases in Nevada.¹² Most business as well as the Courts remain closed to normal visitation as a matter of public safety.

17. According to the Nevada Independent, and based upon DETR's own figures, as of July 20, 2020, DETR has paid just 114,124 out of 325,732 gig workers,¹³ or 35%, slightly more than one third of the applicants, and not all of them are getting the full amount they claim

⁹ Even when an appeal is moot, however, this court may consider it if it involves a matter of widespread importance that is capable of repetition, yet evading review. *Traffic Control Servs. v. United Rentals*, 120 Nev. 168, 171-72, 87 P.3d 1054, 1057 (2004) (recognizing that the capable-of-repetition-yet-evading-review exception to the mootness doctrine applies when the duration of the challenged action is "relatively short" and there is a "likelihood that a similar issue will arise in the future" (*citing Binegar v. District Court*, 112 Nev. 544, 548, 915 P.2d 889, 892 (1996) (noting that the matter must be important), and *Langston*, 110 Nev. at 344, 871 P.2d at 363 (pointing out that facts unique to a particular party will not give rise to the mootness exception)).

¹⁰ The District Court rejected DETR's tacit of awarding benefits to the named Plaintiffs only after they filed suit because DETR's behavior is "capable of repetition, yet evading review." *Personhood Nevada v. Bristol*, 126 Nev. Adv. Op. No. 56, 55429 (2010), 245 P.3d 572 (Nev. 2010); *see also Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). In *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 753-755 (1976), *Sosna v. Iowa*, 419 U.S. 393 (1975) *United States Parole Commission v. Geraghty*, 445 U.S. 388, 398-99, 100 S.Ct. 1202, 1209-10, 63 L.Ed.2d 479 (1980). Courts have applied the "capable of repetition, yet evading review" doctrine and allowed a plaintiff to continue in litigation despite lack of a current personal stake when the named plaintiff had a personal stake at the outset of the action and where the claim may arise against with regard to that plaintiff. *Pottinger v. City of Miami*, 720 F. Supp. 955, 959 (S.D. Fla. 1989).

¹¹ *See* http://nevadaworkforce.com/Portals/197/UI%20Monthly%20Claims%20Press%20Release/2020/UI_Current_Release.pdf at p. 9-10.

¹² *See* <https://www.nytimes.com/interactive/2020/us/nevada-coronavirus-cases.html> (last visited 10/9/20).

¹³ *See* <https://thenevadaindependent.com/article/judge-orders-detr-to-start-paying-more-pua-claimants-but-stops-short-of-granting-all-requests-made-in-lawsuit> (last visited 10/9/20).

1 due for all the weeks that they claimed, and the rate of claim payment for traditional W-2 wage
2 earners is not more than 50%.

3 18. According to an article in the July 31, 2020 by Michelle Rindels in the Nevada
4 Independent,¹⁴ based upon statements from DETR officials, “Nevada’s unemployment situation
5 continues to worsen, with near-peak levels in the number of people filing claims week after week
6 and an ‘insured unemployment’ rate that’s rivaling Puerto Rico for worst of any state or
7 territory.” I understand the term “insured unemployment” to mean those individuals applying
8 for traditional Unemployment Insurance rather than the PUA program for gig workers.

9 19. The July 31, 2020 article, based upon DETR’s own reported numbers, reveals that
10 DETR is processing only 1,000 new claims a week. ***At this rate, it would take DETR***
11 ***approximately 2.5 more years to adjudicate all the outstanding claims (assuming no new***
12 ***claims, which is unlikely and would further delay resolution of all claims).***

13 20. At the July 7, 2020 hearing in the District Court, Appellees presented a table
14 which grouped the claim status of 247,030 initial claims, of which 139,107 or 56%, remain
15 unpaid. See Exhibit C attached hereto, “Minutes of Hearing at Ex. A.” The average amount of
16 money per claim paid was \$3,178.61, which means DETR has \$442,166,303.16, or
17 approximately half a billion dollars, in pending claims unpaid.

18 21. At the hearing, DETR stated that 45,328 claims were denied PUA coverage on
19 the grounds that the claimant had UI program eligibility, but DETR would not start paying
20 claimants under that other program despite this statement of eligibility. These individuals all
21 revived a letter titled in the upper right hand corner “PANDEMIC UNEMPLOYMENT
22 DISQUALIFYING DETERMINATION” in which DETR states the only disqualifying event is
23 that “We have determined that you have other program eligibility available” which in most cases,
24 the other program is regular unemployment insurance.

25 22. In addition, an unknown number of additional claimants have received a letter that
26 is titled in the upper right hand corner “PANDEMIC UNEMPLOYMENT QUALIFYING
27

28 ¹⁴ <https://thenevadaindependent.com/author/michelle-rindels> (last visited August 8, 2020).

1 DETERMINATION” letter which stated “We have determined that your claim is APPROVED
2 as you meet the qualifications required by the Coronavirus Aid, Relief, and Economic Security
3 (CARES) Act of 2020 for Pandemic Unemployment assistance” or words to that effect, but have
4 not received any PUA benefits.

5 23. A sample of a “PANDEMIC UNEMPLOYMENT QUALIFYING
6 DETERMINATION” letter is hereto attached to Appellants Emergency Motion pursuant to
7 NRAP 27(e) (filed concurrently herewith) as Exhibit A and “PANDEMIC UNEMPLOYMENT
8 DISQUALIFYING DETERMINATION” letter is hereto attached as Exhibit B.

9 24. The vast majority of such letters refer to eligibility in the regular Unemployment
10 Compensation program (“UC” also known as regular “Unemployment Insurance” or regular
11 “UI”) but it is possible a few letters address eligibility in one of the following unemployment
12 compensation programs instead: Pandemic Emergency Compensation under Section 2107 of
13 CARES (“PEUC”), Extended Benefits (“EB”), Short-Time Compensation (“STC,”) Trade
14 Readjustment Allowances (TRA), Disaster Unemployment Assistance (DUA), or
15 Unemployment Compensation for Federal Employees (UCFE). Unemployment Compensation
16 for Ex-Servicemembers (UCX)), and/or the Self Employment Assistance (SEA) program. All of
17 these programs are administered by DETR and upon information and belief, they all pay weekly
18 based upon the same formulae, so that there is no difference in the eyes of the claimant which
19 program pays.

20 25. Also, DETR’s reduction of PUA benefits based upon small amounts of W-2
21 earnings which produces a lower UI benefit than PUA amounts due from 1099 and other non-
22 wage income is contrary to DOL guidelines like Attachment II, UIPL No. 16-20 Change 1, p. II-
23 1 attached as Exhibit D.

24 26. By law, the PUA program weekly payments are the same as the UI program
25 payments. And both programs are administered by DETR exclusively.

26 27. In addition, despite DETR’s written decision that the claimant was eligible for
27 payment under the PUA program, or under the letter that says they are ineligible for benefits
28 under the PUA program because they are eligible for benefits under another program, UI, DETR

1 has not and will not pay a claimant the \$600 per week under Federal Pandemic Unemployment
2 Insurance Program or FPUC which is due every person who qualifies for any program of
3 unemployment compensation during the relevant time, nor has it started to pay the \$300 boost.

4 28. But because DETR could not decide which of two programs to pay under, despite
5 having declared the reason for not paying PUA was eligibility for UI, DETR pays nothing — *no*
6 *PUA, no UI, and no FPUC.*

7 29. As of July 7, 2020, DETR represents more than 45,000 claimants have not
8 received in excess of half a billion dollars because of this PUA/UI “whirlpool” as the District
9 Court called it. *See Exhibit C, Minutes of Hearing at Ex. A.*

10 30. Appellants estimate that as August 9, 2020, the total number of individuals who
11 are not receiving any unemployment compensation despite having received either a "
12 “PANDEMIC UNEMPLOYMENT QUALIFYING DETERMINATION” or a “PANDEMIC
13 UNEMPLOYMENT DISQUALIFYING DETERMINATION” as described above is about
14 70,000 individuals.

15 31. In the last few weeks, DETR has issued (*en mass*) denial letters without regard to
16 the merits, arguably to increase the numbers of claims DETR says it has processed. Such a mass
17 denial is itself a violation of due process and an arbitrary and capricious act by DETR;
18 astoundingly, the basis stated in the majority of those letters is that the claimant does not qualify
19 for PUA benefits, because the claimant *is eligible* for UI benefits. But DETR refuses to pay the
20 UI benefits DETR says in this letter that DETR has determined that the claimant was eligible to
21 receive. In many cases, the claimant has already been denied UI benefits, so the claimant is again
22 tossed into the PUA/UI whirlpool.

23 32. Contrary to DETR’s position, the DOL solves and/or avoids the PUA/UI
24 whirlpool by holding that a disqualification from UI program (such as an unmet requirement to
25 work for so many weeks for wages) operates as an determination of ineligibility for UI, thus
26 making the claimant eligible for PUA even if the claimant has an active, but inaccessible, UI
27
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1 account balance. *See* Exhibit E, questions 30 through 35 of Attachment I of the UIPL No. 01-
2 16.¹⁵

3 33. In other cases, the claimants’ file simply says “under review” or “processing” but
4 no reason for denying or delaying benefits is provided. And despite, as of today, Friday, October
5 9, 2020, six-plus months (28 weeks) having passed from the date that the State of Nevada
6 executed an agreement with the United States Department of Labor to perform PUA program
7 administration, and almost 25 weeks and 1 day since the PUA website application process went
8 “live” on May 16, 2020, DETR has not made payments, nor has it provided any working
9 mechanism to appeal from DETR’s decision not to decide.

10 34. And although DETR says the website appeal link became functional on July 18,
11 2020, most denial letters required appeals to be filed within 11 days of issuance—an impossibility
12 in the vast majority of cases—and a more than likely fatal deterrent to tens of thousands of
13 claimants who could have and must still be able to appeal.

14 35. Every week that goes by more and more Nevadans will suffer harm to the point
15 that they may never emerge from the downward spiral of poverty. According to a 2017 report by
16 employment website CareerBuilder,¹⁶ and republished in the January 9, 2019 of Money,¹⁷ nearly
17 80 percent of American workers (78%) say they are living paycheck to paycheck. These Nevada
18 workers have suffered 28 weeks without pay. By the time this appeal can be heard by this Court
19 in the normal course, the right to timely payment “when due” will already have been lost.

20 **B. The Requested Relief Will Avoid Further Irreparable Harm.**

21 36. At the July 7th hearing, DETR presented a table which grouped the claim status
22 of 247,030 initial claims, of which 139,107 or 56%, remain unpaid. *See* Ex C, “Minutes of

23 ¹⁵ *See* Attachment I to UIPL 16-20 Chang 1 at
24 https://wdr.doleta.gov/directives/attach/UIPL/UIPL_16-20_Change_1_Attachment_1.pdf
(last visited 10/9/20).

25 ¹⁶ <http://press.careerbuilder.com/2017-08-24-Living-Paycheck-to-Paycheck-is-a-Way-of-Life-for-Majority-of-U-S-Workers-According-to-New-CareerBuilder-Survey> (last visited July 9, 2020).

26 ¹⁷ [https://www.cnn.com/2019/01/09/shutdown-highlights-that-4-in-5-us-workers-live-paycheck-to-paycheck](https://www.cnn.com/2019/01/09/shutdown-highlights-that-4-in-5-us-workers-live-paycheck-to-paycheck.html#:~:text=Nearly%2080%20percent%20of%20American,report%20by%20employment%20website%20CareerBuilder)
27 [html#:~:text=Nearly%2080%20percent%20of%20American,report%20by%20employment%20website%20CareerBuilder](https://www.cnn.com/2019/01/09/shutdown-highlights-that-4-in-5-us-workers-live-paycheck-to-paycheck.html#:~:text=Nearly%2080%20percent%20of%20American,report%20by%20employment%20website%20CareerBuilder) (last visited July 8 2020).
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1 Hearing at Ex. A.” The amount of money per claim paid is \$3,178.61 which means that DETR
 2 has \$442,166,303.16, or approximately half a billion dollars, in pending claims. Modified to
 3 include percentage of unpaid claims represented by each subcategory, the DETR’ Chart looks
 4 like this:

Claim Status	PUA Initial Claims	PUA Weekly Claims Filed	Percent Unpaid
A: Claim Paid	107,923	1,466,063	
B: Failed Identity Check	17,179	128,132	12%
C: Apparent UI Wages	45,328	485,176	33%
D: No Weeks Filed	14,548	---	10%
E: Out of Country	2,830	35,139	2%
F: Ip Issue	20,786	258,718	15%
G: Recent Activity Stop	23,912	298,605	17%
H: Other Outstanding Issue	5,511	62,783	4%
I: No Detail	9,013	94,711	6%

13 37. “Category D – No weeks filed” is in part due to DETR blocking any claimant
 14 from filing weekly job availability reports after DETR has determined that the claimant is not
 15 eligible for PUA assistance. This can and is being corrected, and Appellants understand that
 16 claimants can now enter missing weeks retroactively, yet still are not being paid.

17 38. Category B- Failed Identity Check” is now under review by DETR since so many
 18 of the claimants uploaded copies of all passports, Nevada “real” Drivers Licenses, Social Security
 19 Cards, tax documents, bills addressed to them, and were still told that they failed the identity
 20 check. The new rapid response team lead by Ms. Barbara Buckley is supposed to have fixed this
 21 issue yet claimants are still unable to resolve this rather easy issue, quickly through direct review
 22 of what documents have actually been uploaded or what exactly is missing.¹⁸

23 39. In addition, as a result of this lawsuit, DETR was able to identify at the July 30,
 24 2020 hearing, approximately 3,000 claimants who started receiving payments by DETR but

26 ¹⁸ Others, like Plaintiff Wyncoop have been denied benefits on the basis that his “claim could not
 27 be validated with the information provided” even though he has downloaded his drivers’ license,
 28 Veteran’s Administration Card, front and back of his social security card, 2018 taxes prepared by
 a CPA, as well as Geico and Direct TV bills with current Nevada address a multiple times (they
 actually even appear in his PUA portal).

1 whose payments stopped without sufficient reason for failing to follow the mandates of the
2 Attachment to Unemployment Insurance Program Letter (“UILP”) 1145 by continuing payments
3 until an impartial hearing officer or administrative law judge determines after notice and a fair
4 hearing, that payments were not due initially. As of this date, these individuals have not yet
5 received any payment.

6 40. The largest single category with 33% of all denials is in category “C: Apparent
7 UI Wages” and appellant estimates that the second largest group would be all those who received
8 a favorable “PANDEMIC UNEMPLOYMENT QUALIFYING DETERMINATION” letter but
9 no payments.

10 41. Each person in category C received from DETR a letter entitled “PANDEMIC
11 UNEMPLOYMENT DISQUALIFYING DETERMINATION” which stated as follows:

We have completed a review and Investigation of your claim for
Pandemic Unemployment Assistance referenced above. We have
determined that you have other program eligibility available. PUA
benefits can only be compensated when no other program eligibility
is available. You are directed to contact the Nevada Unemployment
Insurance office regarding your potential eligibility for a regular
claim.

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17 42. As of the date of this chart DETR says there are 45,328 individuals in this category
18 with a claim for 485,176 weeks of assistance. The number will have increased since DETR has
19 made more disqualification decisions based upon this fact, the number of weeks has increased,
20 and Appellants are unaware of anyone actually getting UI benefits from DETR since being
21 disqualified from PUA benefits on the grounds of UI benefit eligibility.

22 43. DETR does not have a category for all those who receive a “PANDEMIC
23 UNEMPLOYMENT QUALIFYING DETERMINATION”, but one assumes that payment was
24 not made for one of the other reasons listed on DETR’s chart, on the theory DETR reserves the
25 right to re-evaluate and redetermine eligibility retroactively without a hearing or other due
26 process requirements.

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1 44. Appellants estimate that about one third of the 93,779 unpaid claims remaining
2 were sent a “PANDEMIC UNEMPLOYMENT CLAIM QUALIFYING DETERMINATION”
3 which is another 31,260 unpaid claims with favorable eligibility determinations.

4 45. The lawsuit was first filed on May 12, 2020 and amended on June 22, 2020. A
5 renewed motion for writ of mandate was filed by Appellants on July 16, 2020.

6 46. The sole purpose of this action is to ask the Court to command DETR to perform
7 its duty quickly.

8 47. This lawsuit seeks a writ of mandate commanding the Appellees to perform its
9 clear duty pursuant to the federal Social Security Act, 42 U.S.C. § 503(a)(1) (3), to provide a
10 method of administration of unemployment compensation “reasonably calculated to insure full
11 payment of unemployment compensation when due.”

12 48. The term “when due” is a term of art, defined by United States Supreme Court
13 decision in *California Dep't of Human Resources Dev. v. Java*, 402 U.S. 121, 91 S.Ct. 1347, 28
14 L.Ed.2d 666 (1971), to mean “at the earliest stage of unemployment that such payments [are]
15 administratively feasible after giving both the worker and the employer an opportunity to be
16 heard.”

17 49. The earliest stage of the unemployment application process has been clarified to
18 mean as soon as the state agency, like DETR, makes an initial determination of eligibility. As in
19 *Java* itself, the initial “opportunity to be heard” provision is satisfied by informal telephonic
20 inquiry to the opposing party.

21 50. DETR’s clear duty under law is to pay unemployment compensation “when due”
22 as quickly as possible unemployment compensation so that Claimants who are eligible for such
23 payments receive them in time to avoid the adverse consequences of not having an income for
24 many weeks, and so that these same individuals can pay their own bills, and can purchase food,
25 shelter, and the necessities of life for themselves and their families.

26 51. Starting on the bottom of page 32 of Plaintiffs’-Petitioners’ Renewed Motion and
27 Supplemental Argument in Support Of Writ Of Mandamus filed July 16, 2020, Appellants state:

28 DETR makes an eligibility “determination” when it states, “We
 have determined that you have other program eligibility available.”

Because payment is “due” immediately after a “determination of eligibility” has been made, and the blocking program is administered by the same state agency as the PUA program (DETR), the blocking program referenced in the letter (usually UI) should start paying the claimant immediately. If the claimant is not entitled to immediate payment under the other program, then the disqualifying letter determination is mistaken, and unless there is some other issue presented by the letter, the claimant should be paid pursuant to the PUA program. Either one program pays or the other. There is no middle ground.

52. Based upon the United States Supreme Court decision in *California Dep't of Human Resources Dev. v. Java*, 402 U.S. 121, 91 S.Ct. 1347, 28 L.Ed.2d 666 (1971), and its progeny, that once DETR makes an initial eligibility determination in the claimants' favor, due process requires that DETR may not cease making those payments, unilaterally and without fair notice, and opportunity to have a hearing before an impartial hearing officer or administrative law judge.

53. It is Appellants position that there is no logical distinction between making an eligibility determination in writing and actually making payments to invoke the property right and due process protections under the *Java* case. Therefore, once DETR has determined eligibility in favor of the claimant, payment must begin and cannot be stopped prior to giving notice, and an opportunity to be heard before an impartial hearing officer.

54. As subsequent cases hold, the initial determination of eligibility must be made in a timely manner. *Fusari v. Steinberg*, 419 U.S. 379, 387-88 (1975) (“Both the statutory and constitutional questions are significantly affected by the length of the period of deprivation of benefits. The basic thrust of the statutory ‘when due’ requirement is timeliness.” (footnotes omitted)). It is unconstitutional for DETR to issue an “open” letter of eligibility, constantly re-considering the initial eligibility determination, and making a post determination decision retroactive just to avoid the constitutional due process hearing requirements.

55. A decision needs to be made quickly, which was done in this case by either of the two letters of eligibility. As stated in *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975):

In this context, the possible length of wrongful deprivation of unemployment benefits is an important factor in assessing the

impact of official action on the private interests. Cf. *Arnett v. Kennedy*, 416 U.S. 134, 168-169 (1974) (opinion of POWELL, J.); *id.*, at 190, 192 (WHITE, J., concurring in part and dissenting in part). Prompt and adequate administrative review provides an opportunity for consideration and correction of errors made in initial eligibility determinations. Thus, the rapidity of administrative review is a significant factor in assessing the sufficiency of the entire process.

56. Once DETR has made a determination of program eligibility due process requires DETR to pay the benefits under that program until that initial determination decision is reversed by an in partial hearing officer after a fair hearing. This doctrine is uniformly repeated in subsequent case law as well as various United States Department of Labor Unemployment Insurance Program Letters (“UIPL”) such as UIPL 1145 (Discusses implementation of 1971 Supreme Court *Java* decision and the “when due” requirements); UIPL 04-01 (Discusses payment of compensation and timeliness of determinations during a continued claim); UIPL 35-95 (Discusses that the Department's overall position is to promote methods of administration that ensure that UI applicants are afforded prompt and efficient service); UIPL 15-01(Requires the state to make a reasonable attempt to contact employers, claimants, or third parties to obtain information.). *See also, Glaser v. Emp't Sec. Div.*, 373 P.3d 917 (Nev. 2011) and *Whitney v. State, Employment Security Dep't*, 105 Nev. 810 (Nev. 1989) among other cases.

57. The fact that one of the employers in *Java* won their case with the agency on appeal, while the other lost, proves that even if DETR wins on appeal that the claimant wasn't eligible, DETR cannot retroactively apply that decision *ab initio* to justify not paying all claimants with an eligibility determination in UI or PUA immediately.

58. Under this view a state could take all the time in the world to decide that an unemployed person was entitled to compensation, provided that it got the check to him promptly when it did decide, but that is not what the courts require. As the stated in *Jenkins v. Bowling*, 691 F.2d 1225, 1229 (7th Cir. 1982):

Under this view a state could take all the time in the world to decide that an unemployed person was entitled to compensation, provided that it got the check to him promptly when it did decide. [¶] We

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think Congress had larger objects in view than the ministerial competence of state comptrollers. Both the humane (or redistributive) objectives of unemployment insurance and its macroeconomic objective (dampening the business cycle by keeping up the purchasing power of people laid off in a recession) require that unemployment compensation be paid as promptly as possible after the worker is laid off. Of course, he must meet the state's eligibility criteria but if the state delays indefinitely in deciding whether he has met them it defeats the objectives behind requiring prompt payment. It is true that section 303(a) is in Title III of the Social Security Act, which provides for federal financing of just the administrative expenses of unemployment compensation. *See* 42 U.S.C. § 502. But it does not follow that the concern behind section 303(a) is limited to administrative efficiency in a narrow sense. In fact, the legislative history suggests that the purpose of Title III in general and section 303(a) in particular was to furnish federal money for the administrative expenses of state unemployment compensation programs as an inducement to the states to adopt programs that would achieve the larger objects suggested above. *See* H.R. Rep. No. 615, 74th Cong., 1st Sess. 7, 9, 23 (1935).

59. There is little difference between the Illinois rule that those arrested for crimes against their employer must wait a court determination before receiving benefits held unconstitutional in *Jenkins*, and the practice of DETR here to unconstitutionally refuse to grant benefits upon a mere suspicion of fraud without checking with the claimant for at least an explanation or country proof of innocence. One of the "badges" of fraud DETR relies upon is when a claimant has an out of state IP address at time of application. Thousands of people use a VPN or use a cell phone with IP addresses outside Nevada at the same time they are standing in Nevada uploading their claim. Besides, being out of state at time of application is not the same thing as being out of state at time of initial unemployment. This is just one of the many false positive indications that had DETR followed the DOL guidelines on application of *Java* to claims contained in both Unemployment Insurance Program (UILP) attachment to 1145 and/or Attachment to UIPL No. 01-16, Change 1, it would have at least called the claimant to confirm that out of state statute prior to being unemployed. *See*, question 3, part I of to UIPL No. 01-16, Change 1.

1 60. Incredibly, DETR claims 75 % of all application—over 800,000—are
2 “fraudulent” but when denying claims that the District Court ordered to be paid, of the 3,000
3 claims DETR analyzed and initially denied for suspected fraud, not a single one was deemed to
4 fit within the “clear and convincing evidence” standard required by the Court’s order.

5 61. DETR is automatically and categorically denying payment for fraud *en mass* and
6 then reviewing individual cases by hand only after payment has stopped. The DOL regulations
7 require the opposite —DETR cannot stop payment or determine fraud until after an individual
8 case is personally reviewed by staff. As stated in question 2 of Part II of the UIPL No. 01-16
9 attachment change 1:

10 Q2. Are there any circumstances under which the state may issue a
11 fraud determination that is fully automated?

12 No. As stated in UIPL No. 01-16, because fraud determinations
13 generally “require the state agency to make determinations of
14 credibility and intent, determinations of fraud must be made by
15 agency staff. Such fraud determinations may not be made by an
16 automated system.”

17 62. And, as the DOL UIPL 01-16 states at 3:

18 In *California Department of Human Resources v. Java*, 402 U.S.
19 121 (1971), (Java) the U.S. Supreme Court held that a state’s law
20 and procedures must provide for paying benefits “at the earliest
21 stage of unemployment that such payments [are] administratively
22 feasible after giving both the worker and the employer an
23 opportunity to be heard.” This case is further explained in UIPL No.
24 1145. In order to give individuals an opportunity to be heard, as
25 required by *Java*, the state must contact the individual before an
26 overpayment is established. The requirements of Section 303(a)(1),
27 SSA, as interpreted by *Java*, mean that when a state identifies a
28 potential overpayment via a cross-match “hit,” such as from a state
prisoner database or other source, the state must take the initiative
to gather all relevant information through fact-finding and provide
the individual an opportunity to be heard before making an
overpayment determination or initiating recovery. In addition, when
there is a factual conflict between the information received from an
individual and other information received by the agency, from any
source, it is incumbent upon a state to make further contact with the
individual, inform him or her of the conflict, and allow an
opportunity for rebuttal. The State should determine that the
conflicting information appears valid and relevant to the eligibility

determination prior to contacting the individual and requesting additional information.

63. In this case, DETR relies on an unsubstantiated claim of massive fraud to justify its non-compliance with the due process requirements of *Java, supra*. On January 13, 2020, the United States Department of Labor issued “Change 1” to UIPL 01-16, to confirm and clarify, that so-called “fraud” is not an excuse for failure to follow the prior guidelines under *Java*. Of special relevance is Question 3 of Part I, which states as follows:

Q3. If the employer responds with what appears to be sufficient information before the end of the period of time provided by statute or regulation for the parties to respond, may the state adjudicate the overpayment and/or the fraud if the individual has not yet responded?

No. The determination of overpayment and/or fraud may not be made before “both parties” have had an opportunity to be heard. (See *California Human Resources Dept. v. Java*, 402 U.S. 121 (1971).) Implicit in this requirement is that the parties are notified of any potential issue(s) and given a reasonable amount of time to respond. Thus, if the response period has not ended, the other party’s (or parties’) opportunity to respond has not expired, and the state may not make an official determination until either all parties have responded, or the response period has expired.

64. In addition, as exemplified by the most recent report by the Inspector General of the U.S. Department of Labor,¹⁹ the DOL’s lack of guidance has resulted in the underpayment or delay of payment of Disaster Unemployment Assistance, which are under the same DOL regulations Congress has adopted by reference for states to administer the Pandemic Unemployment Assistance program at issue here. And “identity theft” is easily avoided by issuing paper checks, requiring banks to verify the identity. DETR’s cries of debarment are only in DETR’s imagination, and DETR cannot produce written specific DOL instructions to justify its actions of the person who is cashing them. In short, DETR’s excuses for non-performance is simply not justified.

¹⁹ <https://www.oig.dol.gov/public/reports/oa/2020/04-20-002-03-315.pdf>, DOL IG Report “ETA Should Do More to Assist Vulnerable States Prepare for Disaster Unemployment Assistance Program Implementation Report No. 04-20-002-03-315 (September 29, 2020)”

1 65. DETR cannot waive by unilaterally declaring its eligibility determination less
2 than what it says it is simply to avoid the restrictions of the due process clause of the Fifth and
3 Fourteenth Amendment to the United States Constitution. There is no such thing as a
4 “conditional” eligibility determination for purposes of due process because if there were, *Java*
5 would have been decided in favor of the State rather than the claimant.

6 66. As is stated in *Moore v. Miller*, 579 F. Supp. 1188, 1191-92 (N.D. Ill. 1983):

7 In Illinois the level of welfare benefits is designed to aid those
8 requiring help “in meeting basic maintenance requirements for a
9 livelihood compatible with health and well-being.” Ill.Rev.Stat., ch.
10 23, § 4-1. “For qualified recipients, welfare provides the means to
11 obtain essential food, clothing, housing, and medical care.”
12 *Goldberg v. Kelly*, 397 U.S. 254, 264, 90 S.Ct. 1011, 1018, 25
13 L.Ed.2d 287 (1970). An unjustified decrease in welfare payments
14 could deprive a recipient and the recipient's family of essential food,
15 clothing, shelter and health care. A subsequent payment by the state
16 cannot adequately compensate a recipient for being required to
17 subsist for a period in a manner incompatible with health and well-
18 being. For those in the “grip of poverty,” living on the financial
19 edge, even a small decrease in payments can cause irreparable harm.
20 This court is unable to hold otherwise. Findings of irreparable harm
21 in the reduction of welfare benefits have been upheld by the circuit
22 courts. *See Banks v. Trainor*, 525 F.2d 837, 842 (7th Cir. 1975), *cert.*
23 *denied*, 424 U.S. 978, 96 S.Ct. 1484, 47 L.Ed.2d 748 (1976); *Chu*
24 *Drua Cha v. Noot*, 696 F.2d 594, 599 (8th Cir. 1982), *mod. on denial*
25 *of reh.*, 701 F.2d 750 (8th Cir. 1983).

26 67. Subsistence benefits by definition are those that provide for the most basic needs.
27 As such, when the outright denial or undue delay in the provision of subsistence benefits is at
28 issue, courts have not hesitated to utilize the extraordinary remedy of preliminary injunctive
relief. *See, e.g., Willis v. Lascaris*, 499 F. Supp. 749, 759-60 (N.D.N.Y. 1980) (enjoining
reduction in food stamp allowances); *Hurley v. Toia*, 432 F. Supp. 1170, 1176-78 (S.D.N.Y.
1977) (granting preliminary injunction and staying enforcement regulation authorizing
termination or reduction of public assistance benefits prior to affording hearing), *aff'd*, 573 F.2d
1291 (2d Cir. 1977); *Boddie v. Wyman*, 323 F. Supp. 1189, 1193 (N.D.N.Y. 1970) (“There is no
doubt . . . that the differences sought in payments by the plaintiff are extremely important in
respect to these things daily and in that sense when the day passes the injury or harm that may

1 occur is irreparable.”), *aff’d*, 434 F.2d 1207 (2d Cir. 1970), *aff’d*, 402 U.S. 991, 91 S.Ct. 2168,
2 29 L. Ed. 2d 157 (1971

3 68. And DETR will not pay any claimant who is denied eligibility in one program
4 because of eligibility in another, the \$600 per week under Federal Pandemic Unemployment
5 Compensation (FPUC) program, and the \$300 weekly boost even though that money must be
6 paid if the claimant qualifies for any underlying program of unemployment compensation.

7 69. If Appellees are correct in their position that no determination is a violation of the
8 Social Security Act, 42 U.S.C. § 503(a)(1) (3), *Jenkins, Fusari*, and DOL guidelines then DETR
9 must exercise its discretion by issuing a determination of benefit eligibility, and an amount, as
10 long as the claimant’s application for benefits reveals a *prima facie* entitlement to benefits under
11 any program of unemployment compensation, and DETR shall pay such sums retroactively to
12 the date indicated on the initial application.²⁰

13 70. If Appellees are correct in their position that the denial of PUA because of a
14 determination by DETR of eligibility in UI means that the individual must start receiving UI
15 payments, then DETR can and must pay all 45,328 or more individuals in category C the full
16 amount they are otherwise due (not less than the weekly amount established by a monetary
17 determination or on the individual’s DETR webpage) immediately, as soon as the bank can issue
18 payment, without further investigation or delay.²¹

19 71. If Appellees are correct that an eligibility determination that states the claimant is
20 eligibility for PUA must result in payment under the PUA program, then DETR must start paying
21 about 70,000 more claimants immediately.²²

22
23 ²⁰ This paragraph covers Appellants’ category 1 “*No Timely Decision*” a tiny fraction of very
24 recent unsolicited emails in example are attached at Exhibit A.

25 ²¹ This paragraph covers Appellants’ category 4 “*Determination No Payment*,” category 5
26 “*Other Program Eligibility*,” and category 6 “*FPUC and Lost Wages Payments*,” respectively,
a tiny fraction of very recent unsolicited emails in example are attached at Exhibit A.

27 ²² This paragraph also covers Appellants’ category 4 “*Determination No Payment*,” category 5
28 “*Other Program Eligibility*,” and category 6 “*FPUC and Lost Wages Payments*,” respectively,
a tiny fraction of very recent unsolicited emails in example are attached at Exhibit A.

1 72. If DETR’s determination of eligibility in UI is not correct, then DETR has
2 determined that the individual should get paid PUA, which is the same weekly amount anyway.
3 In either case, these people can get paid, often more than 10,000 in arrears, which will reduce the
4 severity of the lack of payment considerably. If DETR pays from the wrong program initially,
5 then DETR can back charge itself for these funds so that the innocent claimant continues being
6 paid.²³

7 73. If DETR later determines that the claimant was not eligible initially for any
8 unemployment compensation, under well-established case law, the claimant must be able to file
9 an internal administrative appeal and DETR must continue to pay not less than the weekly benefit
10 amount until the due process appeal procedure is exhausted. DETR cannot simply retroactively
11 re-evaluate initial determination decisions forever without any sort of due process before
12 payments ceases.²⁴

13 74. Therefore, the quicker that this Court decides the PUA/UI whirlpool issue, the
14 quicker DETR can pay instantly more than the 45,000 (about 70,000) claimants it has issued a
15 letter of eligibility to, either Exhibit A or Exhibit B to the motion. At that point, this becomes
16 simple ministerial act of instructing the comptroller or treasury to start making payments. This
17 should take less than a few weeks.

18 75. From the beginning of this litigation and continuing to date, DETR insists it must
19 re-evaluate each claim *ab initio* separately. This will perpetuate the delay. It will also defeat the
20 process described in *Java* of deciding first, and appealing later, with payments being made in the
21 interim if the initial determination is favorable.

22 76. For the reasons stated herein, Appellees believe that there is a need for
23 extraordinary treatment of the hearing on this issue alone.

24 _____
25 ²³ This paragraph also covers Appellants’ category 4 “*Determination No Payment*,” category 5
26 “*Other Program Eligibility*,” and category 6 “*FPUC and Lost Wages Payments*,” respectively, a tiny fraction of very recent unsolicited emails in example are attached at Exhibit A.

27 ²⁴ This paragraph covers Appellants’ category 2 “*No Timely Appeal Mechanism*,” category 3
28 “*Start/Stop Without Due Process*,” respectively, a tiny fraction of very recent unsolicited emails in example are attached at Exhibit A.

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NRAP 27(e) (3) C: NOTICE

77. Opposing counsel were given notice of Appellants’ intent to file this Emergency Motion on August 5th, 2020 by both email directly and the filing of a draft copy of Appellant’s intended Rule 27(e) motion, which motion was discussed in open court with all parties on August 7, 2020 and again later that day via telephone with Mr. Ott for Appellees.

78. A copy of this NRAP 27(e) motion and this NRAP 27(e) certificate has been emailed to Appellee’s Counsel, with a file stamped copy to follow as soon as it is available from the clerk of this court.

AFFIRMATION

I have read the forgoing document entitled “NRAP 27(e) Certificate of Counsel” and declare that the facts stated therein are true and correct to the best of my knowledge and belief. *The undersigned does hereby affirm that the proceeding document to be filed in the Second Judicial District Court in the State of Nevada, County of Washoe, does not contain the social security number of any person.*

DATED: October 9, 2020

Respectfully Submitted,
THIERMAN BUCK LLP

/s/Mark R. Thierman
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