

THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants/Cross-Respondents,

vs.

STATE OF NEVADA *ex rel* NEVADA DEPARTMENT OF EMPLOYMENT, TRAINING AND REHABILITATION (DETR), HEATHER KORBULIC, in her official capacity only as Nevada Director of Employment, Training and Rehabilitation, DENNIS PEREA, in his official capacity only as Deputy Director of DETR, and KIMBERLY GAA, in her official capacity only as the Administrator for the Employment Security Division (ESD),

Respondents/Cross-Appellants.

Supreme Court No. 81763  
District Court Case No. CV20-0075  
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Elizabeth A. Brown  
Clerk of Supreme Court

**CROSS-APPELLANTS' RESPONSE TO APPELLANTS' EMERGENCY MOTION FOR IMMEDIATE RELIEF OR, IN THE ALTERNATIVE, AN EXPEDITED BRIEFING SCHEDULE**

## I. Introduction

As the economic impact of the COVID-19 pandemic continues to threaten the livelihood of many Americans, there is no lack of sympathy for the record-levels of Nevadans that are out of work and struggling to make ends meet. Unfortunately, the need to create special benefits for those disproportionately affected by devastating events like a pandemic also creates an opportunity for nefarious characters to exploit the system. And current circumstances—an astronomical increase in unemployment claims combined with the need to create new programs that provide benefits to those not covered by ordinary unemployment insurance—has made it exceedingly difficult, but ever more important, to identify and weed out those bad apples that seek to exploit the availability of these important benefits.

Despite Appellants' claims to the contrary, the continued threat of fraud in the unemployment system is real.<sup>1</sup> The Nevada Department of Training and Rehabilitation's (hereinafter "DETR") vigilance to identify fraud within the United States Department of Labor's (hereinafter "DOL") new program for Pandemic

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<sup>1</sup> On October 15, 2020, the U.S. Attorney for the District of Nevada announced that it filed charges against ten individuals for various offenses related to unemployment fraud. *Ten Defendants Charged For Unemployment Insurance Fraud*, Department of Justice, U.S. Attorney's Office, District of Nevada (Oct. 15, 2020), *available at* <https://www.justice.gov/usao-nv/pr/ten-defendants-charged-unemployment-insurance-fraud> (last viewed Oct, 16, 2020).

Unemployment Assistance (hereinafter PUA) may have saved them from compromising Nevada's ability to provide these much needed benefits altogether.

And despite the discovery of widespread unemployment fraud throughout the country validating DETR's cautious approach, Appellants continue to claim they know how to do DETR's job better than DETR does, seeking an order from this Court telling DETR how to "exercise its discretion." However, Appellants' emergency motion is not a proper vehicle for seeking such extraordinary relief.

And even considering the merits of Appellants' arguments, they fail to identify a clear legal duty that DETR is failing to fulfill, nor have they shown an arbitrary and capricious exercise of discretion. The initial fears of fraudulent claims were valid, and DETR continues to do its best to timely process claims while vigilantly working to abide by its obligation to avoid making overpayments of benefits or paying benefits on fraudulent applications under the agreement it entered with DOL at the end of March.

Cross-Appellants are nevertheless committed to bringing this litigation to a quick resolution and do not oppose the alternative request for expedited treatment.

## **II. Factual Background**

On May 12, 2020, Appellants filed a Petition for Writ of Mandamus and/or Class Action Complaint for Damages, challenging DETR's failure to have created a website or portal of any kind for self-employed individuals, 1099 employees, and

“gig workers” that are not entitled to normal unemployment benefits, who are out of work as a result of the COVID-19 pandemic, under DOL’s newly created PUA program. Exhibit 1. Thereafter, they amended their petition/complaint on June 22, 2020. Exhibit 2. Their amended petition/complaint set forth three causes of action: (1) a request for mandamus relief, (2) a violation of due process, and (3) a claim for backpay and damages, and a related prayer for relief. Exhibit 2 at 22-29.

The district court ordered Cross-Appellants to show cause why a writ of mandamus should not issue, appointed a special master, and set a hearing. Cross-Appellants responded to the court’s order. Exhibit 3. The special master prepared a detailed report. Exhibit 4. And Appellants filed a motion with “supplemental argument” in support of their request for mandamus relief. Exhibit 5.

At the conclusion of the show-cause hearing, the court orally announced its decision. It later issued a written decision, granting in part and denying in part the petition for writ of mandamus, solely ordering DETR to make payment to anyone that had initially received PUA benefits but subsequently had their payments discontinued without any sort of hearing. The district court otherwise denied relief, save for the fact that it expressed its desire to continue monitoring three issues.

The parties appealed, but this Court dismissed the appeal for lack of jurisdiction due to the district court’s identification of unresolved issues. The district

court has since issued an order that conclusively denied the remainder of Appellants' petition for writ of mandamus.

### **III. Argument**

#### **A. Appellant's request for what amounts to writ relief or summary resolution of the appeal by emergency motion is improper.**

Appellants attempt to seek extraordinary relief or a summary disposition of this appeal by motion is improper. If Appellants want extraordinary relief, they should file a proper writ petition under NRAP 21. Alternatively, Appellants have not cited any authority to support the proposition that they can circumvent the normal appellate process and litigate this case by motion.

Additionally, Appellants' use of the certificate required by NRAP 27(e)(3) to present additional argument is improper. "A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it." NRAP 27(a)(2). In contrast, NRAP 27(e)(3)(B) requires the moving party to identify "[f]acts showing the existence and nature of the claimed emergency"; it is not an opportunity for counsel to present additional argument in support of the motion. Accordingly, this Court should limit its consideration of the motion to argument made within the four corners of Appellants' motion.

**B. This Court's authority to grant relief is limited to crafting relief available to the parties before it.**

Appellants' motion begins with six discrete paragraphs identifying different forms of relief they seek from this Court. However, the motion lacks anything linking the six different requests for relief to the circumstances of any of Appellants. Without anything actually establishing that the Appellants named in this appeal are entitled to the various forms of relief sought in the motion, they are merely asking this Court to resolve non-justiciable abstract propositions and political questions about DETR's discretionary decision-making in responding to the devastating impact of the pandemic. *N. Lake Tahoe Fire v. Washoe Cnty. Comm'rs*, 129 Nev. 682, 310 P.3d 583 (2013) (applying the political question doctrine); *NCAA v. Univ. of Nevada, Reno*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981) ("Of course, the duty of every judicial tribunal is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before it.").

Nor is this Court currently in a position to provide relief to anyone not a party to this action. Although Appellants did alternatively plead their petition for writ of mandamus as a class action, they never sought class certification below. And an inquiry into whether a party has standing to seek relief and the propriety of class certification are separate issues under Nevada law. *Beazer Homes Holding Corp. v.*

*Dist. Ct.*, 128 Nev. 723, 291 P.3d 128 (2012). Thus, even if Appellants suffered injuries that would give them standing to seek all the relief they seek in the motion, this Court should not allow Appellants to seek broad, sweeping relief on behalf of a putative class of individuals without first requiring them to show that they can meet the requirements for class certification under NRCP 23. *Id.* at 133, 291 P.3d at 730-31; *see also Nat'l Ctr. for Immigrants Rights, Inc. v. INS*, 743 F.2d 1365, 1371 (9th Cir. 1984) (limiting scope of preliminary injunction to named parties in absence of class certification).

**C. Appellants' motion is without merit.**

Nevertheless, Appellants fail to establish that they are entitled to the orders they seek from this Court. First, the district court already granted Appellants the relief they seek regarding individuals that originally received payments but DETR later ceased making payments without certain conditions being met. Of course, Cross-Appellants intend to challenge that aspect of the district court's order, but while that order remains in effect, there is no need for a redundant order from this Court.

Second, the motion does not present anything suggesting any appeals have been dismissed as untimely when the time to appeal lapsed before a means to appeal was available. So, there is currently no need for an order on that point either.

Third, all of Appellants' claims seeking a mandate directing DETR to pay certain benefits to the other classes of persons identified in the motion are undermined by their inability to establish that DETR is failing to fulfill a clear duty, nor have they shown an arbitrary and capricious exercise of discretion. NRS 34.160; *Rugamas v. Eighth Jud. Dist. Ct.*, 129 Nev. 424, 430, 305 P.3d 887, 892 (2013)(citing *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981)). DETR has continuing obligations, including under its agreement with DOL, to ensure that it takes proper measures to avoid the possibility of overpayment of benefits and awarding benefits on fraudulent claims. Exhibit 3; Exhibit 4 at 89-98. Thus, DETR's agreement with DOL requires the exercise of caution when determining eligibility for PUA benefits to avoid overpayments and granting fraudulent applications.

In assessing this point, there is a critical distinction between the scenario presented here and *California Human Resources Dep't. v Java*, 402 U.S. 121 (1971), a case appellants heavily rely upon to suggest that DETR is failing to fulfill its obligation to make payments to certain classes of individuals "when due." In *Java*, the United States Supreme Court focused on the fact that an eligibility determination had been made at a hearing where the former employer had an opportunity to appear and present evidence establishing an applicant's ineligibility to collect benefits but

failed to exercise its right to do so. 402 U.S. at 133-34. Instead, the employer only objected and appealed after a formal adjudication on eligibility had been made. *Id.*

Here, there is no employer to provide evidence and object to an applicant's eligibility, and there is no hearing determining eligibility. DETR is left to make its own determination based on paperwork submitted by the applicant and its own investigation. And DETR has properly exercised caution in determining eligibility for PUA benefits against other kinds of benefits with different approval procedures.

This distinction undermines Appellants' arguments that certain classes of individuals should be immediately awarded benefits. First, they want an order forcing DETR to "exercise its discretion" to issue a determination where a "claimants' application for benefits reveals a *prima facie* entitlement to benefits under any program of unemployment compensation...." Acknowledgment that this is a discretionary function of DETR undermines their claim from the start. There is no clear duty to act. And DETR's decision to proceed with caution in its review process in the face of evidence of widespread fraud is not arbitrary or capricious.

Second, Appellants seek an order requiring payment of benefits to anyone that received a letter like Exhibit A to the motion. But they fail to acknowledge that evidence in the record, and identified by the special master's report, acknowledges that the aforementioned letters were sent in error after resolution of an individual issue with an application but DETR had still yet to make a final determination on

eligibility. Exhibit 4 at 247-48. Without an actual determination on eligibility, *Java* has no application.

Third, they seek an order requiring payment of benefits to any person that has been denied eligibility of PUA benefits because of eligibility under another program. However, even assuming such a determination would be considered an official determination on eligibility in a different program—it should not<sup>2</sup>—there is no clear duty for DETR to simply start paying out benefits from the wrong program. Nor is it an arbitrary and capricious exercise of discretion for DETR to require that person to submit a proper application through the correct program.

Finally, Appellants seek payment of Federal Pandemic Unemployment Compensation and Lost Wages Payments to any person determined “eligible in any program at all. . . .” But again, there is no clear duty for DETR to simply start paying benefits from the wrong program, nor is it an arbitrary and capricious exercise of discretion for DETR to require a person to submit a proper application establishing eligibility for payment through the correct program before they issue any payments.

**D. Cross-appellants do not object to expedited treatment of this case.**

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<sup>2</sup> “If the individual’s eligibility for regular UI is questionable . . . then the state must first require the individual to file a regular UI initial claim. If the individual is subsequently disqualified, then the state may consider the individual for PUA eligibility.” Attachment 1: Pandemic Unemployment Assistance (PUA) Implementation and Operating Instructions, Unemployment Insurance Program Letter No. 16-20 at I-9, *available at* [https://wdr.doleta.gov/directives/attach/UIPL/UIPL\\_16-20\\_Attachment\\_1.pdf](https://wdr.doleta.gov/directives/attach/UIPL/UIPL_16-20_Attachment_1.pdf) (last viewed Oct. 16, 2020).

Appellants alternatively seek expedited treatment of this appeal. Cross-Appellants also desire a swift resolution of this case. Accordingly, Cross-Appellants do not object to this Court issuing a new briefing schedule that allows for expedited treatment of the case.

#### **IV. Conclusion**

The motion should be denied, with the exception that Cross-Appellants do not oppose Appellants' alternative request for an expedited briefing schedule.

RESPECTFULLY SUBMITTED this 16th day of October 2020.

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**CERTIFICATE OF SERVICE**

I certify that I am an employee of the Office of the Attorney General and that on this 16th day of October, 2020, I filed and served the foregoing **CROSS-APPELLANTS' RESPONSE TO APPELLANTS' EMERGENCY MOTION FOR IMMEDIATE RELIEF OR, IN THE ALTERNATIVE, AN EXPEDITED BRIEFING SCHEDULE** with the Clerk of the Court of the Supreme Court of Nevada, by using the Court's Electronic Filing System, upon the following:

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