IN THE SUPREME COURT OF NEVADA

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

Appellants,

v.

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 as 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,

Appellees.

Supreme Court Docket Number: 81763

Second Judicial District Court
Case No.: CV20-00755

APPELLANTS' REPLY IN SUPPORT OF APPEAL AND RESPONSE TO APPELLEES' CROSS-APPEAL

THIERMAN BUCK LLP
Mark R. Thierman, Nev. Bar No. 8285
mark@thiermanbuck.com
Joshua D. Buck, Nev. Bar No. 12187
josh@thiermanbuck.com
Leah L. Jones, Nev. Bar No. 13161
leah@thiermanbuck.com
Joshua R. Hendrickson, Nev. Bar. No. 12225
joshh@thiermanbuck.com

7287 Lakeside Drive
Reno, Nevada 89511
Tel. (775) 284-1500
Fax. (775) 703-5027
Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

REGULATIONS

CONSTITUTIONAL PROVISIONS

I. INTRODUCTION

Experiencing the worst unemployment rate since the 1929 Great Depression, hundreds of thousands of innocent Nevadans are suffering needlessly because DETR failed and continues to fail to perform its clear statutory duty to: (1) exercise its discretion to promptly determine unemployment compensation eligibility; (2) implement that determination by either (a) paying benefits immediately based upon that determination, or (b) promptly providing proper notice and quickly conducting a due process "fair hearing" so an impartial Appeal Tribunal can resolve a claimant's challenge to any adverse determination; (3) maintain all existing payments of unemployment benefits after an initial determination of eligibility pending appeal of any subsequent re-examination of DETR's initial eligibility determination[1] until and unless a decision is timely rendered by an Administrative

[1]Appellants agree with the Amicus Curiae filed by the United States Department of Labor (hereinafter "Amicus United States") that the duty to maintain the *status quo ante* by continuing to pay benefits already granted pending any appeal of an adverse post-initial eligibility unemployment compensation decision does not include conditions subsequent that could not have been determined at the time of initial benefit eligibility determination. Subsequent events such as filing eligibility for work reports or supplying specifically requested supplemental documents within the claimant's control by the time specified in the initial grant of benefit eligibility could not possibly have been considered at the time of the initial eligibility determination because the facts did not yet exist. For example, obtaining employment after weeks of being unemployed is a new event which terminates eligibility prospectively. On the other hand, an out of area IP address used at the time of initial application or eligibility for other kinds of compensation such as

Tribunal after a fair hearing conducted with adequate due process; and (4) refrain from demanding or collecting any repayment of any sums allegedly incorrectly paid before receiving a final decision from an impartial Appeals Tribunal after a fair hearing. Each and every one of these actions are mandated by the Social Security Act (42 U.S.C. § 503(a)(1)&(3)), the Coronavirus Economic Stabilization (CARES) Act (15 U.S.C. § 9001 et al.) as modified effective 2021 by the Consolidated Appropriations Act, 2021, H.R. 133, 116th Cong., div. N, tit. II, subtit. A, ch. 1, subch. I, § 201(a)(1), (b) (2020) ("2021 CAA"), applicable federal regulations (20 C.F.R. Part 625) and federal Department of Labor guidance published in Unemployment Insurance Program Letters (UIPL). Appellees have a clear duty to follow these laws.

Appellees' failure to perform this clear duty required the District Court to issue a writ of mandate. NRS 34.160. This Court should review the orders of the District Court in this case "de novo" even in the context of a writ petition. *High Noon at Arlington Ranch Homeowners Ass'n, Nonprofit Corp. v. Eighth Judicial*

---

pensions or regular unemployment insurance at the time of initial application is not a new event, and therefore cannot justify summarily discontinuing unemployment benefits once they have been granted. Simply put, discovery of old facts is not a new fact for benefit eligibility. DETR cannot retroactively re-examine the initial eligibility determination ad infinitum, but it can react to new facts that may impact eligibility week by week. The weekly certification process is designed to illicit changed circumstances, not to verify or analyze previously available data under a new or different standard.

Dist. Court of State, 402 P.3d 639 (Nev. 2017). The District Court abused its discretion by failing to compel DETR to perform its clear duty. Nothing in Respondent/Appellees' brief or brief for the Amicus United States rebuts the fact that DETR has not decided tens of thousands of claims for Pandemic Unemployment Assistance ("PUA") for almost ten months after claimants were entitled to unemployment compensation, first by failing to provide a mechanism for applying for those benefits and again by failing to decide those claims for seven months or more even after they were filed. Nothing in the record shows that DETR has exercised, *in a timely manner*, its discretion to grant or deny various unemployment compensation benefits as provided by the CARES Act to hundreds of thousands of claimants. And nothing in the record shows that DETR has fulfilled its clear legal duty under Section 303(a)(1) of the Social Security Act, 42 U.S.C. § 503(a)(1), to pay benefits "when due." "The basic thrust of the statutory 'when due' requirement is timeliness." *Fusari v. Steinberg*, 419 U.S. 379, 387-88 (1975) (45-day delay is unacceptable). *See, California Human Resources Dept. v. Java*, 402 U.S. 121, 130-133 (1971) (seven-week delay is unacceptable).

The requirement of timeliness is applicable at all phases of the administrative process, not only to the time within which claimants determined to be eligible are paid but also to the rapidity with which appeals of ineligibility determination are decided, lest claimants who ultimately win their appeals suffer long delays in

obtaining payment. *Wilkinson v. Abrams*, 627 F.2d 650, 660-61 (3d Cir. 1980); *Ross v. Horn*, 598 F.2d 1312, 1321 (3rd Cir. 1979), *cert. denied*, 100 S.Ct. 3048, 65 L.Ed.2d 1136 (1980), *Jenkins v. Bowling*, 691 F.2d 1225 (7th Cir. 1982).[2] The "timeliness" clock begins to run from the time of application, not from when a decision to pay has been made. *Gann v. Richardson*, 43 F. Supp. 3d 896 (S.D. Ind. 2014), *Pennington v. Didrickson*, 22 F.3d 1376 (7th Cir. 1994). For too many months, and for too many people, DETR, as required by law, has failed to pay over a billion dollars of federal money in a timely manner to those unemployed through no fault of their own.

Once having exercised its discretion, DETR must promptly perform its clear duty under law to either pay the benefits DETR has determined are due ("eligibility") promptly ("when due") or issue a denial. If DETR denies benefits or makes any other adverse decision, DETR must provide claimants prompt access to an impartial administrative hearing mechanism to appeal any denial or reduction of benefits. 42 U.S.C. § 503(a)(3) requires that DETR ***must*** provide an "Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." Even in cases of alleged fraud, "No

[2] And for reasons stated in Appellants' Opening Brief, DETR's belated sending of 270,000 mass denial form letters within a three-week period without reciting any facts and with a list of one or more applicable legal conclusions stated as reasons, does not constitute a sufficient exercise of discretion to satisfy DETR's duty to exercise discretion promptly.

repayment shall be required, and no deduction shall be made, until a determination has been made, notice thereof and an opportunity for a fair hearing has been given to the individual, and the determination has become final." 15 U.S.C. § 9023(f)(3)(B); *see also* 15 U.S.C. § 9025(e)(3)(B). The duty to pay when due, or offer an impartial administrative fair hearing promptly is not discretionary.

It is uncontested that DETR failed to provide any method for claimants to file an appeal of a denial of PUA until late July 2020, and even after that date, the system was unavailable to most claimants most of the time, with hearings just starting in late November 2020. Although DETR avoids answering a direct question by claiming it has hundreds of hearings "scheduled" as of this date, DETR has actually conducted only a few hundred Appeal Tribunal hearings out of almost 270,000 appeals filed. All of these hearings will have occurred more than 30 days from the filing of the appeal in violation of the 30-day rule set forth in the last sentence of 20 C.F.R. § 625.10(a).[3]

[3] DETR's latest "trick" to game the reported statistics was perpetuated by a clearing of the backlog of appeals through issuing thousands of denials within a three-week period dismissing PUA appeals without a hearing and without any consideration of evidence, or statement of reasons by an Appeals Tribunal. This denial of a hearing violates the literal language of the statutes and regulations, as well as basic fairness required by due process of law. 42 U.S.C. § 503(a)(3) requires that DETR must provide an actual fair hearing. Instead, on its own, DETR issued a summary dismissal without hearing, thus providing no notice of further appeal rights (even if appeal is to the District Court), no evidentiary record for review, no confrontation of witnesses, no ability to intelligently offer contrary evidence, and meaningful statement from DETR of a single basis for decision.

In addition, DETR is constantly unilaterally reconsidering (*ab initio*) initial eligibility decisions retroactively, and as a result, reducing or denying benefits previously granted without any due process for the claimant—no opportunity for the claimant to explain why DETR is wrong. DETR has failed to perform its duty to maintain the *status quo ante* that DETR itself has created by its exercise of discretion to grant unemployment benefits initially. DETR has failed to perform its clear duty to continue to pay those benefits it previously determined were due until an impartial hearing officer, administrative law judge, or an Appeals Tribunal has, after a full and fair hearing, rendered a written decision to the contrary.

As a result of the limited relief granted herein by the District Court's July 22, 2020 Order on the writ of mandate,[4] DETR has started making payments again to a small portion of approximately 9,000 Nevadans who DETR had begun to pay based upon an initial determination of eligibility and then stopped making payments based

---

DETR simply turns off the button to the only method to appeal (which is by a non-function web portal with no post office address available to send a written appeal) when it doesn't want to process an appeal. By this trick, DETR asserts it has reduced its backlog of pending appeals overnight without conducting any hearings. This may be an efficient method for handling claim appeals, but it is blatantly unconstitutional.

[4] For reasons known only to itself, DETR limited its compliance with the District Court's Order of Mandate to claims that were once paid, then stopped being paid due to other program eligibility, which would be only a fraction of all start-stop claims. EOR, 4175.

upon a re-examination of the initial eligibility criteria *ab initio* (referred to also as the "start-stop" group). Instead of following the statute, as both Appellants and Amicus United States urge, the District Court's July 22, 2020 Order did not compel DETR to resume payment where DETR said (without further disclosure)[5] it had "clear and convincing evidence of fraud" (later diluted to mere "badges of fraud"). As a result, DETR still fails to restore and/or maintain benefits *status quo ante* to at least an additional 865 individuals (EOR , 4184) that DETR unilaterally determined exhibited clear and convincing evidence of fraud, in violation of both the CARES Act 15 U.S.C. § 9023(f)(3)(B) and (e)(3)(B) and guidance from the United States Department of Labor.[6]

Appellants mostly agree, in principle, with Amicus United States that DETR must follow the CARES Act. First, the exception to the District Court's order for

[5] Due process requires confrontation, both as to DETR's conclusions and the facts upon which they are based. "[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. *Greene v. McElroy*, 360 U.S. 474 at 496, (1959). *Cf. Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72, (1951) (Frankfurter, J., concurring) ("No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.").

[6] On December 8, 2020, DETR was found in Contempt of Court—an embarrassment to the State of Nevada. Yet, even without considering all those DETR unilaterally claimed "clear and convincing evidence of fraud" DETR refused to pay thousands as commanded by the July 22, 2020 Order of the District Court by not including non-start stop individuals.

"clear and convincing evidence of fraud" is not authorized by statute, and therefore the District Court must be reversed on that exception to its Order of Mandate. Second, Appellants agree with Amicus United States that those conditions that did not exist at the time of initial eligibility determination, such as filing reports of continued availability to work, are not within the *Java* requirements to maintain *status quo ante*. These are new facts, conditions subsequent, that did not exist at the time of initial benefit determination. This exception does not apply to facts that did exist, whether or not DETR knew about them, at the time of initial application. *See* fn. 1, *supra*. As to those facts, DETR may not unilaterally reconsider initial eligibility *ab initio* and suspend benefit payment unilaterally without due process of law.

Third, while Appellants agree with Amicus United States, that only eligible claimants are entitled to unemployment compensation benefits, Appellants disagree with Amicus United States that it is necessary to repeat verbatim all the CARES Act qualifying criteria in the District Courts' Order of Mandate. As it exists now, the Order of Mandate applies only to those claimants who started receiving unemployment compensation if such compensation was stopped unilaterally without a due process hearing based upon facts existing at the time of initial program eligibility determination. As to those claimants, by payment of benefits, DETR must have already decided that these claimants were eligible to receive benefits.

Therefore, since DETR must have already determined that the claimants initially met the CARES Act criteria, repeating all the CARES Act eligibility rules for initial benefit entitlement is redundant and confusing. The existing order does require the claimant to meet continuing duties subsequent, such as certification of availability for work, and should be modified to include duties imposed by the 2021 CAA which did not exist at the time of the July 22, 2020 District Court order.

All Appellants want, and all Appellants have wanted since the inception of Appellants' writ request, is for DETR to perform its duty under law to act according to the express commands of the CARES Act/2021 CAA[7], as interpreted and explained by case law regulations and federal DOL UIPL guidance. In the District Court, Appellants requested a writ of mandate to the State of Nevada, its officers, employees, and assigns, including DETR itself, compelling DETR to follow the exact language of the CARES Act as delineated in Section 303(a)(1) of the Social Security Act, 42 U.S.C. § 503(a)(1) by paying these benefits 'when due'. For the

[7] As the Supreme Court noted in *Fusari v. Steinberg,* even admonishing the parties that, "[t]his Court must review the District Court's judgment in light of the presently existing [] law, not the law in effect at the time the judgment was rendered." *Fusari v. Steinberg,* 419, U.S. 379, 387 (1975). Accordingly, Appellants have supplemented their argument and Appendix with the relevant portion of the December 2020 Consolidated Appropriations Act, 2021, H.R. 133, 116th Cong., div. N, tit. II, subtit. A, ch. 1, subch. I, § 201(a)(1), (b) (2020), specifically, the "Title II-Assistance to Individuals, Families, and Businesses" and hereinafter referred to as "2021 CAA" at EOR 4185-4186.

reasons stated herein and previously set forth in Appellants' Opening Brief, this Court should reverse the District Court's denial of the writ as requested by Appellants herein.

II. ARGUMENT

A. The Standard For Review Here Is De Novo

Abuse of discretion is the normal standard for review of a District Court's order denying a writ of mandate. *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003). But "failure to follow an applicable statute is always an abuse of discretion." *U.S. v. Klein*, 543 F.3d 206, 215 (5th Cir. 2008); *see also*, *United States v. Delgado-Nunez*, 295 F.3d 494, 496 (5th Cir. 2002). In matters of statutory construction, this Court reviews the orders of the District Court "de novo" even in the context of a writ petition. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) ("A writ of mandamus is available to compel the performance of an act that the law requires ... or to control an arbitrary or capricious exercise of discretion."). Failure to follow the law is a capricious exercise of discretion. *Trotman v. Eighth Judicial Dist. Court*, No. 74497, at *2-3 (Nev. App. Apr. 24, 2018)*; see also Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Therefore, this Court should exercise de novo review of the District Court's July 22, 2020 Order on the Writ of Mandate.

B. Appellants Have Standing

Appellants have suffered real harm as a direct result of the unconstitutional actions of DETR. Four of the six individual Appellants waited nearly three months for any determination by DETR on benefit eligibility before filing or joining this lawsuit.[8] In addition, not one of the Appellants were paid benefits due at the time they joined the lawsuit and have not been paid interest or consequential damages as full compensation for DETR's delays. Thus, each Appellant has suffered specific injury based upon the time from entitlement to file a claim until a claim was able to be filed, and the time from filing of a claim until the claim was decided.[9] Appellants

[8] *See* FAQ, EOR 60-212. A seven-week delay "constituted failure to pay unemployment compensation "when due" within the meaning of § 303(a)(1)" in *Goldberg v. Kelly,* 397 U.S. 254 (1970) and the report to the Committee on Economic Security, Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., 1311 (1935) on the development of the Social Security Act estimated a two to four week waiting period as acceptable and "indicating an intent that payments should begin promptly after the expiration of a short waiting period." *See Java,* 402 U.S. at 131. Under the CARES Act and agreement by the State of Nevada, state mandated first week waiting period be waived. EOR 463-474 at 466.

[9] Three of the twelve Plaintiffs are still having issues with payments: Plaintiffs Naimi, Waked, Wyncoop. Plaintiff Wyncoop filed the first week the portal was available, May 16, 2020, but was not paid until December 24, 2020 and has still not received all of his backpay in the form of Lost Wage Assistance payments. Plaintiff Waked is also a first-day filer, was paid on July 2, 2020, 47 days later (6.7 weeks) but still has not received payment for the Week 6 "glitch." Plaintiff Naimi was a first-day filer, never received an approval, denial, or any payments. He has since given up and resumed working as an Uber driver in Las Vegas. Plaintiff Albing is a first-day filer, was first paid on July 7, 2020, the same day she received notification that she "had other program eligibility" and was stuck in the UI/PUA whirlpool. She was never able to speak with an adjudicator, but her payments were resumed on October 26, 2020. Plaintiff Asare was a first-day filer, received payment on June 30, 2020, 45 days (6.5 weeks) later. Her payments were stopped on September 23,

were denied meaningful notice and a prompt administrative hearing in appeal of DETR's adverse actions.

Furthermore, the Court has jurisdiction to hear Appellants' claims for due process and violation of statutory rights under 42 U.S.C. § 1983. Entitlement to unemployment compensation "when due" is a property right that cannot be denied without due process. Appellants have standing for damages and declaratory relief resulting from the denial of their constitutional rights.[10] The United States Supreme Court has already recognized that § 303(a)(1) of the Social Security Act does in fact create an enforceable right under 42 U.S.C. § 1983. *Cal. Dep't of Human Res. Dev.*

2020 and she filed her appeal on September 29, 2020. Ms. Asare's payments with back pay for the weeks missed were resumed October 20, 2020 before she could speak with an adjudicator. Plaintiff Tunley was a first-day filer but did not receive his first payment until July 10, 2020, 55 days later (7.9 weeks). He has no outstanding issues and has continued to receive payments. Plaintiff Howard was a first-day filer and began receiving payments on June 30, 2020, 51 days later (6.7 weeks). He has no outstanding issues and has continued to receive payments. Plaintiff Ploski was a first-day filer and began receiving payments on July 6, 2020, 51 days later (7.3 weeks). His payments stopped in November when he started his new job. Plaintiff Payne was a first-day filer and received her payment on June 4, 2020. She received payments for all weeks she was unable to work. She has since resumed work and is no longer making a claim. Plaintiff Podesta-Mireles was a first-day filer, but has received her payment that were stopped then started.

[10] Appellants' operative First Amended Petition for Writ of Mandamus and/or Class Action Complaint filed June 22, 2020 includes a 42 U.S.C. § 1983 claim, violation of due process, Appellants Second Cause of Action, as well as Appellants' Third Cause of action for "Backpay/Damages/Compensation Against Defendant-Respondent DETR" on behalf of themselves and a gig worker class, plus interest, which was also included in their Prayer for Relief. EOR, 85-89.

v. Java, *supra*. "'State courts as well as federal courts have jurisdiction over § 1983 cases' but 'the elements of, and the defenses to, a federal cause of action are defined by federal law.'" *Howlett v. Rose*, 496 U.S. 356, 358, 375 (1990); *Slaughter v. Nev. Dep't of Corr*., No. 74447-COA, at *19 (Nev. App. Aug. 11, 2020) (holding that the district court erred by dismissing Plaintiff's due process claim.) *See also Gann v. Richardson*, 43 F.Supp.3d 896 (S.D. Ind. 2014) (private right of action exists to enforce 42 U.S.C. § 303(a)(1)). As stated in *Zynda v. Arwood*, 175 F. Supp. 3d 791, 813 (E.D. Mich. 2016) "the court will not dismiss Plaintiffs § 1983 claims arising under the 'when due' provision of the Social Security Act."

Appellants also have standing under the public-importance doctrine. *Schwartz v. Lopez*, 382 P.3d 886, 894 (Nev. 2016) ("We now recognize an exception to this injury requirement in certain cases involving issues of significant public importance.") This case is the only case now pending before this Court to consider the constitutionality of DETR's failure to pay unemployment compensation to over 200,000 Nevada claimants, representing well over a billion dollars of Congressionally mandated and earmarked money not being distributed to the workers of our State. DETR's conduct violates a specific provision of the Nevada State Constitution, *i.e.,* the due process clause of Article 1, Section 8(5) of the Nevada Constitution. *See e.g., Rico v. Rodriguez,* 121 Nev. 695, 702–03, 120 P.3d

812, 817 (2005); *Gordon v. Geiger,* 402 P.3d 671 (Nev. 2017) (Due process claims are often argued *sua sponte* when they appear at trial or at oral argument.).

Finally, the issues in this case do not become moot simply by DETR paying the claims of the named Appellants several months or more (in Mr. Wyncoop's case, 7 months) after the lawsuit was filed. The issues here apply to hundreds of thousands of real people who have been suffering, continue to suffer, and will likely suffer for many years to come because of DETR's failure to pay unemployment benefits promptly and/or afford a due process hearing from adverse agency action.[11] The issues in this case are ongoing, and thus are capable of repetition yet will evade review. This Court should "exercise [its] discretion to adjudicate a moot case when (1) the contested issue is likely to arise again, and (2) the challenged action is 'too short in its duration to be fully litigated prior to its natural expiration.'" *See e.g., Stephens Media, L.L.C. v. Eighth Judicial Dist. Court*, 125 Nev. 849, 858, 221 P.3d 1240, 1247 (2009) (quoting *Jason S. v. Valley Hosp. Med. Ctr. (In re Guardianship of L.S. & H.S.)*, 120 Nev. 157, 161, 87 P.3d 521, 524 (2004)); *Paley v. Second*

[11] *See* CNN.com, 1/13/21 article, "Las Vegas, the hardest-hit metro economy in America, just suffered another blow" reporting on the digitalization of the Consumer Electronics Show of 2020 and estimating "it will take at least three years for the state to achieve the consistent annual rates of growth seen in major economic indicators before the pandemic hit. It will take even longer [] to get back to the actual levels of jobs, sales taxes, gaming revenues and conventioneers." https://www.cnn.com/2021/01/13/business/las-vegas-economy-ces-2021/index.html last visited 1/13/21.

Judicial Dist. Court of State, 310 P.3d 590, 592 (Nev. 2013). This Court should also exercise its discretion to decide this case because "an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction." *Mineral Cnty. v. State, Dep't of Conservation and Natural Res.,* 117 Nev. 235, 243, 20 P.3d 800, 805 (2001) *(quoting Bus. Computer Rentals v. State Treasurer,* 114 Nev. 63, 67, 953 P.2d 13, 15 (1998)).

C. DETR Must Follow Its Statutory And Constitutional Mandate To Exercise Its Clear Duty To Promptly Pay Benefits "When Due"

DETR must exercise its discretion in a reasonable period of time after the initial application for benefits is filed. "[A]n official's failure to exercise discretion when its exercise is required can violate a duty, permitting mandamus relief to compel the official to undertake the discretionary review process, though not to dictate its outcome." *See* Collier *v. Legakes*, 98 Nev. 307 (Nev. 1982); *Clark Cnty. v. S. Nev. Health Dist.*, 289 P.3d 212, 221 (Nev. 2012); *see also Kochendorfer v. Board of Co. Comm'rs*, 93 Nev. 419, 566 P.2d 1131 (1977). "There is generally no public interest in the perpetuation of unlawful agency action. To the contrary, there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *See e.g., League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12, 426 U.S. App. D.C. 67 (D.C. Cir. 2016) (internal quotation marks and citation omitted); *New York v. United States DOC*, 351 F. Supp. 3d 502, 676 (S.D.N.Y. 2019). "In effect, these provisions recognize judicial

commitment to the proposition that 'justice delayed is justice denied'" even in the non-criminal law context." *Dougan v. Gustaveson*, 108 Nev. 517, 523 (Nev. 1992).

The essence of Appellants' position is that DETR is not following the CARES Act which mandates that DETR make prompt decisions of eligibility and act in accordance with the decision promptly. 20 C.F.R. § 640.3(a) requires DETR to provide for "such methods of administration as will reasonably ensure the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible." Section 6013(A)(1) of 20 C.F.R. 625 Appendix B adopts the "when due" requirement discussed in the case of *California Department of Human Resources Development v. Java,* 402 U.S. 121, 133 (1971).[12]

Nine months after the CARES Act program began and seven months after the portal was established, DETR has still failed to make an initial determination for hundreds of thousands of claimants. At the present rate, it will take many years before DETR has truly decided to pay or not pay these many applicants if DETR ever makes an enforceable decision at all. In the meantime, workers suffer

[12] For example, 20 C.F.R. 625 Appendix B states:

> Section 303(a)(1) of the Social Security Act requires that the State law provide for: "Such methods of administration... as are found by the Secretary to be reasonably calculated to insure full payment of unemployment compensation ***when due***." [emphasis supplied].

irreparable harm; unemployment benefits are designed for the necessities of life — rent, groceries, medical care. The burden is on DETR to make a decision quickly, and if not, the default is to pay benefits based solely upon the *prima facie* case presented by the claimant's initial application. *See e.g., Littlefield v. Dept. of Employ. and Training*, 145 Vt. 247, 253 (Vt. 1984) ("We also consider that the [Unemployment Compensation Act], as remedial legislation, is to be construed liberally in favor of the claimant." *quoting State v. Santi*, 132 Vt. 615, 617, 326 A.2d 149, 151 (1974)); *Ind. Comm. v. Sirokman*, 134 Colo. 481, 485 (Colo. 1957) *citing, Campbell Soup Co. v. Board of Review*, 13 N.J. 431, 100 A.2d 287 (1953). *Ford Motor Co. v. Kentucky Unemployment Comp. Com.*, 243 S.W.2d 657(Ky.,1951) ("Unemployment compensation acts are to be liberally construed to further their remedial and beneficent purposes."). The Court in *Islam v. Cuomo*, articulated this edict, stating:

> It has long been recognized that protracted denial of subsistence benefits constitutes irreparable harm. *See Morel v. Giuliani*, 927 F. Supp. 622, 635 (S.D.N.Y. 1995) (finding irreparable harm where New York City regularly failed to provide "aid continuing" benefits, in violation of federal and state law), amended, 94-CV-4415, 1996 WL 627730 (S.D.N.Y. Mar. 15, 1996). To indigent persons, the loss of even a portion of subsistence benefits results in injury that cannot be rectified through the payment of benefits at a later date. See *id*. (collecting cases). The reason for this should be obvious. Subsistence benefits by definition, are those that provide for the most basic needs. As such, when the outright denial or undue delay in the provision of subsistence benefits is at 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 occur is irreparable."), aff'd, 434 F.2d 1207 (2d Cir. 1970), aff'd, 402 U.S. 991, 91 S.Ct. 2168, 29 L. Ed. 2d 157 (1971).

Islam v. Cuomo, 20-CV-2328 (LDH), at *21 (E.D.N.Y. July 28, 2020).

DETR is denying hundreds of thousands of claims by failing to make a binding decision of benefit eligibility within a reasonable time after initial application. Accordingly, because DETR has failed to exercise discretion, where its exercise is required pursuant to the CARES Act/2021 CAA, DETR has violated its duty, and thus, mandamus relief to compel DETR to undertake the discretionary review process (though not to dictate its outcome) is warranted here.

1. DETR bears the burden to make a prompt binding decision and failure to do so is a violation of Appellants' due process rights.

Appellants have always and consistently sought to compel DETR to make a prompt binding eligibility determination. Initially, DETR avoided having to make any decisions by failing to provide any mechanism for Appellants to apply to DETR

for PUA benefits. Two months later, DETR finally established a portal for independent contractors to apply for PUA benefits. Yet for many tens of thousands, if not hundreds of thousands of Nevadans out of work through no fault of their own, DETR refused to act and continues to refuse to act on these applications in a timely manner.

DETR should now be compelled to either deny or pay benefits immediately based upon the information it has through self-attestation and other means available at the time of initial application. The CARES Act mandates that DETR, under appropriate conditions, "will make payments of pandemic emergency unemployment compensation to individuals." 15 U.S.C. § 9025(a). 15 U.S.C. § 9021(b) states, ". . . the Secretary shall provide to any covered individual unemployment benefit assistance while such individual is unemployed, partially unemployed, or unable to work for the weeks of such unemployment with respect to which the individual is not entitled to any other unemployment compensation." DETR bears the burden of proving ineligibility because DETR has the burden to gather the facts. 20 C.F.R. 625 titled "6013 Claim Determinations Requirements Designed to Meet Department of Labor Criteria," Appendix B states at A(1) and (3):

> It is the responsibility of the agency to take the initiative in the discovery of information. This responsibility may not be passed on to the claimant or the employer. . .The information obtained [by DETR] must be sufficient reasonably to insure the payment of benefits ***when due***. (Emphasis supplied.)

In addition to the thousands of people whose claims have been "in process" for over nine months without any determination, DETR now states that none of its tens of thousands of conditional initial eligibility determinations are sufficient to process payment or allow the claimant to appeal.[13] DETR does so by issuing one of two non-binding letters. Either claimants receive a letter granting benefits as in the case of a "PANDEMIC UNEMPLOYMENT QUALIFYING DETERMINATION"[14] which says the claimant is eligible, but with an unconstitutional clawback provision, so no benefits are paid. Or DETR issues a letter of "PANDEMIC UNEMPLOYMENT DISQUALIFYING DETERMINATION" which denies PUA benefits based upon some other program eligibility (usually UI or Unemployment Insurance), but DETR does not pay any benefits under that other program because there is no real eligibility for benefits under that other program.[15]

---

[13] EOR, 2801, from the Special Master's Report – "Appeal Feature not available" indicating claimants "do not have the *privilege* to perform this action." (Emphasis added.)

[14] EOR, 106-120; 505-510 in example, stating, "You may receive multiple decision on your claim; please note that any one denial decision supersedes all other decisions."

[15] EOR, 840, 2921-2922, 3099 in example, stating "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." (Emphasis added.)

No one says that a claimant should receive double benefits, but if the text of the "PANDEMIC UNEMPLOYMENT DISQUALIFYING DETERMINATION" letter was true, then the claimant is at least entitled to payments under one or the other program. Instead, DETR does not pay under either program. Since DETR states these two conditional determinations are not final, DETR cannot be compelled to act upon either of them.[16]

To fulfill its statutory duty, DETR should honor its own written grant of initial eligibility as stated in its "PANDEMIC UNEMPLOYMENT QUALIFYING DETERMINATION" letters (EOR, 106-120; 505-510 in example), but with this Court striking the boilerplate disclaimer that any past present or future contrary decision by the agency will override the determination retroactively and benefits will be summarily suspended *ab initio*. Likewise, DETR should be compelled to fulfill

[16] "The term 'covered individual'- (A) means an individual who- (i) is not eligible for regular compensation or extended benefits under State or Federal law or pandemic emergency unemployment compensation. . ." 15 U.S.C. § 9021 The CARES Act disqualifies only those who are eligible for payment under another program, not those who theoretically ***might be*** eligible, but who do not receive benefits under that other program because they are not really eligible. The plain meaning of eligible is "having the right to do or obtain something; satisfying the appropriate conditions." *See,* Google Oxford online dictionary; https://www.google.com/search?q=eligible+definition&rlz=1C1GCEU_enUS820US820&oq=eligible&aqs=chrome.1.69i57j0i131i433l2j0j0i433j0i131i433l2j0.3784j0j15&sourceid=chrome&ie=UTF-8 last visited January 8, 2021. If the individual is eligible for benefits under the UI program, there is no reason DETR should not be compelled to pay those benefits it has determined that the claimant is entitled to receive.

its statutory duty by honoring the express determination of other program eligibility in its written "PANDEMIC UNEMPLOYMENT DISQUALIFYING DETERMINATION" letters (EOR, 840, 2921-2922, 3099 in example). DETR should be compelled to make payments due to the claimant under any program DETR says the claimant is eligible for payments under.

It should be clear, Appellants have never, nor did the District Court's Order require, DETR to make "double payments" but instead, to make payments under at least one qualifying program if DETR says one or more apply. The CARES Act prevents duplicate payments when it provides the claimant is not a covered individual under CARES Act if that claimant is actually eligible for another program. The statute does not say a claimant is not eligible for PUA if DETR thinks the claimant *may possibly be* eligible for payment under another program, but DETR doesn't know for sure. But when DETR does not know, DETR simply refuses payment under both programs.[17]

DETR wants the time it must pay unemployment compensation "when due" to run from the date DETR decides to pay, rather than the date when a claimant

[17] DETR often denies PUA eligibility whenever there are regular W-2 earnings within two years of the application, which is just one factor for UI eligibility. As a result, DETR does not pay benefits under PUA even though the claimant is not truly eligible for payment under regular UI, either. Even if the claimant has received a denial of UI eligibility letter from DETR, DETR refuses to pay PUA on the grounds of another program eligibility and fails to pay under that other program as well. This is a perfect example of Joseph Heller's "*Catch 22*".

applies. In this way, DETR benefits from its own refusal to decide to pay or not pay. To be a meaningful standard, the time for payment must be measured from the moment the claimant completes the application until paid or denied, not from the time DETR finally decides to act.

This Court should not allow DETR to forever "kick the can down the road, " relying on the same discredited logic rejected by the United States Court of Appeals in *Jenkins v. Bowling*, 691 F.2d 1225, 1230 (7th Cir. 1982), *Wilkinson v. Abrams*, 627 F.2d 650 (3d Cir. 1980), and by the United States Supreme Court in *Fusari v. Steinberg*, 419 U.S. 379 (1975). "We conclude that the word 'due' in § 303(a)(1), when construed in light of the purposes of the Act, means the time when payments are first administratively allowed. . ." *Java,* 402, U.S. at 133. In *Java*, a seven-week delay was not "reasonably calculated to insure full payment of unemployment compensation when due." *Id. citing, Goldberg v. Kelly.* Here, for nine months, the claims of hundreds of thousands of Nevada's workers remain in limbo. These workers have not been paid unemployment compensation and have not been properly denied payment with a quick administrative appeal because no actual appeal was made available until November with appeals are just now beginning to be heard by DETR personnel, *not* impartial tribunals. EOR, 3814-3816. The Court should compel DETR to make a decision promptly and then act on that decision promptly as well.

D. Appellants Agree In Principle With The Position Of The Amicus United States That Nevada Must Follow The CARES Act/2021 CAA, Its Regulations, And DOL Guidance In Making Payments To Eligible Claimants "When Due", Promptly, And Affording Due Process For Denials Or Reductions In Benefits

Notably, Amicus United States does not argue that DETR has been following the CARES Act in all respects because DETR has not. Instead, Amicus United States limits its brief to "clarify the meaning of the CARES Act" by arguing: (1) the District Court's Order was under-inclusive because it failed to faithfully tract the CARES Act statutory criteria on initial eligibility, now also failing to tract the recently enacted 2021 CAA as to continued eligibility, and (2) there is a prerequisite that the agency must make an eligibility or ineligibility determination prior to any hearing.

As to the Amicus United States' first point, Appellants do not disagree that the District Court's Order does not include reference to eligibility requirements of the CARES Act, nor does it make clear that a covered individual under the CARES Act may include a person who "does not have sufficient work history" as opposed to the District Court's pronouncement that a covered individual must have "reportable income." *See* Amicus United States at Section A. Appellants acknowledge that the District Court's Orders, dated August 28, 2020 (EOR, 1-4) and June 24, 2020 (EOR, 5-10) did not include the recently enacted 2021 CAA increase of up to 50 weeks of PUA assistance, clearly because the 2021 CAA was not passed

until December 21, and not signed by the President until December 27, 2020. Appellants do not oppose modification of the District Court Order to reflect these points.

As to the Amicus United States' second argument, the Amicus United States misreads the District Court's mandate. The mandate only applies in the case of individual claimants who have or had been receiving payments. The District Court correctly assumed that by starting to make unemployment compensation benefit payments, DETR must have decided to pay benefits because the claimant had already satisfied all the conditions of eligibility required under the CARES Act (based upon the evidence DETR had at the time of making its initial eligibility decision). Therefore, the District Court correctly concluded that there was no need to re-state these qualifications separately, and to do so would be confusing because it could then appear that DETR had the right to re-examine initial eligibility determinations retroactively and to stop payments once begun, *ab initio,* without any due process.

Amicus United States notes at pp. 4 and 12 that pursuant to § 9021(a)(3(A)(ii), a covered individual may cease to be eligible for PUA benefits "until she can make another self-certification" which each claimant must continually do through their weekly claim. *See* EOR, 925-931 – Special Master's Report descriptive overview and screenshots of Nevada's PUA Portal, *see specifically,* EOR 1382-1400; EOR,

1396 at ¶ 10, "Weekly Claims" "Eligibility Review Questions" that states, "The eligibility review contains one question per page and asks the claimant if they are, for instance, still unemployed, receiving worker's compensation, receiving other income, pension, or allowance, and if they are engaged in training for job placement. The claimant needs to state whether they have received job offers and if they have refused. The claimant then receives a claim status." Notably, at EOR 1398 "Summary of Eligibility Review Answers" the last question asks: "Were you still unemployed as a direct result of the disaster/pandemic."[18] This self-certification is not an excuse for DETR to re-examine its initial determination of eligibility, but the continued payment of benefits can and should be made conditional upon the submission of these certifications and the post-initial determination facts reflected therein.

[18] The 2021 CAA at Sec. 263 – Continuing Eligibility For Certain Recipients of Pandemic Unemployment Assistance, subsection (a)(6) states, "[a]s a condition of continued eligibility for assistance under this section, a covered individual shall submit a recertification to the State for each week after the individual's 1st week of eligibility that certifies the individual remains an individual described in subsection (a)(3)(A)(ii) for such week" which claimants must complete during their weekly certifications. *See* EOR 931. In additional the 2021 CAA at subsection (b)(2) states, … "an individual who received pandemic unemployment assistance from such a State for any such week shall not be considered ineligible for such assistance for such week solely by reason of failure to submit a recertification …." Nevada claimants submit an initial certification with their initial PUA claim (EOR, 1387) and recertify with each weekly claim. EOR, 1396-1398.

Appellants agree with the Amicus United States that "[i]f the information available to a State unemployment agency 'discloses no essential disagreement on eligibility and provides a sufficient basis for fair determination,' no pre-termination hearing is required." Amicus United States at p. 13, *citing* 20 C.F.R. pt. 614 app. B, § 6013(A)(1).[19] It should not take long for DETR to make an initial eligibility decision based upon the evidence it solicits from the claimant. The DOL allows for a computer determination of eligibility, although a denial of eligibility on the basis of fraud or in light of conflicting evidence may only be made by a person (after the computer identifies a likely denial). The Amicus further clarifies, "When a question concerning a claimant's continued eligibility for benefits for a given week arises, the agency must simply conduct an investigation of the facts and make a determination

[19] As noted in footnote 1, Appellants agree that prospective conditions for continued eligibility that could not have been determined at the time of initial agency decision are valid conditions subsequent. UIPL guidance already deals with the difference between the finality of agency decisions of initial eligibility based upon facts that were known or could have been known at the time of initial determination (conditions predicate to being eligible), and agency actions based upon those facts that occur only after the time for initial determination such as "continuing availability for work" and/or the requisite filing of weekly claims, which are already included in the certification, such as the claimant is unable to work due to COVID. Such conditions of continued eligibility, which DETR could not have possibly considered at the time of initial determination because they did not exist, are perfectly acceptable reasons to cease payments once begun—*i.e.,* failure to file a weekly claim—which was included in the District Court's Order. But, as pointed out at UIPL 1145 (EOR, 2294-2310), those conditions that already occurred prior to the initial determination may not be reconsidered, even based upon new information, without proper due process.

of eligibility or ineligibility." *Id. citing,* UIPL 1145 "Procedures For Implementing The *Java* Decision requirements" at EOR 2295-2310. DETR must then give claimant notice of any adverse decision it makes based upon this subsequent information.

But if DETR decides that the claimant is not entitled to continued eligibility, and an appeal is filed, DETR cannot cease payment of existing benefits or otherwise act on this information adverse to claimant until an Appeals Tribunal issues a decision after a fair hearing with due process. In other words, once initial eligibility is determined, DETR can make a contrary decision, but DETR can't implement any changes until an appeal (if filed) is decided. By ceasing benefit payments unilaterally based upon a re-examination of initial eligibility criteria, after first making a favorable determination of claimant eligibility, DETR violates due process of law as expressed in *Java*

E. Once DETR Makes An Initial Eligibility Determination, It Must Promptly Implement That Decision And Provide Claimants At Least 60 Days to Appeal Any Adverse Determination; If An Appeal is Filed In A PUA Case, DETR Must Conduct a Fair Hearing and Issue An Appeals Tribunal Decision Within 30 Days Of Receipt of the Claimant's Appeal

Once DETR makes an initial eligibility determination/decision, DETR must implement that decision without delay in either one of two ways. One, DETR must pay the money promptly (within a few weeks), if the decision is to pay, or two, DETR must provide a hearing under Section 303(a)(3) of the Social Security Act,

42 U.S.C. §503(a)(3), within a reasonable period of time if DETR determines that no payment is due. Federal law defines a "reasonable period of time" to allow a claimant to appeal as 60 days from any adverse determination, and for an Appeals Tribunal to issue a written decision after conducting a fair hearing within 30 days after an appeal is filed. 20 C.F.R. § 625.10(a). These are the time limits Congress borrowed from the DUA to be used in all PUA cases[20] and were designed to apply even in emergency situations. DETR does not deny it has violated this rule *in toto*.

DETR is simply incorrect when it argues that *Java* does not control, and that *Mathews v. Eldridge* should. *See* Appellees' Opp. at pp. 4-5. The exact issue presented in *Java*, was "whether a State may, consistent with § 303(a)(1) of the Social Security Act, suspend *or withhold* ***unemployment compensation benefits*** from a claimant, when the employer takes an appeal from an initial determination of eligibility." *Java,* 402 U.S. at 123-24. (Emphasis supplied.) *Mathews v. Eldridge* was a case for continued Social Security disability benefit payments, which required a lower level of due process because issues of credibility and veracity did not play a significant role in the continued disability entitlement decision, which turns primarily on medical evidence, and because there were plenty of opportunities for experts to comment on the findings of the agency before a decision was made.

[20] *See* EOR, 1514, UIPL 1420; 15 U.S.C. § 9021(h) (the CARES Act requires the words DUA to be read as PUA).

In addition, "[t]he principal reasons for [social security disability] benefits terminations are that the worker is no longer disabled or has returned to work." *Mathews v. Eldridge*, 424 U.S. 319, 336 (1976). This is a condition subsequent, like the filing of weekly certifications in the unemployment compensation arena. The ability to physically return to work in *Eldridge* is the same concept as continued availability for work in the unemployment compensation field. Both are conditions subsequent that could not have been considered at the time of initial eligibility determination. The logic of *Matthews* favors Appellants.[21]

DETR argues, because "there is no adversarial party to challenge eligibility" and that DETR is left to its own devices to confirm eligibility, *Java* does not fit with this case." (Opp. at pp. 3-4.) DETR is wrong. It is not DETR's job to assume the role of an adversary. While an employer is economically incented to fight all claims against its account, the CARES Act relies on information in either DETR's or the claimant's knowledge, so employer input is irrelevant. All CARES Act benefits are 100% paid by the federal government, including the cost of state administration.

While there is no "employer" *per se* to rebut a claimant's facts in an initial claim for PUA benefits, the CARES Act relies on the claimant's self-

[21] Another difference is that benefits for Social Security disability benefit payments are terminated only after an impartial second level examiner in the SSA Bureau of Disability Insurance agrees with the determination of the agency while in the case of unemployment compensation, DETR terminates benefits based solely upon a first level agency review.

attestation/certification to grant PUA benefits instead of employer testimony or records. *See* § 9021(a)(3)(A)(ii). Accordingly, DETR has developed a portal which requires the claimant to navigate multiple pages of eligibility requirements/questions, provide supporting documents, and file weekly claims. This is sufficient to make an initial determination of eligibility.

Moreover, UIPL 1145 demands that the State "is required to 'to seek from any source the facts required to make a prompt and proper determination of eligibility'" including "the claimant [] appearing for an interview and being asked questions, explain inconsistencies and offer his version of the facts." EOR, 2297-98, #2. UIPL 1145 also notes, "[w]hen no other interested parties are involved … [t]he claimant should be informed of the purpose and nature of the proceeding," (EOR, 2298) and that "the time and place of the proceeding must neither be a burden to the claimant *nor delay payment of benefits* to which the claimant may be found entitled." EOR, 2303, at # 3 (emphasis added). Once DETR has collected from the claimant the information required to make an eligibility determination through its own portal, and unless there are any outstanding questions or inconsistencies, benefits should be granted automatically. If there is a problem, then DETR must afford the claimant notice and an opportunity to be heard, *pre-determination*, by at least making a phone

call to inquire if the discrepancy can be explained.[22] There is no excuse for DETR's extensive delay in initial claims processing or its lack of communication before acting unilaterally to deny or suspend benefits.

DETR's position that it must use its limited resources to constantly re-examine initial eligibility determinations rather than decide new claims is incorrect for many reasons. First, UIPL 1145 (EOR, 2294-2310) stresses the importance and Congressional objective "to provide a substitute for wages lost during a period of unemployment not the fault of the employee." Noting that "[p]robably no program could be devised to make insurance payments available precisely on the nearest payday following the termination, but to the extent that this was administratively feasible, this must be regarded as what Congress was trying to accomplish." EOR, 2296-97. Further, UIPL 1145 quoted *Java* stressing, "We conclude that the word 'due' in § 3030(a)(1), when construed in light of the purposes of the Act, means the time when payments are first administratively allowed as a result of a hearing of which both parties have notice and are permitted to present their respective positions; any other construction would fail to meet the objectives of early substitute compensation during unemployment." UIPL 1145 also noted that the "Promptness

[22] DETR incorrectly puts the burden on the claimant to file for UI when DETR's own website precludes such filings whenever there is a PUA claim pending. DETR's software problems are not claimants' responsibility.

of the Determination Process" should be "accomplished no later than the second week after the week in which the claims is effective." EOR, 2301.

Appellants are not seeking a grant of benefits without justification. Because self-attestation replaces employer testimony in most cases, initial determination of eligibility can easily and lawfully be made based upon a *prima facie* showing in the application, rather than the extended research session now used by DETR in PUA cases only. *See e.g., Dept. of Employment Services v. Smallwood*, 26 A.3d 711, 712 (D.C. 2011) ("DOES is required to disburse unemployment benefit payments as soon as a claimant is found eligible and before an employer's appeal is decided."); *Windham Cnty. Sheriff's Dep't v. Dep't of Labor*, 86 A.3d 410, 413 (Vt. 2013) ("According to 21 V.S.A. § 1301(23), a 'valid claim' for unemployment compensation benefits is established by a determination of monetary eligibility at the time that an initial claim is filed.") If DETR learns that its initial determination is in error, DETR must afford due process before terminating benefits. "The department's procedure of summary termination by a certifying officer, on the grounds of a subsequent finding of ineligibility, does not change the concept of when benefits are due." *Pregent v. New Hampshire Dep't of Empl. Security*, 361 F. Supp. 782, 793 (D.N.H. 1973), *vacated and remanded for determination of mootness,* 417 U.S. 903 (1974). The statute errs on the side of benefit payment, not denial. "The average delay of eight weeks between the last check received prior to termination,

and the issuance of the first check after the appeal tribunal reverses the termination decision is not a *de minimis* deprivation of property and highlights the importance of a pretermination due process hearing." *Royer v. State Dep't of Empl. Security*, 118 N.H. 673, 676-77 (N.H. 1978).

As UIPL 1145 notes, *Java* left to the states "the choice of procedures to be used in a pre-determination factfinding proceedings, ***so long as*** the procedures provide to the parties reasonable notice and opportunity to be heard and resulting in prompt payment of benefits." *Id.* at 2297-98 (emphasis added). Before the pandemic, DETR would grant unemployment if the employer did not contest and DETR's own records did not disprove eligibility. If DETR wants to substitute for the employer, which it should not, then DETR must either grant unemployment compensation or attend a pre-determination "conference" with the claimant before it denies eligibility, especially when it denies eligibility based upon mere speculation like other program eligibility when the other program declines payment. These are the pre-determination due process rights afforded to claimants that DETR has trampled and the District Court's Order ignored.

UIPL 1145 further explains, while "the [*Java*] decision dealt specifically only with the *initial determination* of a worker's eligibility made at the time of the worker's *initiation* of a claim series, the reasoning of the Court would lead to the conclusion that when redeterminations or appeal decisions allow benefits such

benefits must be paid promptly without delay *or suspension* because of the pendency of an appeal or an appeal period." *Id.,* emphasis added. Thus, payments cannot be reduced, redetermined, or ceased once began without due process. *Id.* at 2307. As 9,000 or more start-stop claimants experienced, DETR does not follow the law.

1. Mathews v. Eldridge provides the courts with the framework to determine the extent of pretermination due process, which supports and validates Appellants' position.

Contrary to DETR's assertion, a careful reading of *Mathews v. Eldridge* actually supports Appellants' position. The question presented in *Mathews* was "whether the Due Process Clause of the Fifth Amendment[23] requires prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing?" *Mathews v. Eldridge,* 424 U.S. 319, 323 (1976). Although the Court found that the claimant Mathews was not entitled to a pretermination evidentiary hearing, the Court noted that "the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and finally the Government's

[23] Social Security is federally funded and federally administered, so only the Fifth Amendment Due Process clause applies, whereas Unemployment Compensation is state administration of a federal benefit, so both the Fifth and Fourteenth Amendment Due Process clauses apply. The result is the same here.

interest, including the function involved in fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335 *citing Goldberg v. Kelly,* 397 U.S. at 263-271. The issue in *Mathews* was not whether due process was required, but the level of process that was due. As the Supreme Court stated:

> The Secretary does not contend that procedural due process is inapplicable to terminations of Social Security disability benefits. He recognizes, as has been implicit in our prior decisions, [citations omitted] that the interest of an individual in continued receipt of these benefits is a statutorily created "property" interest protected by the Fifth Amendment. [Citations omitted] Rather, the Secretary contends that the existing administrative procedures, detailed below, provide all the process that is constitutionally due before a recipient can be deprived of that interest.

Mathews v. Eldridge, 424 U.S. 319, 332-33 (1976).

In *Mathews*, an additional factor to be considered was the fairness and reliability of the existing pretermination procedures and the probable value, if any, of additional procedural safeguards. In *Mathews*, the Court noted that "the decision whether to discontinue disability benefits will turn, in most cases, upon 'routine, standard, and unbiased medical reports by physician specialists. . ." The decision to terminate benefits was made on medical records analyzed by experts from both sides who had personally examined the claimant. In this case, there is not input from the claimant or the claimant's representative, and the decision is made unilaterally by an

administrative employee. And with the input of claimant's doctors in *Mathews*, the reversal rate was a mere 12.2% whereas the unilateral disqualification of those arrested for crimes against their employer showed that "39 percent of the applicants who incur postponement by virtue of the 'held in abeyance' proviso are in fact eligible for unemployment compensation, yet because of the proviso experience delays in receiving compensation that are often substantial." *Jenkins v. Bowling*, 691 F.2d 1225, 1230 (7th Cir. 1982). The relatively high reversal rate in unemployment compensation cases mandates more, not less, due process safeguards before agency action in the unemployment compensation arena.

a. The private interests affected by DETR's failure to make prompt eligibility determinations and pay "when due," weighs in favor of Appellants.

In analyzing the first factor, the *Mathews'* Court distinguished the disability benefits at issue in *Mathews* with the welfare assistance in *Goldberg,* noting that in *Goldberg,* the Court "held that due process requires evidentiary hearing prior to a temporary deprivation" because welfare assistance is given to the persons on the very margin of subsistence …". *Id.* at 340. The Court in *Mathews* differentiated welfare benefits stating disability benefits are not based on financial need. *Id.* at 341. The Court then relied on its reasoning in *Fusari v. Steinberg*, noting that the delay between "wrongful deprivation of benefits" and a hearing for an "erroneously terminated disability recipient may be significant" it is "likely to be less than that of

the welfare recipient" because the disability recipient has access to other private resources. *Id.*

After almost ten months of unemployment, most claimants are in desperate need of assistance. Thus, CARES Act benefits are analogous to welfare benefits as opposed to disability benefits. Although unemployment compensation was not intended to become a substitute for welfare assistance, many of those who don't receive unemployment compensation in a timely manner have must/have already applied for welfare general assistance as they sink well below the poverty index nationally and in Nevada. Indeed, the CARES Act/2021 CAA is actually titled "Continued Assistance for Unemployed Workers Act of 2020" and was enacted to provide "economic relief to workers, families, small business, industry sectors, and other levels of government that have been hit hard by the public health crisis created by" COVID-19. *See* CARES Act Pub. L. No. 116-136, 134 Stat. 281 (2020). The whole point of the CARES Act is to get money into the hands of workers who are unemployed through no fault of their own,[24] so that they can stay in their homes (and

[24] Since all unemployment compensation is federally financed in part, all state unemployment statutes share common themes such that cases from other states are instructive, even if these out of state cases are not controlling. "The [unemployment compensation law] chapter is remedial in nature and must be applied in favor of awarding benefits, and any provision precluding receipt of benefits must be narrowly construed." *Haub v. Dep't of Emp't & Econ. Dev.*, A13-1986 (Minn. Ct. App. June 9, 2014); *Missouri Division of Employment Security v. Labor & Industrial Relations Commission*, 647 S.W.2d 893, 895 (Mo. Ct. App. 1983); *Von Stauffenberg v. Dist.*

not spread COVID-19), feed their families, not overwhelm social services, and keep our economy going.

b. The risk of erroneous deprivation of benefits through the procedures used and the probable value, if any, of additional or substitute procedural safeguards, weighs in favor of Appellants.

In analyzing the second factor, the *Mathews'* Court noted the disability recipient's medical condition is more easily documented as opposed to the welfare recipients' "wide variety of information … critical to the decision-making process." *Id.* at 343. The Court again relied on *Goldberg*, arguing that in welfare benefit eligibility questions, "written submissions are a wholly unsatisfactory basis for decision." *Id.* at 344 *citing Goldberg,* 397 U.S. at 269. Additionally, the Court noted a disability recipient is provided with "full access to all information relied upon by the state agency" and "prior to cutoff of benefits the agency informs the recipient of its tentative assessment, the reason therefor, and provides a summary of evidence that it considers most relevant." *Id.* at 346. "Opportunity is then afforded the recipient to submit additional evidence or arguments, enabling him to challenge directly the accuracy of the information in his file as well as the agency's tentative conclusions." *Id.* This due process requirement is not present in DETR's decision

Unemployment Comp. Bd., 459 F.2d 1128, 1131 (D.C. Cir. 1972); *State ex rel. Wash. Univ. v. Richardson*, WD74907 & WD74993, at *3 (Mo. Ct. App. Feb. 5, 2013).

making process for denial or reduction of benefits as illustrated by its own determination letters, if DETR even issues an eligibility determination at all.

Here, DETR has not paid benefits on thousands of claims "in progress" for many months without providing claimants any written assessment stating reasons for ineligibility or giving them an ability to appeal. While there can be no appeal because those "in progress" have no adverse decision, a delay of payment with no decision for several months is tantamount to a denial of payment. Tens, if not hundreds, of thousands of claimants linger in this "in progress" abyss for months and months.

When it does decide to deny PUA benefits, DETR only provides cryptic reasoning for its decision stating: "We have completed a review and investigation of your claim for Pandemic Unemployment Assistance referenced above. We have determined that your claim is DENIED as you do not meet the qualifications required by the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 for Pandemic Unemployment Assistance." EOR, 3420. DETR fails to provide any reasoning, arguments, or evidence for claimants to rebut, even if they were given a chance to do so. DETR never affords the claimant the opportunity to directly challenge DETR's accuracy of information as well as DETR's tentative conclusions because claimants have no way to appeal tentative decisions (EOR, 2801 stating

claimants "do not have the privilege to perform this action") or even speak to a knowledgeable DETR representative.[25]

And, if the claimant is actually given a way to appeal the denial, the delay of five to nine months for an actual appeal hearing and decision is both a denial of due process, and in the case of PUA payments, a violation of the federal regulations which requires a decision within 30 days of the date DETR receives the appeal. 20 C.F.R. § 625.10 ("Any decision on a [PUA] first-stage appeal must be made and issued within 30 days after receipt of the appeal by the State."). Moreover, sending two-hundred thousand plus mass denials within three weeks without an ascertainable reason for that denial is not an exercise of discretion—it is a *per se* denial of due process. EOR, 3798-99. *Schettler v. Ralron Capital Corp*., 275 P.3d 933 (Nev. 2012). These denials have no facts and articulate a mix and match menu of possible legal conclusions, which give the claimant virtually no notice of DETR's basis for denials at all. *Schettler v. Ralron Capital Corp, supra, citing National Union Fire Ins. v. City Sav., F.S.B*, 28 F.3d 376 (3d Cir. 1994) (for the proposition that "because a defendant is unable to know what his or her defense will be before hearing the claim, 'it seems that it would be nearly impossible for a party to submit future hypothetical defenses to the administrative claims procedure—defenses to lawsuits

[25] EOR, 2748-2808 from Special Master's Report 2, chronicling issues claimants have in trying to get help from DETR's call center.

which may not yet have [been] brought against [a party] or which may never be brought at all.'"). Thus, not only is the routine rejection of all claims not an exercise of discretion, the notice itself also violates due process and is void.

c. The public interest weighs in favor of Appellants.

Lastly, "in striking the appropriate due process balance, the final factor to be assessed is the public interest." *Id.* at 347. Although the Court noted, "[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision … the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may outweigh the cost." *Id.* at 348. It clearly does so here.

The emergency of a pandemic is not a permanent excuse. "But even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87 (Nov. 25, 2020). "Let us be perfectly clear: public officials do not have free rein to curtail individual constitutional liberties during a public health emergency." *Calvary Chapel Bangor v. Mills*, No. 20-1507, at *13 (1st Cir. Dec. 22, 2020). "Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical." *Roman Catholic Diocese of Brooklyn supra,* slip opinion at 10. GORSUCH, J. concurring.

Appellants rebut each of DETR's excuses and attempts to avoid its duty as quickly as DETR manufactures them. As analyzed throughout section C.1, *supra*, a denial based upon eligibility in another program is also a determination of eligibility by DETR that the claimant is entitled to payment under that other program. The term "eligibility" means "the state of having the right to do or obtain something through satisfaction of the appropriate conditions." Oxford Online Languages Dictionary.[26] DETR, not the claimant, has the burden to produce all relevant records within the custody and control of DETR. *Accord*, *id.* at 6013 A(1)[27] and 20 C.F.R. 625 Appendix B 9 at 6011 B.[28] If DETR determines a claimant is eligible for benefits in some other program, DETR is estopped from then denying benefits in that program at the same time. *See, e.g., Edison v. the First Judicial Dist.*, 127 Nev.

[26] On the web at https://www.google.com/search?q=elibiliy&rlz=1C1GCEU_enUS820US820&oq=elibiliy&aqs=chrome..69i57j0i13i131i433i457j0i13l6.5656j1j7&sourceid=chrome&ie=UTF-8 last visited January 4, 2021.

[27] The Secretary of Labor interprets the above sections to require that a State law include provisions which will insure that: . . . (B) The State agency obtains and records in time for the prompt determination and review of benefit claims such information as will reasonably ensure the payment of benefits to individuals to whom benefits are due.

[28] "It is the responsibility *of the agency* to take the initiative in the discovery of information. *This responsibility may not be passed on to the claimant* or the employer. In addition to the agency's own records, this information may be obtained from the worker, the employer, or other sources." (Emphasis added.)

Adv. Op. No. 22, 55228 (2011), 255 P.3d 231 (Nev. 2011) (Applying judicial estoppel when the Nevada Department of Taxation has taken totally inconsistent positions in quasi-judicial administrative proceedings.) "As a form of res judicata, collateral estoppel or issue preclusion may apply to administrative proceedings." *See e.g., Jerry's Nugget v. Keith*, 111 Nev. 49, 54 (Nev. 1995); *Campbell v. State, Dep't of Taxation*, 108 Nev. 215, 218, 827 P.2d 833, 835 (1992). "[T]he doctrines of equitable estoppel and waiver can be invoked in workers' compensation proceedings." *Dickinson v. Am. Med. Response*, 124 Nev. 460, 467, 186 P.3d 878, 883 (2008)." *Orozco v. Wynn Resorts,* LLC, No. 66425, at *3 (Nev. App. Oct. 16, 2015) (same).

i. *DETR has a duty to pay eligible UI and PUA claimants when due.*

The so-called UI/PUA whirlpool[29] is not a valid excuse for non-payment under either program because it is DETR's responsibility to make sure the claimant is eligible for this other program in fact, not merely that the claimant *might be eligible,* especially when upon further investigation the claimant is not eligible at

[29] The CARES Act provides that claimants ***cannot*** collect under two programs at once, when it states that 'the term "covered individual"- (A) means an individual who-(i) is not eligible for regular compensation or extended benefits under State or Federal law or pandemic emergency unemployment compensation. . ." 15 U.S.C. § 9021(a). There is nothing contingent about this requirement of being entitled to benefits under another program as a block to benefits under the PUA program.

all.[30] *See*, *e.g.,* Attachment I to UIPL No. 16-20 Change 1, Section "E. Eligibility – Not Eligible for Regular UC" Q&A 30-37 at EOR, 1580-81. There is no need for a whirlpool under federal regulations. If DETR suspects duplicate program eligibility, then it must pay under one or the other, but not both. DETR cannot irreparably harm many thousands of claimants by not paying benefits at all, for which the claimant is entitled to under one or the other program.

ii. *Allegations of fraud do not circumvent due process.*

Grandiose claims of fraud in other states without individualized proof to particular applicants in this state are not valid excuses for DETR to cease payment without due process. Even the Amicus United States does not support DETR's

[30] Due to DETR's website design, and contrary to DETR's express instructions to the PUA applicant, there is no way for a claimant with a PUA claim pending to re-apply for UI on the DETR website after an initial UI determination of ineligibility which violates 20 C.F.R. 625 Appendix B at 6013 (A)(5) (If the State agency requires any particular evidence from the worker, it must give him a reasonable opportunity to obtain such evidence.") DETR blocks the claimant from obtaining this information and, at the same time, DETR cannot actually know if all the conditions have been met for UI payments without information from the claimant in addition to quarterly earnings (which DETR refuses to ask of claimant directly), which information can only be supplied by the claimant by using the website from which DETR has blocked the claimant. Notwithstanding DETR's self-imposed impossibility of performance, DETR disqualifies any applicant from PUA wherever there is a mere suspicion of UI eligibility based solely on quarterly earnings, as a matter of policy. *See, e.g.* In the Matter of: ALIYAH SANTAMARIA of Reno, NV Appeals Referee Docket: 2020011973-AT Claim Number: 419642 Determination Number: 1095292 EOR 4427

claims that this a sufficient reason for not making payments "when due."[31] Nor is there any causal connection between stopping mass fraud by some and denying payments to others. Under the due process clause, deserving claimants cannot be denied their entitled benefits based upon alleged generic allegations of fraud in other cases. *See, e.g., Law v. Whitmer*, Nevada Supreme Court No. 82178 (Dec. 8, 2020) (Affirmation of denial of election contest where allegations of voter fraud not supported by specific facts or admissible evidence in the record).

The District Court's Order allowed DETR to deny continuation of benefit payments based solely upon "clear and convincing" evidence of fraud, rather than as case law and DOL UIPL guidance. For instance, post-initial eligibility determination discovery or suspicion of fraud must be treated the same way as any other post-initial determination discovery of non-eligibility claim, which disallows unilateral action by DETR and requires exhaustion of the claimant's due process rights to notice, a fair hearing before an impartial Appeals Tribunal, and a written decision in favor of DETR before benefits are stopped. *See* UIPL 01-16, EOR, 3783-85, 3787.

[31] *See* Amicus United States at pp. 5-6 noting that "[e]nsuring benefits are not paid to *ineligible* claimants is critically important … Nevada has received funding to hire a dedicated prosecutor to combat CARES Act insurance fraud." (Emphasis added, internal citations omitted.) This is the only mention of fraud in the entire brief.

Appellants agree and have argued that under the CARES Act, undefined, unparticularized allegations of "clear and convincing proof of fraud" are not sufficient reasons for DETR to cease making payments once payments have started.[32] Instead, DETR must follow the DOL guidelines and the federal regulations at 20 C.F.R. Part 625 and treat post-initial determination claims of fraud the same as any other objection to benefits.[33] The standard for judging fraud at such administrative hearings is no different than the standard for determining any other disqualification, provided that such a determination is made by an impartial Appeals Tribunal *after a fair hearing* which afforded the claimant sufficient due process.

UIPL 16-20 states that "[i]f a state has reasonable suspicion of fraudulent activity on a claim … a states' investigative and adjudicative practices should be done in alignment with the processes described in UIPL No. 01-16 to ensure due process is afforded to the individual." EOR, 2477-2478. UIPL 01-16 expressly states that in cases of pre-initial determination allegations of fraud, DETR must at

---

[32] *See e.g.,* Appellants' Renewed Motion and Supplemental Authority in Support of Writ of Mandamus at EOR, 708 and 731; Appellants' Second Motion for Contempt at EOR 2848, 2851; Appellants' Reply In Support of Motion for Contempt at EOR, 3773-74.

[33] Ironically, DETR admitted as far back as its Opposition to Petitioners' Petition for Writ of Mandamus, that "pursuant to its agreement with the Department of Labor" DETR must follow the DUA "regulations at 20 CFR 625 **including follow[sic] the provisions for fraud and overpayments.**" *See* EOR, 414 (emphasis in original).

least contact the claimant to ascertain quickly if there is any non-fraudulent explanation for the suspected behavior. EOR 2485. To Appellants knowledge, DETR does not contact the claimant at all before suspending benefits because of "tell-tail" signs of fraud, which may or may not be explained and which often does not apply to the individual claimant at all.

Appellants agree with the Amicus United States that the exception for "clear and convincing evidence of fraud" should be struck from the District Court's Order of Mandate, but the remainder of that Order should stand for the "start-stop" group of claimants who DETR determined were eligible for benefits as evidenced by DETR paying those benefits, and then ceasing payment without reason or for reasons related solely to the initial determination rather than any subsequent requirements for maintaining benefit status. Indeed, this is what the United States Supreme Court held in *Java* and was reiterated by the DOL in UIPL 1145, which unequivocally states, benefits must continue to be paid "promptly without delay or suspension because of the pendency of appeal or an appeal period." EOR, 2297. And UIPL 1145 explains that the "Requirement of Notice and Opportunity to be Heard" whether pre-or post-determination, allows the agency to conduct a "conventional type of hearing"; it does not "contemplate taking evidence in the traditional judicial sense", but it *does require* "an occasion when the claims of both the employer *and* the employee can be heard." EOR, 2298 *citing Java,* 402 U.S. 121, at p. 134. DETR

is not providing claimants who are suspected of fraud any of these procedural protections; instead, DETR seems to label most claim issues (such as IP address out of state, phone number out of state, more than one claimant at same address, scriveners errors, software glitches and update issues, et cetera at EOR, 2750, 2754-65) as "clear and convincing evidence of fraud."

2. DETR must provide due process for overpayment determinations.

Based directly upon the *Goldberg* and *Java* decisions, as well as the express language of the CARES Act at 15 U.S.C. § 9023(f)(3)(B) and again at 15 U.S.C. § 9025(e)(3)(B) Appellants seeks a writ of mandate that DETR cease using self-help to reclaim alleged overpayments until there has either been an Appeal Tribunal decision or the time for requesting such a hearing has passed without any appeal being filed. The CARES Act specifically requires a due process hearing ***before*** a state agency can require repayment for any overpayments.

> No repayment shall be required, and no deduction shall be made, until a determination has been made, notice thereof and an opportunity for a fair hearing has been given to the individual, and the determination has become final.

15 U.S.C. § 9025(e)(3)(B)] The statute is clear—no repayment can be required until and unless there has been a written decision by an Appeals Tribunal after a fair hearing with adequate notice. *Accord*, 15 U.S.C. § 9023(f)(2)(B). This applies to

all cases, including cases with allegations of "clear and convincing evidence of fraud."

Moreover, DETR's argument that it will lose CARES Act/2021 CAA funding due to overpayment/repayment issues has been addressed by Congress. On December 28, 2020, the President signed the 2021 CAA which provides at section 201 an extension of unemployment benefits from 39 to 50 weeks. *See* EOR, 4185. At subsection (d)(4) beginning on page 14, "Waiver Authority for Certain Overpayments of Pandemic Unemployment Assistance the new legislations states:

> In the case of individuals who have received amounts of pandemic unemployment assistance to which they were not entitled, the State shall require such individuals to repay the amounts of such pandemic unemployment assistance to the State agency, ***except that the State agency may waive such repayment*** if it determines that—(A) the payment of such pandemic unemployment assistance was without fault on the part of any such individual; and (B) such repayment would be contrary to equity and good conscience.

(Emphasis added.) Thus, any repayment of a significant sum would be contrary to equity and good conscience. Likewise, overpayments could easily be determined *en masse* to be non-fraudulent, and the bill allows for forgiveness when overpayment is done innocently.

For example, DETR now refuses to pay the $600 per week supplemental benefits under the FPUC program or $300 a week under the

AWL program because it is afraid that if the case is assigned from PUA to UI, or UI to PUA, DETR will be obligated to repay these sums. But since these supplemental payments are triggered by any underlying payment of compensation, it no longer matters whether the triggering event is a PUA claim instead of a UI claim or *visa a versa*. This merely confirms what Appellants have been saying from the beginning—the purpose of the CARES Act is not to account for overpayments, but to put money into the economy, and the unemployment compensation program is simply an injection point, just as the PPP program helps small businesses to retain skilled workers when there is insufficient work to justify the expense.

III. CONCLUSION

For these reasons, this Court should reverse the District Court's failure to issue a writ of mandate compelling the State of Nevada ex rel. Department of Employment, Training and Rehabilitation to follow its clear duty to exercise its discretion and issue written binding decisions either by granting or denying benefits within a reasonable time not to exceed three weeks from initial application.

Further, this Court should reverse the District Court's failure to issue a writ of mandate compelling compliance with DETR's written decision as soon as administratively possible. If DETR decides to grant PUA benefits, then DETR should be compelled to make payments within three weeks of that decision. If DETR

decides not to grant PUA benefits, DETR must provide adequate notice of the denial and the claimant shall be afforded 60 days within which to file an appeal from any adverse determination by DETR to an impartial Appeals Tribunal.

If an appeal is filed, then DETR must be compelled to provide a fair hearing with adequate due process as required by law and an impartial Appeals Tribunal must issue a written decision within 30 days of the initial appeal by the claimant. In the interim, if any appeal is filed, DETR may not cease making benefit payments, except that if there are conditions subsequent to any grant of benefits by DETR such as reporting eligibility for work, failing to file weekly claims, or supplying specific documentation requested at the time of initial eligibility determination in support of self-certification, then DETR may suspend payments pending the fulfilling of these conditions that could not have been satisfied by the claimant at the time of initial determination because they did not exist or were unknowable.

If DETR fails to perform these tasks as required by the order on writ of mandate, then DETR must make benefit payments in the same manner as if any adverse decision had been successfully appealed by the claimant. In these ways, DETR can fulfill its statutory mandate of providing benefits owed "when due" and provide the requisite due process to all claimants whose claims it denies. DETR can reserve the right to recover any overpayments in the manner provided under 20 C.F.R. Part 625, to the extent that such overpayments are not forgiven as allowed by

law, but further, if such overpayments are the result of underpayment by any other program of unemployment compensation DETR administers, DETR shall first use that underpayment to satisfy any overpayment recovery charged to a claimant.

DETR is harming hundreds of thousands of Nevadans by failing to perform its clear duty under law. This Court should correct the Order of Mandate to DETR by the District Court to correct this intolerable situation DETR has created.

January 20, 2021

Respectfully Submitted,

THIERMAN BUCK LLP

/s/ Mark R. Thierman
Mark R. Thierman, Bar No. 8285
Joshua D. Buck, Bar No. 12187
Leah L. Jones, Bar No. 13161
Joshua R. Hendrickson, Bar No. 12225
Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5)(A) and the type Type-Volume Limitation. requirements of NRAP 32(a)(7)(ii) because:

- This brief has been prepared in a proportionally spaced typeface using Microsoft Office in 14-point font size and Times New Roman.
- This brief contains less than 14,000 words (13,929), as measured by Microsoft's Office 365 (word count) program, including footnotes, but excluding the disclosure statement, table of contents, table of authorities, required certificate of service, and certificate of compliance with these Rules.

I hereby certify that I have read the **Appellants' Reply in Support of Appeal and Response to Appellees' Cross-Appeal** brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or EOR where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: January 20, 2021

THIERMAN BUCK LLP

/s/ Mark R. Thierman

Mark R. Thierman, Bar No. 8285

CERTIFICATE OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within the action. My business address is 7287 Lakeside Drive, Reno, Nevada, 89511. On January 20, 2021, the Appellants' Reply in Support of Appeal and Response to Appellees' Cross-Appeal was served on the following by using the Supreme Court of Nevada's eFlex System:

Jeff Conner
Greg Ott
Robert Whitney

By electronic transmission to the following email accounts:

JConner@ag.nv.gov
GOtt@ag.nv.gov
RWhitney@ag.nv.gov

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 20, 2021

/s/ Jennifer Edison-Strekal