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' OPENING BRIEF

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the Appellants Amethyst Payne *et al* are each natural persons, who have no stock or ownership interest in any entity involved in these proceedings, and do not have a parent or subsidiary company or corporation, although some have sole proprietorship certificates from the Nevada Secretary of State for sales tax purposes.

The undersigned counsel of record further certifies that the firm of Thierman Buck, LLP, and its attorneys, Mark R. Thierman, Joshua D. Buck, Leah L. Jones, and Joshua R. Hendrickson, are the only attorneys who have appeared for the parties in the case (including proceedings in the district court) or are expected to appear in this Court.

Dated: November 24, 2020

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I. INTRODUCTION

It is often said that "justice delayed is justice denied." For the hundreds of thousands of Nevadans suffering because of the Department of Employment Training and Rehabilitation's ongoing failure to comply with its legal and moral obligations, this maxim is more than a poetic muse; it is a sorrowful reality of day-to-day life. DETR's failures have resulted in extraordinary harm to Nevada's workers, including but not limited to having to rely on food banks to feed their children, mortgage and credit card defaults, credit scores ruined, depletion of life and retirement savings, eviction proceedings initiated, all leading to depression, despair, loss of self-worth, domestic violence, a strain on social services and the courts, as well as suicidal ideation.

To date, nearly nine months after the federal government passed the landmark Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), designed to assist those Americans most in need and suffering from the effects of a global pandemic, DETR has failed to process hundreds of thousands of claims for unemployment benefits in the form of regular unemployment insurance ("UI") or one or more of the several federal programs such as Pandemic Unemployment Assistance ("PUA"), Pandemic Emergency Unemployment Compensation ("PEUC"), the $600 per week Federal Pandemic Unemployment Compensation ("FPUC") program and the $300 per week Lost Wages Assistance ("LWA")

program.[1] Nevadans have been waiting in limbo, without any final determination/adjudication from DETR, favorable or unfavorable, for months. By failing to promptly perform its duty to pay benefits "when due," DETR has inflicted enormous economic and emotional distress on Nevada's workforce and the economy that depends on them.[2] In this case DETR has denied and/or delayed payment of more than $1 billion of federally funded unemployment compensation benefits to over 100,000 Nevadans.[3]

DETR's failure to comply with its statutory and constitutional obligations of prompt benefit determination and payment is compounded by its failure to provide

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[1] A list of acronyms and definitions to terms used throughout this Brief can be found as Exhibit 5-2 to the Special Master's First Report ("SM Report 1") at EOR, 1407-1413.

[2] In addition to providing much-needed support for hard-working Nevadans affected by the pandemic, this money would also act as an indirect federal stimulus to the local Nevada economy as people on unemployment have a high marginal propensity to consume. On Friday, November 20, 2020, United States Secretary of the Treasury, Steven Mnuchin clawed back some $455 billion that was part of the CARES Act and earmarked for medium to small business loans further jeopardizing Nevada businesses, and the people who work and shop at them. See, https://www.cnn.com/2020/11/19/business/steven-mnuchin-federal-reserve-cares-act/index.html (last visited 11/20/20). DETR must start paying eligible claims to allow Nevada citizens to start rebuilding their lives and support Nevada's economy.

[3] Appellants estimate conservatively that a lump sum payment of back benefits to 100,000 people would equal approximately $1 billion. According to DETR, as of August 19, 2020 there were 243,963 unpaid claims, and the amount of back pay per claim would be closer to $16,000 per claimant. EOR, 2708. Therefore, Appellants estimate the full amount of federal relief due but unpaid in this case is closer to $4 billion.

a functional mechanism for appealing adverse determinations. Before July 18, 2020, DETR did not provide claimants with any form of internal appeal mechanism, despite informing previously denied claimants they had only 11 days from the original denial date to file an appeal via the website only.[4] Claimants were only recently able to file appeals—far beyond the constraints of the Act's "when due" requirement and in violation of claimants' right to due process under the State and Federal Constitutions. DETR has further breached its clear duty by redetermining eligibility *ab initio*, retroactively, without a due process hearing as required by law, attaching and/or ceasing existing benefit payments to that claimant prior to any notice or hearing and in many cases requiring repayment of money with no ability to appeal.

According to DETR, as of August 19, 2020 there were 243,963 individuals with claims still pending, not including claimants who have yet to appeal.[5] In

[4] DETR violates due process by misinforming PUA claimants that they have only 11 days to appeal whereas Federal law requires the state to allow claimants a full 60 days. *See* 20 C.F.R. § 625.10(1) ("except that the period for appealing shall be 60 days from the date the determination or redetermination is issued or mailed instead of the appeal period provided for in the applicable State law.")

[5] Unless otherwise stated, the numbers provided throughout this brief are taken from DETR's own estimates provided to the Special Master as set forth in one of two of the Special Master's Report. EOR, 2703-2846 ("SM Special Report 2"), dated August 19, 2020. Appellants assume that the 243,963 (EOR, 2708) figure includes both regular UI and CARES Act PUA claims, and the number of unpaid claims has not significantly decreased in the months following the Report.

addition, on October 16, 2020, DETR announced it will automatically deny, *en masse*, in a single week, approximately 217,000 PUA claims on top of the 70,000 denials based upon the "UI/PUA whirlpool" (a situation when claimants are denied PUA based upon a determination that they are eligible for UI but denied UI and therefore receive nothing).[6] DETR only recently (second week of November 2020) began scheduling appeal hearings at the rate of about 100 a week.[7] At this pace, it will take DETR over 3 years to adjudicate the backlog.[8] DETR has done this as a

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[6] "DETR officials announced large batches of mass denials this week, however, more than 217,000 PUA claims will be denied in the next three weeks because DETR has been unable to verify the identity of applicants. That's on top of about 70,000 denials based on applicants that have eligibility in the regular unemployment program and [when added together] amounts to about half of all PUA claims filed." *See*, *DETR: Lost Wages Assistance unemployment benefit payouts have begun; hundreds of thousands of PUA claims denied for ID issue*, by Michelle Rindels in the Nevada Independent, October 16th, 2020 Edition, available at https://thenevadaindependent.com/article/detr-lost-wages-assistance-unemployment-benefit-payouts-have-begun (last visited 11/21/2020).

[7] *See* Nevada Independent, "Indy Q&A: What has unemployment strike force accomplished as its three-month timeframe ends" by Michelle Rindels. https://thenevadaindependent.com/article/indy-qa-what-has-unemployment-strike-force-accomplished-as-its-three-month-timeframe-ends (last visited 11/12/20).

[8] Based on the issues presented, DETR, through the Special Master's Second Report, indicates there are 53,292 class members in the "UI/PUA Whirlpool." EOR, 2708. Compared to the numbers DETR revealed in its October 16th, 2020 press release, the amount of claims in the whirlpool has actually increased from the time of the special masters report. See footnote 6 above. The "Start-Stop" subclass consisted of at least 30,647 individuals, although DETR claims "7,407 [of those] had failed to file weekly claim or were disqualified for excessive earnings, leaving 23,240 claims [where payment began but] that were stopped for other reasons." EOR, 2709. Because DETR did not disclose how many claims were stopped for

matter of policy to tens of thousands of Nevadans in clear violation of its duty to: (1) promptly determine PUA or other program eligibility; (2) either (a) pay benefits immediately based upon that determination, or (b) provide a prompt due process hearing for the claimant to challenge the denial with written decision by an Appeal Tribunal within 30 days of filing of an appeal[9]; (3) if an initial determination is appealed, then maintain all existing payments of benefits until and unless an adverse determination is timely rendered by an Administrative Tribunal; and (4) refrain from demanding or collecting any repayment of allegedly incorrectly paid sums before receiving a final decision from an impartial Appeals Tribunal after a fair hearing. 42 U.S.C. § 503(a)(1)&(3).

At some point, enough is enough; DETR's refusal to adjudicate claims for unemployment violates the due process clauses of the Nevada and Federal Constitutions and runs afoul of 42 U.S.C. § 503(a)(1)'s requirement that unemployment payments must be made in a timely fashion. The remedy for said violations is actually quite simple: DETR must (1) make an eligibility determination

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excessive earnings, or how many were stopped for failing to file weekly claims, and because many claimants were blocked by DETR from filing weekly claims, while others were misled to believe that they did not have to file weekly claims, the number of people in the Start-Stop group is probably greater than the 23,240 admitted to by DETR.

[9] 20 C.F.R. § 625.10(a) "Any decision on a DUA first-stage appeal must be made and issued within 30 days after receipt of the appeal by the State."

within 30-days of a claim being made; (2) provide for a functional appeal mechanism for all adverse adjudications, denials, redeterminations and overpayment issues; and (3) once an eligibility determination has been made, payments must promptly follow and cannot be ceased, denied, redetermined until and *unless* any appealed adverse determination is sustained in a written decision issued by an impartial Appeals Tribunal within 30 days of the claimant's filing of an appeal or the time for first level appeals (60 days) has lapsed, whichever is later. Appellants respectfully request that this Court reverse the decision of the District Court and mandate the issuance of a writ compelling DETR to do so.

II. JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to NRAP 3A(b)(1) because the District Court's August 28, 2020 Order is a final order resolving all issues related to Appellants' Petition for Writ of Mandate previously reviewed in the district court's July 22, 2020 Order.

On November 11, 2020, Appellant timely filed and served a notice of entry of the Order by using the Court's eflex Electronic Notification System. The notice of appeal was timely filed on September 4, 2020 through electronic means by using the Court's eflex Electronic Notification System and pursuant to NRAP 4(a)(1).

III. ROUTING STATEMENT

This case is presumptively retained for the Supreme Court to "hear and decide" because it raises "as a principal issue a question of first impression involving the … Nevada Constitution" and because the case raises "as a principal issue a question of statewide public importance." NRAP 17(a)(11)-(12).

This case presents the questions of whether the Nevada Department of Employment Training and Rehabilitation ("DETR") has violated the Nevada Constitution, and its agreement with the federal government to in its administration of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act," Pub. L. No. 116-136, 15 U.S.C. § 9000 et seq) and other unemployment compensation programs. The District Court's decision raises issues of extreme importance to the people of Nevada, particularly Nevada workers, who, due to the COVID-19 health crisis, and through no fault of their own, may be entitled to unemployment or CARES Act benefits. This statement is made pursuant to NRAP 28(a)(5).

IV. ISSUES PRESENTED FOR REVIEW

A. Whether DETR's dilatory determination/adjudication of initial eligibility for hundreds of thousands of unemployment compensation claimants violates the due process clauses of the Nevada and Federal Constitutions as well as 42 U.S.C. §503(A)(1)'s timeliness "when due" requirement?

B. Whether DETR's practice of issuing purportedly 'contingent' initial determinations/adjudications of eligibility for tens of thousands of unemployment compensation claimants without making any payments thereon violates the due process clauses of the Nevada and Federal

Constitutions as well as the payment "when due provision of 42 U.S.C. §503(A)(1)?

C. Whether DETR's failure to promptly provide a fair hearing by an impartial tribunal of all adverse determinations of tens of thousands of claims violates the due process clauses of the Nevada and Federal Constitutions and the due process requirements of 42 U.S.C. §503(A)(3)?

D. Whether DETR's practice of ceasing payments of benefits granted initially, and /or demanding, collecting and/or deducting payments of amounts allegedly overpaid before "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" violates the due process clauses of the Nevada and Federal Constitutions as well as the CARES Act at 15 U.S.C. §§ 9023(f)(1)(B), 9024(f) and/or 9025(e)(1)(B)?

E. Whether DETR's practice of issuing form letters to tens of thousands of claimants stating overbroad, generalized, and generic grounds for denial with no proof of individual ineligibility violates the due process clauses of the Nevada and Federal Constitutions, as well as DETR's clear duty pursuant to 20 C.F.R. Part 625 to exercise its discretion in deciding if and when unemployment benefits are due?

F. Whether DETR's practice of denying PUA benefits based upon eligibility in some other unemployment program while simultaneously denying or at least failing to provide benefits under that other program (the so-called UI/PUA whirlpool) violates DETR's clear duty to follow 20 C.F.R. § 625.4(i) and the provisions of question 33 in UIPL No. 16-20, Change 1, which provides that an individual may be eligible for PUA if he or she is disqualified from regular UI because of a prior quit or termination or unserved penalty period?

V. BRIEF STATEMENT OF THE CASE

The legal questions presented in this case can be distilled down to four queries of whether or not DETR violated its duty to: (1) promptly determine PUA or other

program eligibility; (2) either (a) pay benefits immediately based upon that determination, or (b) provide a prompt due process hearing for the claimant to challenge the denial resulting in a written Appeals Tribunal decision within 30 days of the date of the appeal; (3) ceasing, denying, and/or redetermining benefit payments until and unless any appealed adverse determination is sustained in a written decision issued by an impartial Appeals Tribunal (after a proper due process fair hearing) within 30 days of the claimant's filing of an appeal or the time for the filing of such first level appeals (60 days) has lapsed (if an appeal mechanism was provided but not used), whichever is later; and (4) refrain from demanding or collecting any repayment of allegedly incorrectly paid sums before receiving a final written decision from an impartial Appeals Tribunal after a fair hearing

Payment of unemployment compensation is an entitlement, not a gift. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (Social Security Disability benefit payments are "'property' interests within the meaning of the Due Process Clause of the Fifth and Fourteenth Amendment."); *accord, Glaser v. Emp't Sec. Div*., 373 P.3d 917 (Nev. 2011) ("Due process protections of the Fourteenth Amendment of the U.S. Constitution and Article I, Section 8 of the Nevada State Constitution apply to unemployment benefit hearings.").

Section 303 of the Social Security Act, 49 Stat. 626, as amended, 42 U.S.C. § 503(a)(1), requires the payment of unemployment compensation "when due." The

Social Security Act's "when due" requirement mandates that DETR both promptly determine initial eligibility and promptly make payment thereafter. *See, e.g., Jenkins v. Bowling,* 691 F.2d 1225, 1230 (7th Cir. 1982) ("[T]he objectives behind the requirement of prompt payment could be defeated simply by the state's indefinitely deferring final action on applications for unemployment benefits"); *Wilkinson v. Abrams*, 627 F.2d 650, 661 n.14 (3d Cir. 1980) ("We find no merit in the Secretary's argument that the 'when due' requirement of §303(a)(1) of the Act, 42 U.S.C. § 503(a)(1) does not apply until a claimant has first been administratively determined to be eligible for unemployment compensation benefits."). Once eligibility is determined, payments must be "made with the greatest promptness that is administratively feasible." 20 C.F.R. § 625.9(e).[10] The agency is required to promptly provide "a fair hearing, before an impartial tribunal, for all individuals

[10] All the post-pandemic UIPLs retain this requirement for promptness. *See*, *e.g.* UIPL 16-20 dated 4/5/20 at Attachment I, pp. I-11 – I-12, no. 13 (a) through (h) which provides in pertinent parts: "Provide Notices to Individuals such that: (a) Determination of Initial Claim. When an individual files an initial claim for PUA the state agency must determine promptly the eligibility of the individual and, if eligible, the weekly maximum amounts of PUA payable. If denied PUA, the individual must be issued an appealable determination. (b) Determination of Weekly Claims. … if entitled to a payment of PUA … issue a prompt payment." (d) Notice to Individual. The state agency must give written notice to the individual of any determination or redetermination of an initial claim and all weekly claims. Each notice must include such information regarding rights to reconsideration or appeal, or both, using the same process that is used for redeterminations of regular compensation. (e) Promptness. Full payment of PUA when due must be made as soon as administratively feasible. (g) Promptness of Appeals Decisions."

whose claims for unemployment compensation are denied." 42 U.S.C. § 503(a)(3). In cases where a state has already made a determination of eligibility, the state must provide this hearing *before* withholding, stopping, or reducing benefit payments. *See e.g., Wilkinson*, 627 F.2d at 664; *Goldberg v. Kelly*, 397 U.S. 254, 263-64 (1970) (recognizing "entitlement to welfare payments" as a property right that cannot be taken away without a "pre-termination evidentiary hearing"); *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971) (applying this principal to the payment of unemployment compensation).

The legal authority is clear—any State entity administering unemployment compensation benefits must: (1) promptly determine benefit eligibility; (2) promptly pay all unemployment compensation benefits after determining eligibility, and (3) promptly provide a fair hearing before an impartial tribunal for all individuals whose claims for unemployment compensation are denied, including both initial eligibility denials as well as any subsequent redetermination of eligibility that results in a reduction or nonpayment of benefits, and/or any overpayment allegations. The state may not reduce or cease payments previously granted (whether paid or not) until and unless either a) the claimant has failed to timely file (60 days for all PUA claims) an appeal from notice of any adverse determination if a mechanism for filing such an appeal is made available, or b) until and unless an adverse determination is

affirmed by an impartial Appeals Tribunal within 30 days of filing such an appeal, whichever is later.

Even in a national disaster, promptness is measured in days or weeks, as opposed to months or years. These basic requirements govern state and federal administration of unemployment benefits and provide the underlying legal framework for this Court's analysis of whether DETR has complied with its clear legal duties in administering unemployment benefits to the people of Nevada in this time of extreme need.

By this appeal, Appellants seek to reverse the Second Judicial District Court's denial of Appellants' application for a writ of mandamus compelling Appellees to make an initial eligibility determination and to pay unemployment benefits to more than 100,000 Nevada residents.

VI. FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED

A. The CARES Act

On March 27, 2020, in response to the COVID-19 pandemic, Congress passed the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act," Pub. L. No. 116-136, 15 U.S.C. § 9000 et seq). The statute created the Pandemic Unemployment Assistance ("PUA") program, which provides, *inter alia*, unemployment assistance through state agencies for individuals who are not eligible for regular unemployment compensation or extended benefits under existing State

or Federal law. 15 U.S.C. § 9021 (a)(3)(A)(i). On March 31, 2020, the United States Department of Labor ("DOL") entered into an agreement with the State of Nevada, Department of Employment Training and Rehabilitation pursuant to 15 U.S.C. § 9025(a), which mandates that DETR, under appropriate conditions, "will make payments of pandemic emergency unemployment compensation to individuals." EOR, 462-474. Such payments are 100 percent funded by the federal government, including DETR's administrative costs. *See* 15 U.S.C. § 9023(d)(1)(A).[11]

B. Nevada's Unemployment Pandemic

There have been more than 1.3 million initial claims for unemployment benefits in Nevada during the pandemic, out of a workforce that numbers only 1.5 million.[12] Since March 2020 through the week of November 13, 2020 there have been 752,795 initial claims for unemployment filed, which includes 631,572 PUA claims filed.[13] Instead of granting benefits before the programs expire, DETR has

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[11] Payment by the federal government to DETR can be made in arrears or in advance. 15 U.S.C. § 9023(d)(1)(B).

[12] Nevada Independent *Q&A: What has unemployment strike force accomplished as its three-month timeframe ends*? By Michelle Rindels https://thenevadaindependent.com/article/indy-qa-what-has-unemployment-strike-force-accomplished-as-its-three-month-timeframe-ends posted on November 11th, 2020, last visited November 17, 2020.

[13] *See* November 13, 2020 DETR Press Release at http://nevadaworkforce.com/Portals/197/UI%20Monthly%20Claims%20Press%20Release/2020/UI_Current_Release.pdf (last visited 11/20/20).

prevented hundreds of thousands of eligible claimants from receiving these federally mandated and federal paid benefits.

C. Appellants' Writ of Mandamus

Appellants originally filed their Petition for Writ of Mandamus and/or Class Action Complaint for Damages On May 12, 2020 alleging two causes of action: (1) violation of section 303(a)(1) of the federal Social Security Act, 42 U.S.C. § 503(a)(1)(3) and CARES Act, PUA[14]") by failing to provide a mechanism for self-employed individuals, sole proprietors, and independent contractors ("self-employed" or "gig" workers)[15] to apply for CARES Act benefits; and (2) denial of

[14] The PUA program generally allowed states that entered into an agreement with the Secretary of Labor to pay up to 39 weeks of new federal benefits to individuals who were not eligible to receive or who have exhausted regular unemployment compensation (UC), Extended Benefits (EB), and Pandemic Emergency Unemployment Compensation (PEUC) under 15 U.S.C. § 9025(a)(2), and who otherwise meet the eligibility requirements of the CARES Act. EOR, 913-915.

[15] Each of the named Plaintiffs and the class they seek to represent do not receive a W-2 wages, instead have 1099 net income as self-employed individuals, independent contractors or so-called "gig workers." So-called "gig workers" are covered by the PUA program. *See* DOL Unemployment Insurance Program Letter ("UIPL") No. 16-20, dated 4/5/20, Attachment I, sec. C(k), which states that a covered individual is "an individual who works as an independent contractor with reportable income may also qualify for PUA benefits if he or she is unemployed, partially employed, or unable or unavailable to work because the COVID-19 public health emergency has severely limited his or her ability to continue performing his or her customary work activities, and has thereby forced the individual to suspend such activities." The UIPL uses a ridesharing driver who earns 1099 income as an example. DOL UIPL No. 16-20, dated 4/5/20 at EOR, 1538.

due process of their right to receipt of federally mandated benefits pursuant to the CARES Act. EOR, 32-59. Appellants sought a writ of Mandamus pursuant to NRS 34.160 compelling DETR to: (1) timely initiate a mechanism for gig workers to apply for CARES Act benefits and (2) include an appeals process. *Id.* A week after the initial writ was filed, Appellees finally set up a process by which gig workers could at least file for CARES Act benefits. EOR, 924-925. This rendered one of the requests set forth in Appellants' initial writ moot.

However, it soon became apparent to Appellants that Appellees' system for determining/adjudicating CARES Act benefits was still fatally flawed. This lawsuit was amended on June 22, 2020 to require payment of unemployment compensation benefits under the CARES Act "when due" and to provide an working appeals mechanism, as required by the federal Social Security Act, 42 U.S.C. § 503(a)(1)&(3).[16] EOR, 60-89.

[16] 42 U.S.C. § 503(a) states: The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for — (1) Such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary of Labor shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary of Labor to be reasonably calculated ***to insure full payment of unemployment compensation when due***;. . . . . (3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied. (Emphasis added).

D. The District Court Record: Nevadan's Are Suffering

To aid the Court, the Honorable Judge Barry L. Breslow appointed Reno attorney Jason D. Guinasso as Special Master to conduct a thorough factual investigation and issue a report with recommendations to the Court. EOR, 12-18. By this act, the District Court wisely condensed many years of potential discovery to a few weeks of extraordinary, "Herculean" effort by the Special Master. The Special Master issued two reports—an initial 310-page report with 9,044+ pages of exhibits on 7/17/20 and, at the request of the Court, a second supplemental report consisting of another 115-page report with an unknown number of additional confidential pages of exhibits on 8/19/20[17]—which form most of the factual record in this case. Appellants have no dispute with the factual findings contained in these two reports. Appellants agree with some of the conclusions of the Special Master but disagree with others.[18]

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[17] The two reports by the Special Master provided concrete examples of how DETR could fix problems with payment, agreeing with Appellants that DETR could be paying more claimants, through implementing a "one-stop shop" to prevent the UI/PUA whirlpool, making the process more user friendly while communicating more with claimants to prevent scrivener-type errors resulting in needless denials, and especially affording claimants due process through a working appeals process. EOR, 2809-2813.

[18]For example, many of the Special Masters' conclusions and recommendations were based upon DETR's argument that unsupported allegations of massive, unproven fraud override statutory and constitutional rights to payment after the initial favorable determination, or lack of adverse determination within a reasonable length of time. After Appellants filed their first motion for contempt of

The Special Master found as a matter of fact based upon the party admissions of DETR's Administrator that since May 16, 2020, PUA claimants did not have any effective means to appeal written (or de facto) determinations by DETR. EOR, 943, 1133-1135. The Special Master correctly concluded as matter of fact that from May 16, 2020, until whenever DETR implemented a functioning appeals mechanism, every person who had filed a claim and been aggrieved by DETR's determinations regarding that claim for PUA benefits had not had an opportunity to be heard by an impartial Appeals Tribunal. *Id*. Appellants agree with his conclusion that this was a violation of the due process protections of the Fourteenth Amendment of the U.S. Constitution and Article I, Section 8 of the Nevada Constitution. Appellants agree with the Special Master's statement:

> Notwithstanding Administrator Gaa's and her team's Herculean efforts to deliver benefits to eligible claimants, there is no pandemic exemption

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the District Court' original order, DETR admitted that it did not find a single incident of "clear and convincing evidence of fraud" in the first 3,500 claims re-examined by DETR. EOR, 3671-3673. In light of this fact, coupled with no offers of *in camera* inspection of records or specific offers of proof of such fraud, plus news reports of just a few arrests for fraud, negate the truthfulness of DETR's assertions. In addition, *Java* and federal regulations and guidance specifically do not allow suspension of benefit processing based upon mere unproven suspicion of fraud. 20 C.F.R. § 625.9, 625.10 and 625.14. *See also*, UIPL 1145 (EOR, 2295-2310) attachment entitled "Procedures for Implementation of the *Java* Decision" *affirmed* by UILP 16-20 at Section 13(g) on page 11 of attachment 1 ("20 C.F.R. 625.14 shall apply with respect to PUA overpayments and fraud to the same extent and in the same manner as in the case of DUA") and UILP 16-20 at Change 2, at Q&A 23 ("a state's 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, 3876-3877.

> to the due process rights of claimants who have been aggrieved by ESD determinations (or non-determinations). . . [T]he protective purpose behind Nevada's unemployment compensation system to provide "temporary assistance and economic security to individuals who become involuntarily unemployed."

EOR, 1135-1136.

On the other hand, Appellants disagree with the Special Master and the District Court that the correct solution to this problem was to simply hire more people to turn pages one by one in order to grant benefits on an individual basis, while automatically denying entire classes of claimants benefits based upon incorrect assumptions. EOR, 2734-2735. UIPL 01-16 says that DETR may not automatically deny benefits, but it does not say DETR cannot automatically grant benefits. In cases of insufficient information (EOR, 3783); DETR is supposed to rely on the self-attestation of the claimant. 20 C.F.R. § 625.9(a)(2).[19] DETR could have used a computer program to simply check if all the right answers appeared on the initial claims form, confirm with other databases that the claimant was not actually receiving or eligible to actually receive UI payments, use computer data bases to confirm the same claimant had not filed in other states for the same period,

[19] 20 C.F.R. § 625.9(a)(2) states "An individual's eligibility for DUA shall be determined, where a reliable record of employment, self-employment and wages is not obtainable, on the basis of an affidavit submitted to the State agency by the individual, and on a form prescribed by the Secretary which shall be furnished to the individual by the State agency." All references to DUA must be read as PUA, unless specifically provided otherwise. 15 U.S.C. § 9021(3)(h).

and then issue a check or checks for the benefit amount due mailed to a Nevada address on file with the Nevada Department of Motor Vehicles ("DMV") or other confirming database —thereby avoiding the false identity issue as well as the out of state claimant issues. In this way, DETR could have processed all claims quickly and as accurately as required by law. Instead, DETR held up each application until it confirm each answer provided individually, rather than to default to self-attestation and readily accessible cross checking data bases, all of which caused tremendous delay and improper denial of valid claims.

Appellants also disagree with the Special Master's assumption that claims of widespread fraud or a massive claims rate justify DETR's failure to follow the law. EOR, 1140-1141, 2814-2816. The CARES Act adopted the Disaster Unemployment Assistance ("DUA") regulations at 20 C.F.R. Part 625 as the regulations for the PUA program as well, with few exceptions not relevant here. 15 U.S.C. § 9021(3)(h), EOR, 1529. The DUA regulations were developed and refined after years of experience with emergencies like hurricanes, floods, earthquakes, and other regional and national disasters. *Id.* These regulations were sufficient to allow other states[20] to

[20] By November 12, 2020, the Georgia DOL says it had processed over 4 million regular UI claims since March 21, 2020, and once an application is submitted, it now takes less than seven days to process the claim, the same as it did before the pandemic hit. Press Release-- GDOL Processes all Claims in Regular UI Queue, https://dol.georgia.gov/press-releases/2020-11-12/gdol-processes-all-claims-regular-ui-queue last visited November 19, 2020.

distribute their allotted PUA money within weeks of application, unlike the 9 months and counting that it has taken DETR.[21] Moreover, the potential for fraud is not new; the DOL has provided guidance in UIPL 16-20 referring to 20 C.F.R. 625.14 and page 2-3 the October 1, 2015 UIPL 01-16 requirement that it is "incumbent upon the state agency to make further contact with the individual" to "allow an opportunity for rebuttal" and that "determinations of fraud must be made by agency staff. The determination ***may not*** be made by an automated system." EOR, 3787.

E. The District Court's Orders

Appellants' Motion for Writ of Mandamus (EOR, 213-388) and DETR's Opposition (EOR, 409-474) on an order to show cause were first heard by the District Court on July 7, 2020. EOR, 596-703. Appellants filed a Renewed Motion and Supplemental Authority in support of Writ of Mandamus on July 17, 2020. EOR, 704-842. A hearing was held on July 20, 2020. EOR, 2290-2452. After argument by counsel, the District Court announced its decision from the bench, entering a written Order on July 22, 2020. EOR, 19-28. The District Court granted

[21]For example, while Nevada has not yet distributed the bulk of its PUA allotted funds, in mid-September, the Connecticut State Department of Labor distributed all its PUA money and had just caught up on delayed federal unemployment relief under the "Lost Wages Assistance" program, which replaced the PUA program on August 8, 2020, and paid $301 million to nearly 146,000 residents in three days. Connecticut Mirror https://ctmirror.org/2020/09/29/ct-catches-up-on-delayed-federal-unemployment-relief/ last visited November 19, 2020.

the Appellant's request for a writ in part and denied it in part. The District Court ordered DETR to perform three specific actions, which were:

> (1) once payments have started, payments cannot be withheld and must be reinstated UNLESS: (a) the applicant did not file a weekly claim; or (b) the applicant has earnings in excess of that which would otherwise qualify the applicant for benefits; or (c) there is clear and convincing evidence of fraud by the applicant; or (d) until such time as the applicant is afforded an opportunity to be heard.
>
> (2) Payments to the above individuals must commence on or before Tuesday, July 28, 2020.
>
> (3) A covered individual for the purpose of the Pandemic Unemployment Assistance includes individuals with reportable income, and is either unemployed, partially employed, or unable or unavailable to work because the COVID-19 public health emergency has severely limited his or her ability to continue performing work activities and has therefore caused substantial interference with his or her work activities, payments are required.

DETR has cross appealed this portion of the Court's Order.[22] EOR, 2631-2645.

However, the Court refused to require payment to all claimants who had received a written notice of eligibility determination which stated that: (1) the claimant was approved for payment under the PUA program of unemployment compensation, or (2) the claimant was not approved for payment under the PUA program because DETR had determined that the claimant was eligible for benefits

[22] In issuing the order the District Court rejected DETR's stock defenses that: (1) the Department of Labor will punish Nevada if DETR does anything DETR does not want to do, and (2) there is massive fraud which justifies DETR's unconstitutional actions.

under the regular Unemployment Insurance (UI) or some other program, referred to as the UI/PUA loop. DETR recently confirmed that granting the UI/PUA portion of Appellants' Renewed Motion (requested relief paragraph number 4) would result in payment to approximately 70,000 additional claimants.[23] Appellants appealed from the District Court's partial denial its requested relief.

The District Court held another hearing on July 30, 2020 regarding the status of DETR's compliance with the Order[24] as well as to further address progress made on the following issues: (a) the status of resolving the "UI/PUA Whirlpool" or UI/PUA dichotomy, including their relationship to the FPUC payments; (b) what

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[23] *DETR: Lost Wages Assistance unemployment benefit payouts have begun; hundreds of thousands of PUA claims denied for ID issue*, by Michelle Rindels in the Nevada Independent, October 16th, 2020 Edition, available at https://thenevadaindependent.com/article/detr-lost-wages-assistance-unemployment-benefit-payouts-have-begun (last visited 11/21/2020). *Cf,* footnote 6 herein.

[24] During the hearing, DETR admitted that approximately 22,000 claimants were covered by the portion of the District Court's order that DETR resume paying all stop-start claims but paid only about 3,000 of these claims. EOR, 2575-2576. In defense of non-compliance, DETR sets forth a list of reasons attached as Exhibit 1 to the August 31, 2020 declaration of David Schmidt, consisting of the same reasons the court already considered and rejected in issuing its initial order as well as a catch-all fraud in the air defense. EOR, 3671-3673. The issues related to contempt of the Court's 7/22/20 Order and the Second Cause of Action of the First Amendment Writ are the only issues still pending before the District Court. EOR, 2-4. Appellants have filed two Motions *in re* Contempt based on DETR's admission that they failed to pay claimants by 7/28/20 subject to the Order and continue to fail to pay claimants pursuant to the Order. EOR, 2847-3532 and 3659-3679 and 3768-3877. The hearing on contempt is scheduled for December 3, 2020.

steps DETR has made to move the first filers to the front of the line; and (c) the "retroactivity" issue whereby people who sought benefits between January 27, 2020, and March 5, 2020, were determined not eligible for payments because the first confirmed case of COVID-19 in Nevada did not occur until later. EOR, 19-28. The District Court denied all other forms of relief sought by Appellants with no right to renew while reserving the right to modify *sua sponte* the relief ordered. *Id.*

Appellants filed an initial appeal to the Supreme Court State of Nevada on August 3, 2020, Case No. 81582. EOR, 2626-2630. DETR cross-appealed on August 6, 2020. EOR, 2631-2645. Ultimately, after the Supreme Court of Nevada requested additional briefing on a potential jurisdictional defect, the Court rejected both appeals based on lack of jurisdiction on August 26, 2020. Two days later, on August 28, 2020, the District Court issued a final order pursuant to NRCP 54(b), thus curing any jurisdictional defect. EOR, 1-4. The Parties have timely filed new appeals and jointly requested expedited resolution. EOR, 3680-3708 and 3709-3728.

VII. ARGUMENT

The purpose of the CARES Act is to provide immediate relief to all American workers, who through no fault of their own have been adversely impacted by the COVID-19 global pandemic. In line with this goal, the strong presumption of the Act is to pay benefits rather than to deny them. 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."

To aid in the implementation of the new programs, the CARES Acts mandates administration in accordance with DUA (Disaster Unemployment Assistance)[25] regulations, unless otherwise provided by the CARES Act itself. 15 U.S.C. § 9021(3)(h). Unless otherwise stated in 20 C.F.R. Part 625, DUA benefits are administered pursuant to the standard rules governing benefit entitlement programs discussed throughout. The relevant provisions of the CARES Act that differ from DUA uniformly weigh in favor of granting benefits to unemployed individuals, not against. In other words, all of the standard protections applicable to DUA and other entitlement programs likewise govern administration of benefits under the CARES Act, with the further guidance that the presumption in favor of benefits is stronger under the CARES Act, likely due to the exceptional circumstances and extreme need giving rise to the 2020 legislation. Cf, 15 U.S.C. § 9022 ("Flexibility in paying

[25] Disaster Unemployment Assistance (DUA) benefits are available to those individuals who have become unemployed as a direct result of a declared major disaster and are not eligible for regular Unemployment Compensation (UC). First created in 1970 through P.L. 91-606, DUA benefits are authorized by the Robert T. Stafford Disaster Relief and Emergency Relief Act (the Stafford Act), which authorizes the President to issue a major disaster declaration after state and local government resources have been overwhelmed by a natural catastrophe or, "regardless of cause, any fire, flood, or explosion in any part of the United States" (42 U.S.C. §5122(2)).

reimbursement").For example, the CARES Act grants unemployment benefits to self-employed individuals. "The term 'covered individual'-means an individual who is not eligible for regular compensation or extended benefits under State or Federal law or pandemic emergency unemployment compensation under section 9025 of this title . . . " 15 U.S.C. § 9021(a) (3)(A) (i). "Covered individuals also include self-employed, those seeking part-time employment, individuals lacking sufficient work history, and those who otherwise do not qualify for regular unemployment compensation or extended benefits under state or Federal law or PEUC." EOR, 1527-1529. The DOL guidance also waives the looking for work requirement. EOR, 1577. An individual is "unable or unavailable to work due to one of the COVID-19 related reasons identified in Section 2102(a)(3)(A)(ii)(I) of the CARES Act if "[t]he individual's place of employment is closed as a direct result of the COVID-19 public health emergency." *Id*. For self-employed persons,[26] 1099 net earnings substitutes for wages in determining minimum benefit amounts. "For individuals without reported wages sufficient to establish a [Weekly Benefit Amount] WBA, the WBA will be calculated according to processes for DUA benefits set out in 20 C.F.R. 625.6." EOR, 1577.

[26] "Self-employed individuals" as defined in 20 C.F.R § 625.2(n) means individuals whose primary reliance for income is on the performance of services in the individual's own business, or on the individual's own farm. These individuals include independent contractors, gig economy workers, and workers for certain religious entities." EOR, 1535.

A. DETR's Dilatory Determination/Adjudication of Initial Eligibility For Hundreds Of Thousands Of Unemployment Compensation Claimants Violates The Due Process Clauses Of The Nevada And Federal Constitutions As Well As 42 U.S.C. §503(a)(1)'s Timeliness "When Due" Requirement.

Payment of unemployment compensation is an entitlement, not a gift. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (Social Security Disability benefit payments are "'property' interests within the meaning of the Due Process Clause of the Fifth and Fourteenth Amendment.) *accord Glaser v. Emp't Sec. Div.,* 373 P.3d 917 (Nev. 2011) ("Due process protections of the Fourteenth Amendment of the U.S. Constitution and Article I, Section 8 of the Nevada State Constitution apply to unemployment benefit hearings."). "State statutes providing for the payment of unemployment compensation benefits create in the claimants for those benefits property interests protected by due process." *See e.g., Ross v. Horn*, 598 F.2d 1312, 1317-18 (3d Cir. 1979), *cert. denied*, ___ U.S. ___, 100 S.Ct. 3048, 65 L.Ed.2d 1136, (1980)"; *Wilkinson v. Abrams*, 627 F.2d 650, 664 (3d Cir. 1980).

Section 303 of the Social Security Act, 49 Stat. 626, as amended, 42 U.S.C. § 503(a)(1) requires the payment of unemployment compensation "when due." 42 U.S.C. § 503(a)(3) requires the agency to provide a fair hearing prior to suspending payment of benefits. *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971). DETR has a clear duty to pay all unemployment compensation benefits "when due" and, if DETR denies payment, then DETR ***must***

provide a fair hearing before an impartial tribunal as provided by law. *Fusari v. Steinberg,* 419 U.S. 379 (1975) Payments must be "made with the greatest promptness that is administratively feasible." 20 C.F.R. § 625.9(e). The "promptness" of payment is part of the right to be paid. *Fusari*, 419 U.S. at 389 ("In this context, the possible length of wrongful deprivation of unemployment benefits is an important factor in assessing the impact of official action on the private interests."). The "when due" clause is a "timeliness" requirement that extends to both eligibility determinations and the payments themselves: "[T]he state should determine who is eligible to receive unemployment compensation and make payments to such individuals at the earliest stage that is administratively feasible." *Zambrano v. Reinert*, 291 F.3d 964 (7th Cir. 2002).

DETR simply does not follow these rules. Almost 300,000 claimants have waited for up to nine months without a determination by DETR. Instead, they are told their claim is "in process" and that there are no outstanding issues. EOR, 933, 2490, 2944.[27] In addition, DETR has failed to pay thousands of claims despite having

[27] Prior to October 16, 2020, DETR had not made a timely determination on at least 277,000 claims, which is why it sent out mass denial letters without considering the individual facts. *See*, *fn* 6, *supra, See*, *DETR: Lost Wages Assistance unemployment benefit payouts have begun; hundreds of thousands of PUA claims denied for ID issue*, by Michelle Rindels in the Nevada Independent, October 16th, 2020 Edition, available at https://thenevadaindependent.com/article/detr-lost-wages-assistance-unemployment-benefit-payouts-have-begun last visited November 21, 2020.

issued a favorable determination letter.[28] By failing to promptly issue a determination, or issuing an adverse determination not based upon individual facts, DETR has failed to perform its clear duty under due process clauses of the Nevada and United States Constitutions as well as pursuant to 42 U.S.C. §503(A)(1).

B. DETR's Practice Of Issuing Purportedly 'Contingent' Initial Determinations/Adjudications Of Eligibility For Tens Of Thousands Of Unemployment Compensation Claimants Without Making Any Payments Thereon Violates The Due Process Clauses Of The Nevada And Federal Constitutions As Well As the Payment "When Due" provision of 42 U.S.C. §503(a)(1).

In addition to failing to issue a determination of eligibility within a reasonable period of time, DETR issues purportedly revocable determination letters, or non-committal, contingent approval determinations, again without making payments. For example, DETR has issued thousands of such "PANDEMIC UNEMPLOYMENT QUALIFYING DETERMINATION" letters.[29] This favorable determination form letter usually states:

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[28] Failing to pay claims despite a favorable determination means exactly what it says. DETR has made a determination that a claimant is eligible for payment and, in some cases, has even sent out a paycard to be used to access the unemployment benefits, but the payment is never made to the claimant. These claimants cannot appeal, because they have been determined eligible for benefits, yet they cannot survive because they have never received any money.

[29] DETR also issues a letter of "Monetary Determination," which is just the amount to be paid if, and only if, program eligibility is granted. Although Monetary Determination letters may constitute (implied) eligibility determinations under the Act, Appellants do not argue that Monetary Determination letters create an entitlement to benefits. By the same token, if the monetary determination letters are

> We have completed a review and Investigation of your claim for Pandemic Unemployment Assistance referenced above. We have determined that your claim is APPROVED as you meet the qualifications required by the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 for Pandemic Unemployment Assistance. In order to receive payment, you must maintain weekly certifications until you are employed and earning over your weekly benefit amount.

EOR, 3350. But then DETR fails to pay the determined amount because it routinely includes a statement in every approval letter that:

> You may receive multiple decisions on your claim; please note that any one denial decision supersedes all other decisions. Your claim will be processed for payment unless there are other issues to be resolved.

Id. DETR relies on the second qualifying sentence of such letters to not pay any unemployment compensation at all.

When asked, DETR says the application is still in process. One way to read this letter is that it does not bind DETR. But if the letters are non-binding because they do not represent *final* benefit determinations, then DETR has violated the statutory requirement of making a quick determination. It also raises the question as to why DETR wastes time issuing such a non-committal determination letter, even though that is the only type of determination letter DETR ever issues. The Third Circuit in *Wilkinson v. Abrams*, 627 F.2d 650, 661 n.14 (3d Cir. 1980) agreed:

> We find no merit in the Secretary's argument that the "when due" requirement of § 303(a)(1) of the Act, 42 U.S.C. § 503(a)(1) does not

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not eligibility determinations, then Monetary Determination letters without payment do not satisfy the requirements for a prompt initial determination.

> apply until a claimant has first been administratively determined to be eligible for unemployment compensation benefits. The Supreme Court in *Fusari v. Steinberg*, 419 U.S. 379, 388-89, n. 15, 95 S.Ct. 533, 539, 42 L.Ed.2d 521 (1975), made clear that it would not endorse such a restrictive interpretation of the statute.

The DOL as well as the case law requires a real determination and not an illusionary one. In *Jenkins v. Bowling, supra,* the Court of Appeals for the Seventh Circuit held unconstitutional Illinois' practice of postponing payment of benefits to applicants who are in legal custody or on bail for a work-related felony or theft. The court understood the State's reluctance to pay someone who is about to go to jail for misconduct that would clearly disqualify the employee from benefits, but held that the State could not take such general prophylactic action against potential wrongful payment based upon arrest and arraignment alone. As the Court explained, "the objectives behind the requirement of prompt payment could be defeated simply by the state's indefinitely deferring final action on applications for unemployment benefits." *Jenkins,* 691 F.2d at 1230; *accord Fusari*, 419 U.S. at 388 n. 15, 95 S.Ct. at 539 n. 15.

The DOL's Attachment to UIPL No. 1145 at section VIII - Payment of Benefits During Investigation, Determination, Redetermination and Appeals (Including Higher Authority)-1. Redeterminations (b), states:

> When a claimant was initially found eligible, notice and opportunity to be heard must be afforded to the claimant and any other interested party before a redetermination can be made that could modify or reverse that initial determination. ***In the meantime, benefits may not be withheld.***

EOR, 2307 (emphasis added).

By issuing a non-committal "PANDEMIC UNEMPLOYMENT QUALIFYING DETERMINATION" letter with a statement that any past, present or future adverse determination will immediately supersede the favorable qualifying determination, and then refusing to pay benefits based upon this inconclusive letter, DETR has not actually made a determination at all which is a violation of the law. "Under this view a state could take all the time in the world to decide that an unemployed person was entitled to compensation, provided that it got the check to him promptly when it did decide." *Jenkins,* 691 F.2d at 1229. This is exactly what DETR has done. As the *Jenkins* court reasoned, "We think Congress had larger objects in view than the ministerial competence of state comptrollers."

Contrary to DETR's interpretation, these letters represent clear benefit eligibility determinations that have been communicated to claimants in writing. They are legally binding, and benefits cannot then be withheld or redetermined without due process. DETR's attempt to add language purportedly reserving a right to later change that determination without due process holds no effect and is in violation of claimants' due process rights as recognized in *Java* and related precedent. In the alternative, if such letters are not considered to be a binding final favorable benefit determination, then DETR has not made any determination at all for 9 months after the claimant has applied. Either way, DETR has denied Appellants

due process of law and violated the "when due" provision of 42 U.S.C. §503(a)(1) by issuing such a contingent approval determination and not paying benefits immediately upon issuance.

C. DETR's Failure To Promptly Provide A Fair Hearing By An Impartial Tribunal Of All Adverse Determinations Of Tens Of Thousands Of Claims Violates The Due Process Clauses Of The Nevada And Federal Constitutions And The Due Process Requirements Of 42 U.S.C. §503(a)(3).

42 U.S.C. §503(a)(3) provides that every agreement with a state agency to administer federal unemployment benefits must provide an "[o]pportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." DETR has such a provision in its agreement with the DOL. EOR, 464-466.

Even after the pandemic, the DOL has not abandoned its position that a state agency must continue to make payments until an impartial hearing officer[30] has rendered a decision after a fair hearing as required by *Java* and 42 U.S.C. §503(a)(3). If DETR suspects fraud before a determination is made, then DETR is

[30] DETR refers to claims examiners acting as administrative law judges in cases that they have not been involved, and impartial hearing officers borrowed from other agencies collectively as Appeal Tribunals. NRS 612.490(1) states "To hear and decide appealed claims, the Administrator shall: (a) Appoint one or more impartial Appeal Tribunals consisting in each case of a salaried examiner, selected in accordance with NRS 612.230; or (b) Enter into an interlocal agreement with another public agency pursuant to chapter 277 of NRS for the appointment of a single hearing officer.

required to call the claimant on the telephone to at least find out if there is an innocent explanation for the facts upon which DETR believes there is fraud. While Section 2102 of the CARES Act relies on self-certification to verify that an individual is covered under the PUA program, the state has authority to request supporting documentation when investigating the potential for fraud and improper payments. However, requests for supporting documentation and a state's 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. DOL UIPL 01-16 requires that:

> The "when due" requirement means that all determinations require a complete investigation of the issue(s) involved, including the opportunity to rebut, **before the issuance of a determination**. Where there is factual conflict between the information received from an individual and other information received by the agency, from any source, **it is incumbent upon the state to make further contact with the individual, inform him or her of the conflict, and allow an opportunity for rebuttal**. Because such factual conflicts require the state agency to make determination of credibility and intent, **determinations of fraud must be made by agency staff. The determination may not be made by an automated system.**

EOR, at 3787.

Discovery of post-determination fraud is not sufficient legal reason to suspend payment without due process. As *Jenkins* court reasoned:

> Since the federal statute desiderates prompt payment to eligible applicants, the denial of immediate benefits that occurs by operation of section 602 B when the applicant is placed in custody for a work-related crime or theft is denial enough to trigger the Social Security Act's

> requirement of a fair opportunity for a hearing. Otherwise, once again, the objectives behind the requirement of prompt payment could be defeated simply by the state's indefinitely deferring final action on applications for unemployment benefits.

Jenkins, 691 F.2d at 1230.

From May 16, 2020 until July 18, 2020,[31] PUA claimants did not even have a mechanism by which to appeal DETR's written determinations or de facto determinations. DETR notified claimants incorrectly[32] that they had only 11 days to appeal, and that the appeal had to be filed electronically via DETR's website, which did not allow the filing of an appeal until at least July 18, 2020. Since then, the appeals mechanism has been sporadic at best, and not until the second week of November 2020 did DETR announce it would actually begin to conduct these Appeal Tribunal administrative hearings. DETR did not even schedule its first PUA hearing until almost nine months after the CARES Act was enacted. Specific to the numbers DETR most recently quoted in the press, Director Cafferata and Strike

[31] EOR, 1089 fn. 97.

[32] By federal regulation, PUA claimants had at least 60 days to appeal., whereas DETR has only 30 days from the date of the appeal being filed in which to issue a written Appeals Tribunal decision upholding the adverse determination. 20 C.F.R. § 625.10(a). Appellants contend this provision mandates a reversal of DETR's adverse determination in all cases where the Appeals Tribunal fails to issue a written determination upholding the adverse agency decision within 30 days of the claimant filing an appeal electronically, or in the case of a non-functioning appeal link on DETR's website, 30 days from the last day the claimant was informed he or she had to file an appeal.

Force Leader Ms. Buckley state DETR has only been able to ***schedule – not hear*** 100 appeals as of November 11, 2020.[33] This equates to some 179 days or 25.57 weeks or nearly six months since Nevadans began to file for PUA benefits 5/16/20 through 11/11/20), which was almost two months after the CARES Act extended unemployment compensation benefits to self-employed and others not entitled to regular unemployment compensation under existing law.

Be it seven or nine months after entitlement should have been granted, this does not meet the promptness requirement by any stretch of the term or the law.[34] DETR asserts that as of August 28, 2020, DETR had received over 12,000 requests for appeals (EOR, 3679) and that over 10,000 of those appeals have now been

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[33] *See* Nov. 11, 2020, Nevada Independent, "Indy Q&A: What Has Unemployment Strike Force Accomplished" https://thenevadaindependent.com/article/indy-qa-what-has-unemployment-strike-force-accomplished-as-its-three-month-timeframe-ends (last visited 11/20/20).

[34] *See e.g.,* EOR, 2301 UIPL-1145 (Nov. 12 1971) which states: "Determinations on issues arising in connection with new claims may be considered on time within the meaning of the Court's requirement for promptness if accomplished no later than the ***second week*** after the week in which the claim is effective." (emphasis added); UIPL No. 04-01 (27 Oct. 2000) (similar). The CARES Act eliminated the one week wait from filing for a claim to become effective pursuant to Nevada's Agreement with the DOL to process CARES Act benefits. *See* Exhibit 3 attached to Dependents' 7/1/20 Opposition to Plaintiffs Writ; *see also* 15 U.S.C. § 9024(b) ("A State is eligible to enter into an agreement under this section if the State law (including a waiver of State law) provides that compensation is paid to individuals for their first week of regular unemployment without a waiting week.").

miraculously resolved without a single hearing, by referees who weren't even hired or trained until the last week of October, if that.[35] If Ms. Buckley is correct in her assertion that DETR can resolve approximately 275 appeals a week, it would take 43.36 weeks (254 days) to get through the 10,000 appeals DETR says were filed, and resolved without a hearing because they were not "legit". Handing the file to another DETR first line employee is not the same thing as a legally required fair hearing before an impartial administrative law judge, referee or hearing officer. Furthermore, a complete written determination must be issued on each appeal within 30 days, or the adverse agency action should be denied.[36] DETR asserts that only 787 out of 12,000 PUA appeals are currently pending. *Id*. How can this be? Because DETR says that it has determined that the remaining 9,213 are not "legit" and therefore these claims will not get a hearing.

[35] Indeed, in the State Bar of Nevada e-publication, dated October 22, 2020, the State of Nevada placed an advertisement "seeking appeals referees to assist with unemployment denial appeals." The ad further stated, "[a]ppeals referees ***ensure all parties are provided with due process of law throughout the appeal process*** …" and that the ideal candidates will require "a period of specialized training" for hearings to be held in person and by telephone.

[36] "Any decision on a DUA first-stage appeal must be made and issued within 30 days after receipt of the appeal by the State." 20 C.F.R. § 625.10(a)

And this does not include the 277,000 (217,500 regular PUA plus 70,000 UI/PUA whirlpool) claimants [37] who received blanket denials within the last few weeks and cannot appeal since the appeal button on the website (the only way to appeal) still does not work.[38] In addition, most, if not all, of the 200,000+ claims on appeal must be decided in favor of the claimant on the grounds of DETR's untimeliness.

For all appeals pending more than 30 days, DETR must be defaulted for failing to follow the last sentence of 20 C.F.R. § 625.10(a) which states "Any decision on a DUA first-stage appeal must be made and issued within 30 days after receipt of the appeal by the State." By failing to timely provide a functioning appeals mechanism and/or by unduly delaying the issuance of a written decision by an impartial administrative law judge, or other Appeals Tribunal for more than 30 days from when the adverse decision should have been appealed if DETR's system was

[37] *See* October 15, 2020 DETR Press Release, https://cms.detr.nv.gov/Content/Media/PUA%20Claim%20Denials%2010220_4.pdf (last visited 11/20/20).

[38] A dismissal based upon timeliness cannot stand when DETR itself was responsible for the claimant's failure to appeal within the time and by the method that DETR communicated to the claimant at the time of denial. Likewise, denial based upon failure to file weekly reports cannot stand when DETR locks out all denied claimants from the computer reporting system, which is the only way to file weekly reports, thereby making it impossible for the claimant to file weekly claims in a timely manner.

functioning, DETR has violated due process of law and the requirements of 42 U.S.C. §503(a)(3).

D. DETR's Practice Of Demanding, Collecting And/ Or Deducting Payments Of Amounts Allegedly Overpaid Before "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" Violates The Due Process Clauses Of The Nevada And Federal Constitutions As Well As 15 U.S.C. §§ 9023(f)(1)(B), 9024(f) and/or 9025(e)(1)(B).

To improve its statistics, DETR began issuing blanket, generic, automatic denial letters to over 217,500 individual claimants in a single week. *See* fns. 6, 23 *supra*. To thousands of claimants who were initially paid benefits, DETR also demanded repayment of these sums. DETR's "NON-FRAUD Employment Security Division FPUC OVERPAYMENT" demand for repayment letter states:

> A determination issued by the state under Section 2102 (c) of the CARES Act resulted in a disqualification from benefits. Pursuant to Section 2104(f) of the CARES Act, you have also been overpaid Federal Pandemic Unemployment Compensation (FPUC) benefits in the amount of $4,200.00 in addition to your PUA overpayment. These benefits were paid to you from 05/24/2020 to 07/18/2020. By law, both of the amounts must be refunded to the State of Nevada. This determination was made because your claim is denied as you do not meet the qualifications required by the Coronavirus Aid, Relief, and Economic Security (CARES) Act and Pandemic Unemployment Assistance.
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> The total amount you have been overpaid is $4,200.00.
>
> All overpayments are legally enforceable debts. Minimum payments or more must be made or legal action may be taken and may include a lien placed on your property, affect to your credit rating, or garnishment of

> wages due you from employment. If a lien is filed, the balance due will begin to accrue interest at the current rate.
>
> If you are currently filing and are otherwise eligible for PUA or regular unemployment insurance (UI) benefits in Nevada, up to 50% of your weekly benefit amount will be withheld and applied to the balance due.

EOR, 3793-3796. The dates and amounts are the only variables in this form letter.

The CARES Act at 15 U.S.C. §§ 9023(f)(1)(B), 9024(f) and 1 9025(e)(1)(B) specifically prohibits this kind of debt collection scare tactics, as do cases on pre-judgement takings of entitlement benefits. *See, e.g. Goldberg v. Kelly*, 397 U.S. 254 (1970), *Fuentes v. Shevin*, 407 U.S. 67 (1972) and *California Department of Human Resources v. Java, supra*. In *Zynda v. Arwood*, 175 F. Supp. 3d 791, 797-98 (E.D. Mich. 2016), the Court refused to dismiss a complaint under 42 U.S.C. § 1983 for claims arising under the "when due" provision of the Social Security Act in a scenario that appears to be the same for DETR in this case.

In the *Zynda* case, "the Agency's computer system robo-adjudicates the fraud issue and automatically determines that the claimant has knowingly and intentionally misrepresented or concealed information to unlawfully receive benefits." The claimant also received a "Notice of Determination" terminating benefits and stating, "[y]our actions indicate you intentionally misled and/or concealed information to obtain benefits you were not entitled to receive." *Id.* Enclosed with the notice was a "Restitution (List of Overpayment)" that informs the claimant of the amount he now

owes UI. *Id.* at 169. That amount is the value of the benefit received or sought by the claimant plus a fourfold penalty (a "quintuple"). *Id*.

Like the automatic denial letter in *Zynda*, DETR's denial notice does not contain any specific information about the alleged overpayments, or any particularized explanation for the denial of benefits. DETR incorrectly tells claimants that they have 11 (recently increased to 30) days to appeal DETR's denial of benefits determination, which in of itself is unlawful.[39] If no appeal is taken, the determination becomes final. DETR threatens to lien the claimant's property, affect the claimant's credit rating, and garnish wages. In addition, DETR says it will unilaterally reduce future unemployment benefits by 50%.

In *Zynda*, the state would similarly sometimes initiate a wage garnishment and tax return seizure in order to satisfy the claimant's debt. *Zynda, supra.* In DETR's case, the letter threatens to do so also, ***without*** a pre-attachment hearing, and DETR garnishes future benefits up to 50% which *Zynda* found to be an unconstitutional taking in violation of the "when due" provisions of 42 U.S.C. §503(a)(1); *see also Gann v. Richardson*, 43 F. Supp. 3d 896 (S.D. Ind. 2014) (refusing to dismiss a claim that Defendants violated Section 303 of the Social Security Act "in suspending their unemployment benefits in the summer of 2012 without first conducting a hearing").

[39] *See* 20 C.F.R. § 625.10(a) says, in part, that " the period for appealing shall be 60 days from the date the determination or redetermination is issued or mailed instead of the appeal period provided for in the applicable State law."

Just like the State of Michigan in the *Zynda* case, DETR violates both the constitution and the literal wording of the CARES Act when it sends this form deficiency letter to over 200,000 claimants.

E. DETR's Practice Of Issuing Form Letters To Tens Of Thousands Of Claimants Stating Overbroad, Generalized, And Generic Grounds For Denial With No Proof Of Individual Ineligibility Violates The Due Process Clauses Of The Nevada And Federal Constitutions As Well As DETR's Clear Duty To Exercise Its Discretion In Deciding If And When Unemployment Benefits Are Due.

To clear its backlog of unresolved cases, DETR issued tens of thousands of identical PANDEMIC UNEMPLOYMENT DISQUALIFYING DETERMINATION letters within a three-week period. Without specific reference to any facts of any individual claim, the letters said unemployment benefits were denied because the claimant "was involved in an investigation," implying the Claimant is both by association and guilty until proven innocent. The disqualification is for the entire period covered by the PUA grant, rather than the workweek in which the unspecified bad behavior occurred. Except for the dates, all these letters are identical and state:

> Date: 7/30/2020
>
> We have completed a review and investigation of your claim for Pandemic Unemployment Assistance referenced above. We have determined that you are involved in an investigation.
>
> You are not entitled to PUA benefits for one or more of the following reasons:
>
> - The Division was unable to authenticate your identity;
> - Your claim was identified as being filed from a location outside of the United States;

- Your claim was identified as being associated with suspicious activity related to PUA claim filing.

This disqualification is effective 03/15/2020 to 12/26/2020.

EOR, 3513-3514. The stated reasons for being "under investigation" are not conclusively determinative or even indicative of ineligibility, much less fraud. And under investigation is not just cause to cease paying benefits previously granted. *Java.* It is doubtful DETR even reads the documentation it requested, if any, before issuing such a letter.

First, as to "authentication of identity," DETR has refused to accept a Nevada "Real ID," a US Passport, or any other form of identity which is uploaded into the system as DETR requires.[40] When claimants upload passports and "real ID" drivers licenses, DETR's failure to verify identity is not so much a conclusive indicium of fraud as much as it is conclusive evidence DETR will not let true facts influence its pre-determinations.[41]

[40] In the case of Named Plaintiff Ralph Wyncoop, a Las Vegas Lyft drive, and 66 year old disabled Vietnam Veteran, Mr. Wyncoop provided (i) a Gieco bill, (ii) bank statement, (iii) front and back of his social security card, (iv) AT&T bill, (v) front and back of his REAL Nevada ID, and (vi) 2019 Tax return, was denied with the above form letter, appealed on 7/30/20 and has yet to receive an scheduled appeal even after multiple email correspondence with a DETR representative. EOR, 3499-3532.

[41] The authentication of identity problem is best resolved by DETR issuing a paper check rather than a payment card. A check makes the bank responsible for identification verification. DETR refuses to implement this easy fix.

Second "out of state" or "out of Country" IP addresses is not a reason for denial. The law requires that the self-employed individual be located in Nevada at the time immediately before claimant lost income due to COVID-19, not that the claimants' computer be in Nevada at the time of application. Many networks use a Virtual Private Network or VPN that re-routes the IP address for security reasons.[42] In addition, all cell phones and tablets (iPad, Samsung, etc.) use a dynamic IP address, randomly assigned, which often shows an out of area location that is not related to the place where the phone is located. A 702 or 775 area code on a mobile phone doesn't prove the location of the phone's owner is in Nevada. I The confidence that an IP address is associated to a specific city is just 12% in the USA, with 73% of IPs regarded as incorrectly resolved. See, *Geolocating Mobile Phones With An IP* by Matthias Wilson & Nixintel, originally posted 5th July 2020 last visited November 23, 2020, which further states:

> There is no real correlation between a physical location and a cellular IP address. IP addresses aren't organized geographically in the way that old landline numbers used to be. It's more accurate to think of them as being grouped by ISP and service type.

[42] "The simplest way to protect your IP address is to stay connected to a VPN. A VPN, or virtual private network, tunnels your internet connection through a proxy server so that your real IP address is only seen by the VPN provider. An IP address assigned by the VPN is what websites and potentially malicious users will see from your device." *HDG Explains: What Is An IP Address & Can It Really Trace Me To My Door?* by: Craig Snyder, posted on January 9th, 2020 in: Networking. Last visited on November 23, 2020.

Third, being "associated with" an unspecified and unproven allegation of fraud is not a reason to deny benefits. This is a catch-all that includes just about everything, and imputes guilt by mere association. The generic denial letter also fails to give a meaningful reason for the denial of benefits as required by 20 C.F.R. Appendix B to Part 625 ("The agency must include in written notices of determinations furnished to claimants' sufficient information to enable them to understand the determinations, the reasons therefor, and their rights to protest, request reconsideration, or appeal." Id at C(2). As 20 C.F.R. Appendix B to Part 625 at C(2)(h) explains if a disqualification is imposed, or if the claimant is declared ineligible for one or more weeks, he must be given a written explanation of the reason for the ineligibility or disqualification. This explanation must be "sufficiently detailed so that he will understand why he is ineligible or why he has been disqualified, and what he must do in order to requalify for benefits or purge the disqualification. The statement must be individualized to indicate the facts upon which the determination was based. Checking a box as to the reason for the disqualification is not a sufficiently detailed explanation. 20 C.F.R. 625 Appendix B at C(2)(h). *Accord* 20 C.F.R. § 625.9(d).

DETR's form letter denials are the same as "checking a box" prohibited by the regulations. Through *en masse* denial of benefits without considering the individual facts applicable to the claimant, DETR has failed to exercise its discretion

and has also violated federal DOL guidelines that prohibit automatic mass denials for fraud or any other reasons, (UIPL 01-16 change 1, *supra*).

There is a wealth of case precedence and the Supreme Court of the United States has been quite clear, that "[i]t goes without saying that the requirements of a fair hearing include notice of the claims of the opposing party and an opportunity to meet them." *FTC v. National Lead Co.,* 352 U.S. 419, 427, 77 S.Ct. 502, 508, 1 L.Ed.2d 438 (1957); *see also Goldberg v. Kelly,* 397 U.S. at, 267-68. A letter with three catch all reasons for denial and no facts fails to provide such notice. DETR's denial letters are all generic notices that are, in substance, no notice at all. *See Adams v. Harris*, 643 F.2d 995, 1000 (4th Cir. 1981) (Winter, J., dissenting), *accord Camacho v. Bowling*, 562 F. Supp. 1012, 1024 (N.D. Ill. 1983); *Pregent v. New Hampshire Department of Employment Security*, 361 F. Supp. 782, 796-97 (D.N.H. 1973) ("The right to timely and adequate notice has been cited as the fundamental element of due process in case after case."), *vacated on other grounds*, 417 U.S. 903, 94 S.Ct. 2595, 41 L.Ed.2d 207 (1974).

A fair hearing requires fair notice of specific factual and legal issues to be faced at the fair hearing to the Appeals Tribunal. As the Court in *Shaw v. Valdez*, 819 F.2d 965 (10th Cir. 1987) stated "And we note further that while the burden on the administrative process of a particular procedural safeguard should be considered, *[Mathews v.] Eldridge*, 424 U.S. [319] at 335, 96 S.Ct. at 903 (1976), administrative

'speed and efficiency' cannot justify a failure to observe basic fairness in procedure. *See Stanley v. Illinois*, 405 U.S. 645, 656, 92 S.Ct. 1208, 1215, 31 L.Ed.2d 551 (1972)."

F. DETR's Practice Of Denying PUA Benefits Based Upon Eligibility In Some Other Unemployment Program While Simultaneously Denying Or At Least Failing To Provide Benefits Under That Other Program (The So-Called UI/PUA Whirlpool) Violates DETR's Clear Duty To Follow 20 C.F.R. § 625.4 and The Provisions Of Question 33 In UIPL No. 16-20, Change 1, Which Provides That An Individual May Be Eligible For PUA If He Or She Is Disqualified From Regular UC Because Of A Prior Quit Or Termination.

Another type of purportedly revocable, non-committal determination letter is the "PANDEMIC UNEMPLOYMENT DISQUALIFYING DETERMINATION," a copy of which was sent to Mr. Greg Doherty dated July 23, 2020.[43] EOR 2921-2920. The language of these form letters are all the same and state, "We have determined that you have other program eligibility available." The letter often states which program, usually unemployment insurance or "UI." But when the claimant contacts UI or any other program, each on administered by DETR, the claimant is told, that the claimant is ineligible for benefits under that program. This scenario

[43] Ms. Karen Figlestahler received that same letter dated 7/6/2020. EOR, 3421. In addition, on the same day, 7/6/2020, Ms. Figlestahler received a PANDEMIC UNEMPLOYMENT DISQUALIFYING DETERMINATION" stating her claim was investigated and she was being denied because: "PUA Benefits were not available in the State of Nevada until 03/08/2020. This disqualification is effective 02/23/2020 to 03/07/2020. … You have the right to appeal." EOR, 3420 A reasonable claimant would not know what evidence to present in appeals from these two different disqualification determinations.

applies to 53,000+ claimants. EOR, 2708. Instead of paying under either program, combining wages with net self-employment income or defaulting to the less generous program,[44] DETR pays nothing. And because DETR is not paying under any program, the claimant is also not getting an additional $600 a week for a maximum of 13 weeks under the FPUC program, which applies automatically when a claimant is eligible for even $1.00 under UI or PUA.

Often, the UI/PUA whirlpool / dichotomy is caused by an unfulfilled penalty period in UI. Under Nevada's UI program, if a claimant quits one of his two last employers without good cause, the claimant is barred from receiving UI again until the claimant can show 10 or 16 weeks of earning wage payments more than his UI payments lost. NRS 612.380(1). In other words, if an employee quits a low paying

[44] The formula for benefits is the same under all programs if net self-employment income and "wages" are considered the same for purposes of benefit calculations. But since the UI program is based on W-2 wages, whereas the PUA program is based upon net self-employed income, a claimant's benefits can vary drastically depending on which program DETR decides to apply. An easy solution to this illogical discrepancy is for DETR's administrator to exercise her discretion under Senate Bill No. 3 (32nd Special Session-- August 2020) to consider "net earnings" by self-employed individual and "wages" by employees to be interchangeable terms meaning net income before taxes for purposes of benefit calculations. NRS 612.185(2) was amended to read as follows: "The Administrator shall adopt regulations applicable to unemployed persons, making such distinctions in the procedures as to total unemployment, partial unemployment of persons who were totally unemployed, partial unemployment of persons who retain their regular employment and other forms of part-time work, as the Administrator deems necessary." The record fails to show that DETR's administrator even considered this solution, which is a failure to exercise her discretion.

job to take a better job, he or she cannot receive UI until he or she has done "penance" of staying on that better paying job and earning more than the amount of UI the employee would have been entitled to for 10 or 16 weeks. But if a claimant quits a job working for "wages" to become a self-employed independent contractor, there is no subsequent W-2 wage income to count towards this "penance" period. So, according to DETR, the claimant is eligible for UI payments but is not going to receive them because the claimant has not worked enough weeks to earn enough W-2 wage income to re-instate the employee's entitlement to payment of UI, even though the claimant may have many more weeks of net self-employment income far in excess amount that which would have qualified for payment of the penance, if only the net self-employment income was classified as wages

This would not be a problem if DETR would simply follow the existing rules. The last sentence of 20 C.F.R. § 625.4(i) says with emphasis added: "An individual shall be considered ineligible for compensation or waiting period credit (***and thus potentially eligible for DUA***) if the individual is under a disqualification for a cause that occurred prior to the individual's unemployment due to the disaster, or for any other reason is ineligible for compensation or waiting period credit as a direct result of the major disaster." The phrase "and thus potentially eligible for DUA" (or PUA in this case) means a claimant is eligible for PUA if the claimant is not eligible for other programs because the claimant did something wrong under that other

program.[45] The same result is provided by Attachment I to UIPL No. 16-20 Change 1, Section "E. Eligibility – Not Eligible for Regular UC" Q&A 30-37. EOR, 1580-1581. The UI penalty or penance period does not apply to the PUA claims (Q&A 30 and 31 directly answer this question by granting the claimant PUA benefits.) "If the individual is disqualified from regular UC for a cause that occurred prior to the individual's COVID-19 related reason, he or she may be eligible for PUA. This includes an individual who has a prior fraud disqualification." Q&A 33. Cf. State law applies only to the question of whether the PUA period counts towards satisfying a UI penalty but does not interfere with continuation of PUA benefits. *See*, Q&A 37. Thus, the regulations and interpreting guidelines solve the UI/PUA whirlpool dilemma. As stated at the bottom of *id,* page I-8:

> If the individual is disqualified from regular UC for a cause that occurred prior to the individual's COVID-19 related reason, he or she may be eligible for PUA. This includes an individual who has a prior fraud disqualification.

EOR, 1580.

VIII. CONCLUSION

Prompt payment of benefits is essential to the unemployed. *Islam v. Cuomo,* 20-CV-2328 (LDH) (E.D.N.Y. July 28, 2020) (denial of unemployment compensation was *per se* irreparable harm because it is subsistence benefits). The

[45] To give the language meaning, the term "probably" must refer to meeting the remaining criteria of PUA or DUA eligibility, i.e. prior self-employment, loss of work due to disaster, etc.

United States Supreme Court has held that prompt payment of unemployment compensation is mandated by statute. If there is an initial determination of benefit eligibility, due process requires the State to continue paying unemployment compensation benefits until and unless there is an opportunity to appeal and if appealed, there is a decision to deny benefits by an impartial tribunal after a fair hearing.

/ / /

/ / /

/ / /

DETR cannot avoid prompt payment of benefits by unduly delaying the initial determination or issuing blanket denials *en masse*. Nor may DETR deny PUA benefits unless there has been a meaningful opportunity to appeal, and if appealed, there has been a written decision from an impartial Appeals Tribunal after a fair hearing is issued within 30 days of the date the claimant first appealed. DETR has failed to perform its clear statutory and constitutional duty to determine benefit eligibility promptly and to pay benefits "when due." DETR has failed to provide a method for claimants to timely appeal from an adverse determination. And DETR has failed to continuing payments until the appeal period has lapsed (if the claimant could have timely appealed but didn't) or a written decision by an impartial Appeals Tribunal after a fair hearing issued within 30 days of the filing of an appeal. For the forgoing reasons, this Court should reverse the District Court's denial of Appellants' Renewed Motion and Supplemental Argument in Support of Writ of Mandamus.

November 24, 2020

Respectfully Submitted,

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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 (13,727 words exactly), 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 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: November 24, 2020 THIERMAN BUCK LLP

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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 action. My business address is 7287 Lakeside Drive, Reno, Nevada 89511. On November 24, 2020, the Appellants Opening Brief was served on the following by using the Supreme Court's eFlex System:

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

Executed on November 24, 2020 at Reno, Nevada.

/s/ Jennifer Edison-Strekal
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