

IN THE SUPREME COURT OF THE STATE OF NEVADA

AMETHYST PAYNE; IRIS PODESTA-
MIRELES; ANTHONY
NAPOLITANO; ISAAH PAVIA-
CRUZ; VICTORIA WAKED;
CHARLES PLOSKI; DARIUSH
NAIMI; TABITHA ASARE; SCOTT
HOWARD; RALPH WYNCOOP;
ELAINA ABING; AND WILLIAM
TURNLEY, ON BEHALF OF
THEMSELVES AND ALL OTHERS
SIMILARLY SITUATED,

Appellants/Cross-Respondents,

v.

STATE OF 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),

Respondents/Cross Appellants.

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are no persons and entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Dated: December 1, 2020

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I. Interests of Amicus

Under NRAP 29(a), Nevada Legal Services, Inc., (“NLS”) may file an amicus brief with this court because the Appellants and Respondents have provided written consents. The written consents are attached to this amicus brief as Exhibits A and B.

NLS is a statewide not-for-profit law firm that has handled thousands of unemployment benefits cases against DETR/ESD since its inception in 1982. NLS provides free legal assistance to low-income Nevadans. Legal assistance obtaining unemployment benefits is one of our core missions. We have recently filed writs against DETR/ESD based on the unreasonable delays in granting hearing on the denial of regular unemployment benefits and PUA, one of the same issues before this Court.

NLS also has at least 5 Supreme Court appeals against DETR/ESD including, *Dolores v. State ESD*, 416 P.3d 259 (Nev. 2018); *Anderson v. State ESD*, 130 Nev. 294 (2014)); and *Kolnik v. Nevada ESD*, 112 Nev. 11, (1996). NLS has also sued DETR/ESD twice for its failure to provide access under Title VI of the Civil Rights Act (Spanish and French Creole).

NLS protects the rights of displaced workers and counsel representing NLS, David Olshan and Kristopher Pre, work for NLS. Mr. Olshan has represented hundreds of idled workers and engaged in many hearings, petitions for judicial

review and Supreme Court arguments. Mr. Pre has less experience, but will work closely with Mr. Olshan to present the issues raised above. Both Mr. Olshan and Mr. Pre are licensed in the State of Nevada. The amicus brief is desirable because it gives a voice to the historical issues plaguing DETR/ESD and this background allows greater scrutiny for any DETR/ESD excuse used today.

II. Summary of Argument

DETR/ESD has approved then stopped payments to the Appellants as well as other numerous PUA claimants. Through the United States Constitution, decisions by the United States Supreme Court, United States Department of Labor guidance, and the CARES Act, DETR/ESD continues violating the Appellants' due process rights. DETR/ESD continues failing to pay the Appellants' PUA benefits "when due".

The Appellants' constitutionally-protected property right interest and legitimate claims should not be held up for broad fraud concerns. When examining unemployment compensation fraud data from other states, it is clear fraudulent claims are not the majority filed when fully investigated. DETR/ESD fails in providing data on their results for verified fraudulent claims from adjudication through administrative appeals hearing.

III. Argument

A. DETR/ESD may not stop existing Pandemic Unemployment Assistance benefits without violating due process of law

Pandemic Unemployment Assistance [“PUA”] under the CARES Act of 2020 [“CARES Act”] provides cash assistance to workers idled by the COVID-19 pandemic for up to 39 weeks, between January 27, 2020 and December 31, 2020. CARES Act Section 2102(c). PUA is a safety net for self-employed, independent contractors, church workers, and others who are not eligible for regular unemployment benefits. *Id.* at Section 2103.

Congress allocated funding for PUA and administrative expenses without any obligation to Nevada to pay it back. CARES Act Section 2102(f)(2), (g)(1)(B) and (g)(2)(B). A critical component of PUA is to quickly get this money to idled workers without the usual seven day waiting period (Section 2102(e)) and allowing self certification that the lack of work is related to COVID-19. Section 2102(a)(3)(A)(ii). Governor Sisolak issued a similar waiver of the work search requirement, too.¹

The Department of Labor issued guidance to Respondents in Unemployment Insurance Program Letter [“UIPL”] No. 16-20 on April 5, 2020. The Department of Labor required “[f]ull payment of PUA when due must be made as soon as

1

https://gov.nv.gov/News/Press/2020/Governor_Sisolak_Waives_Work_Search_Requirement_and_Wait_Period_for_Unemployment_Insurance_Benefits/#:~:text=Unemployment%20Insurance%207%2DDay%20Wait,benefits%20as%20quickly%20as%20possible.

administratively feasible.” UIPL No. 16-20 at I-11. On July 21, 2020, the Department of Labor issued Change 2 to Program Letter No. 16-20, emphasizing the prompt determination of suspected fraud claims and the constitutional due process requirements set forth in *California Dept. of Human Resources Development v. Java*, 402 U.S. 121, 133 (1971)(*see infra*). UIPL No. 16-20 Change 2 at I-10 (referencing UIPL No. 01-16 (2015)). The State of Nevada has a similar “when due” requirement for unemployment benefits. NRS 612.612. 20 CFR § 640.4 requires Nevada to provide “unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible.” To comply with this requirement, federal regulations require Respondents to disburse unemployment benefits to 87% of claimants within **14 days**. 20 CFR § 640.5 (emphasis added).

On May 11, 2020, Governor Steve Sisolak issued Directive 19 and recognized that any delay in unemployment benefits may result in “serious health, safety, welfare and financial consequences” to Nevada workers. Respondents have received funding under the CARES Act to disburse PUA to Nevada workers.

[https://nvhealthresponse.nv.gov/wp-content/uploads/2020/05/COVID-19-](https://nvhealthresponse.nv.gov/wp-content/uploads/2020/05/COVID-19-Directive-019.pdf)

[Directive-019.pdf](https://nvhealthresponse.nv.gov/wp-content/uploads/2020/05/COVID-19-Directive-019.pdf) On May 16, 2020, ESD allowed online PUA applications for the first time. DETR Press Release of May 23, 2020.² Under the CARES Act,

² <https://cms.detr.nv.gov/Content/Media/PUA%20Weekly%20Filing.pdf>

idled workers can self-certify that they are entitled to PUA based being sick with COVID-19, on quarantine, caring or living with a household member with COVID-19, or being idled because of a moratorium based on COVID-19, among other reasons.³

Respondents have a duty to disburse PUA benefits “when due . . . as soon as administratively feasible.” UIPL No. 16-20 at I-11. In Appellants cases, they received PUA benefits, only to have them stop at a later date. The continuing, excessive delay in providing these benefits implicates the procedural due process clause of the United States Constitution. *California Dept. of Human Resources Development v. Java*, 402 U.S. 121, 133 (1971).

The same “when due” and “administratively feasible” language in the CARES Act was used for regular unemployment involved in *Java*. *Java*, 402 U.S. at 131. In *Java*, the unemployed worker was eligible for unemployment benefits and received them when the State of California stopped payment based on the employer appeal. The Supreme Court held that a seven week delay before a hearing violated due process. In *Fusari v. Steinberg*, the United States Supreme Court found that excessive delay in the adjudication of claims for unemployment benefits could deprive due process even if those benefits are ultimately granted. *Fusari*,

³ UIPL No. 16-20 at 3. In addition, PUA is not available to those idled workers who can telework or have received severance, sick or vacation benefits from their employer.

419 U.S. 379, 389 (1975).

In this case, Respondents have determined that Appellants were eligible and paid them. Because Appellants qualify for a government benefit, Respondents cannot delay a hearing without violating procedural due process. Even if Appellants are not eligible, Respondents have a duty to process their claims and make determinations.

The Supreme Court noted in *Fusari* that “when due” does not mean when administratively payable. *Fusari*, 419 U.S. at 388 n. 15. In fact, waiting for Respondents to determine eligibility to invoke “when due” renders these words a

virtual nullity, limiting it to those cases where the state concedes that unemployment is due someone and simply fails to establish administrative mechanisms that result in paying him within a reasonable amount of time If the content of the “when due” clause were so eviscerated, 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[.] *Pennington v. Didrickson*, 22 F.3d 1376, 1386 (7th Cir. 1994) (internal quotations and citations omitted).

The Seventh Circuit has also found that a delay in excess of 14 days after the first compensable week violates the “when due” language of the Social Security Act dealing with unemployment benefits. *Burton v. Johnson*, 538 F.2d 765 (7th Cir. 1976); *see also Islam v. Cuomo*, 2020 U.S. Dist. LEXIS 133082, *14 (E.D. N.Y. 2020). When Respondents begin making PUA payments then stop, Respondents violate federal law when this delay exceeds 14 days. Respondents

have grossly exceeded this deadline.

The interest that Appellants have in receiving PUA benefits is a federal right and property interest protected by the 14th Amendment. *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 873 (9th Cir. 2011). An excessive delay in disbursing PUA is an “important factor” in determining whether procedural due process has been violated. *Id.* (citing *Fusari supra*). As the Ninth Circuit described, “at some point delay must ripen into deprivation, because otherwise a suit alleging deprivation would forever be premature.” *Id.*, 644 F.3d at 873-74 (citing *Schroeder v. City of Chicago*, 927 F.2d 957, 960 (7th Cir. 1991) (Posner, J.)).

The Ninth Circuit cataloged the delays for different federal benefits and how the circuit courts handled these issues, allowing 180 days for a Social Security adjudication and 19 months for a Medicare reimbursement adjudication. *Shinseki*, 644 F.3d at 884-887. While the Court failed to articulate a bright line, the basic standard takes into account

the importance of the private interest and the harm to this interest occasioned by the delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood the interim decision may have been mistaken.

Shinseki, 644 F.3d at 884.

Here, Appellants' interest is vitally important as Governor Sisolak has

indicated in Directive 19. Other courts have held that unemployment benefits are more important than other assistance, like Social Security or Medicare reimbursements. *See supra Java, Fusari*. There is also a broader, public policy reason for disbursing unemployment benefits. As one court has found, the prompt payment is needed to effectuate

the humane (or redistributive) objectives of unemployment insurance and the macroeconomic objecting (dampening the business cycle by keeping up the purchasing power of people laid off in a recession) require that unemployment compensation be paid as promptly as possible after the worker is laid off.

Jenkins v. Bowling, 691 F.2d 1225, 1229 (7th Cir. 1982).

The only government interest is Respondents constant focus on fraud, but fraudulent claims should not slow down legitimate claims. And Respondents have not yet demonstrated how fraud slows down legitimate claims. Finally, Appellants are qualified to receive PUA and the deprivation is erroneous, so ordering the disbursement will prove to be 100% successful.

B. *Fraud is not more important than the timely disbursement of PUA benefits*

As demonstrated above, Respondents must pay PUA claimants “when due”. Respondents must also protect against fraudulent claims, but it cannot and should not place fraud protection over its central goal of providing assistance to idled workers. The COVID-19 pandemic hurt Nevadans financially, emotionally, and psychologically since February 2020. PUA plays an integral part towards security

for those who cannot reenter the workforce and economy for personal, medical, or business shutdown reasons.⁴ The CARES Act “responds to the COVID-19 (i.e. coronavirus disease 2019) outbreak and its impact on the economy, public health, state and local governments, individuals, and businesses.” *Id.*

NRS 612.445(1)(b) defines fraud as, “[f]iling a claim for benefits using the social security number, name, or other personal identifying information of another person.” Additionally, UIPL No. 16-20 Section C.13.b makes clear Respondents “must promptly . . . determine whether the individual is entitled to a payment of PUA. . . .” Further, UIPL No. 23-20 notes,

in determining whether an individual is ineligible for regular unemployment benefits as a condition to receive PUA, states are not required to fully process adjudicate a claim for each week of PUA benefits. However, states must have a weekly certification process for claimants to self-certify that they met one of the COVID-19 related reasons and states must check quarterly to confirm an individual is ineligible for regular unemployment benefits.

UIPL No. 23-20 continues further explaining fraud prevention programs are required for PUA as with other Unemployment Insurance programs. *Id.* UIPL No. 28-20 requires Respondents to “make efforts to rapidly and proactively prevent,

⁴ See “Public Law No. 116-136: Coronavirus Aid, Relief, and Economic Security Act or the CARES Act.” (134 Stat. 218; Date: 03/27/2020; enacted H.R. 748). Text from: <https://www.congress.gov/bill/116th-congress/house-bill/748/summary/49>. Available from: <https://www.congress.gov>; Accessed 12/01/2020.

detect, and investigate fraudulent activity.” Nothing in the Department of Labor’s guidance allows Respondents to stop paying legitimate claims to investigate fraud. Rather, the UIPLs reinforce Respondents’ obligations as the DOL agent administering the PUA program: determine weekly, pay promptly, and prevent fraud. Because Appellants already qualified for PUA and were receiving the benefits as the CARES Act and the DOL intended, Respondents should have no refuge in the fraud excuse.

States with more PUA claims have been able to mitigate fraud and pay claimants with minimal delays. For example, between March 15, 2020 and November 19, 2020, California has had 3,109,826 unique PUA claims.⁵ To address the backlog of claims and fraud, California’s Employment Development Department implemented a freeze on new initial claims lasting about two weeks for implementing fraud detection measures. And a report by the California EDD Strike Team on September 16, 2020, made clear .02% of 183,167 (or 442) cases between May 2020 through July 2020 were likely fraudulent.⁶ “It is the view of the Strike Team that the minimal fraud prevention derived from these practices does not justify the high cost to the system, to the overall pool of claimants, and to the trust and faith of the public in the ability of the system to serve them.” *Id.* at 10.

⁵ <https://www.capolicylab.org/wp-content/uploads/2020/11/Nov-19th-Analysis-of-CA-UI-Claims-During-the-COVID-19-Pandemic.pdf>

⁶ <https://www.govops.ca.gov/wp-content/uploads/sites/11/2020/09/Assessment.pdf>

The report acknowledges these stories of rampant fraud are caused by automatic processing. *Id.* It was recommended EDD's actions did not justify delaying 1,383,302 claims forced into manual review because it prevents timely payment for legitimate claims. *See Id.* at 10.

The Employment Security Department of Washington State also faced similar fraudulent claims issues and worked through their claims. It implemented Operation 100% to clear backdated claims and improve fraudulent claim identification.⁷ The Commissioner for WA Employment Security Department reported on August 3, 2020, that from the 1,280,794 unique initial claims filed across all programs, 86,449 were identified for fraud and initially paid. *See Id.* at 4, 12. Their findings show that of all program initial claims, 6.7% were found fraudulent. *See Id.* The Commissioner also reported two-thirds of the fraud came from federal funding. *Id.* at 14. Since PUA is one-hundred percent federally funded, about 57,056 PUA claims in Washington State were likely found fraudulent. *See Id.* This makes Washington State's PUA rate for fraud around 4.5% of all unique unemployment claims filed. *See Id.*

Although Washington State's findings are higher than the EDD study, it is a full and complete examination of claims through August 3, 2020. The 6.7% rate of

⁷<https://esdorchardstorage.blob.core.windows.net/esdwa/Default/ESDWAGOV/Operation%20100/c2c-slides-8-3%20final.pdf>

fraud across all programs is historically within the pre-COVID-19 pandemic unemployment claims fraud rate.⁸ In fact, the fraudulent rate is significantly lower than the 10.38% overpayment rate for the last 12-month data report provided by the U.S. Department of Labor ending on March 31, 2020. The data makes clear that Washington State did not find a significant spike for fraudulent claims, similar to California's EDD study.

Respondents used similar fraud justifications for delays. However, DETR/ESD has not provided any data regarding outcomes of its fraud investigations. The EDD reports did this by taking a three-month sample and tracking claims through the administrative appeals process. Washington State has complete data through July 31, 2020. These results indicate that Nevada's fraud rate would similarly be below 10% and not sufficient to stop or slow down processing of PUA claims.

Respondents argue the majority of stalled claims require a manual review.⁹ But the law requires them to review promptly and pay when due. Respondents will not likely uncover a significant amount of fraud from these claims, payments will

⁸ <https://www.dol.gov/sites/dolgov/files/OPA/uidata/2020-twelvemonthsendingMarch31.xlsx>;
<https://www.dol.gov/sites/dolgov/files/OPA/uidata/2019-twelvemonthsendingMarch31.xlsx>

⁹ See "<https://thenevadaindependent.com/article/indy-qa-what-has-unemployment-strike-force-accomplished-as-its-three-month-timeframe-ends>"

not result in any adverse action by the Department of Labor, and only serve to frustrate the purpose of PUA and put Nevada's idled workers through needless stress.

Goldberg v. Kelly, 397 U.S. 254, 264 (1970), discusses balancing the recipients' and State's interests. The U.S. Supreme Court acknowledged,

aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means of daily subsistence, in turn, adversely affects his ability to seek redress... Public assistance, then, is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity'."

The government interest in conserving "fiscal and administrative resources" do not override the recipients' interests. *Id.*, 397 U.S. at 265-266. Hearings and efficient human capital usage reduce loss. *Id.*, 397 U.S. at 266. In *Nash v. Florida Industrial Commission*, 389 U.S. 235, 239 (1967), the U.S. Supreme Court recognized,

[e]ven the hope of a future award of back pay may mean little to a man of modest means and heavy responsibilities faced with the immediate severance of sustaining funds.

Appellants, like many others in Nevada, have been awaiting PUA payments for over eight months. The United States Supreme Court appreciates Respondents' fraud fighting activity. The Court also recognizes public benefits' vital importance

to those who have little or no other means for supporting themselves. Respondents failed to present any reason why fraud should interminably interfere with paying legitimate claims. The U.S. Supreme Court clearly recognizes that unemployment benefits, including PUA, are intended for those facing economic insecurity and Respondents' damage through indefinite delay are harming PUA claimants and depriving them a constitutionally recognized property right.

Fraud detection is already part of Respondents existing duty in disbursing regular unemployment benefits. Under the guidance of from the U.S. Department of Labor through UIPL 23-20 and UIPL 28-20, the same fraud detection applies to PUA benefits. In other words, Respondents already have programs to flush out PUA fraud because they are imported from traditional unemployment benefits system.

Recently, Respondents have utilized the ID.me web-based identification system into PUA.¹⁰ But this had done little to reduce delay, since many of the stalled or flagged claims likely require manual examination. Appellants, and PUA claimants at large, should not have claims held indefinitely for staff review. Further delays by Respondents will continue exacerbating an already fragile economic situation. There are real consequences for people like the Appellants

¹⁰ <https://www.ktnv.com/news/q-a-nevada-detr-answers-questions-about-id-me-and-more>.

who need the most assistance. The DOL, CARES Act, U.S. Constitution, and case law clearly support fear of fraud should not prohibit payment. When the success rate is 0.02% or alternatively at 6.7%, fraud detection should not prevent the processing and disbursement of PUA.

IV. Conclusion

Based on the foregoing, the Appellants' request for a Writ of Mandamus should be granted. DETR/ESD should be ordered to immediately resume PUA payments from the date they became due until the claims can be heard and decided by an impartial tribunal.

Dated this 1st of December, 2020.

Respectfully submitted,

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Certificate of Compliance with 28.2

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 2997 words.

3. Finally, I hereby certify that I have read this appellate 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 appendix 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 this 1st of December, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2020, the Brief Amicus Curiae of Nevada Legal Services was served on the following by using the Supreme Court's eFlex System:

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

Executed on December 1, 2020, in Las Vegas, Nevada

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EXHIBIT A

October 27, 2020

VIA EMAIL, FAX, AND US POSTAL

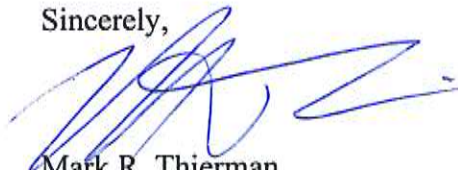
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Re: Payne et al. v. State of Nevada ex rel Nevada Department of Employment, Training and Rehabilitation et al., CASE No. 81763

Dear Clerk of the Court:

Petitioners in the above-captioned case hereby give blanket consent to the filing of *amici curiae* in support of petitioners, respondents, or neither party.

Sincerely,



Mark R. Thierman
Counsel of Record
mark@thiermanbuck.com

cc: Aaron D. Ford
Attorney General, State of Nevada
Gregory D. Ott, Chief Deputy Attorney General
Jeffrey M. Conner, Deputy Solicitor General
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100 N. Carson Street
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EXHIBIT B



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100 North Carson Street
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November 4, 2020

Ms. Elizabeth A. Brown
Clerk of Court
Supreme Court of Nevada
201 South Carson Street, Suite 201
Carson City, NV 89701-4702

Re: *Payne, et al. v. State, Dep't of Emp't, et al.*
Case No. 81763

Dear Madam Clerk:

This letter is to provide this Court with written notice under NRAP 29(a) that Respondent/Cross-Appellants consent to Nevada Legal Services participating as amicus curiae in the matter referenced above.

Sincerely,

AARON D. FORD
Attorney General

By:



Jeffrey M. Conner
Deputy Solicitor General
jconner@ag.nv.gov

cc: Mark R. Thierman, Thierman Buck Law Firm
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