No. 81763

IN THE SUPREME COURT OF THE STATE OF NEVADA

AMETHYST PAYNE, IRIS PODESTA-MIRELES, ANTHONY NAPOLITANO, ISAIAH PAVIA-CRUZ, VICTORIA WAKED, CHARLES PLEMEL, ELIZABETH AL-BSEIL NAIMI, TABITHA ASARE, SCOTT HOWARD, RALPH WYNCOOP, ELAINE 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 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

Respondents/Cross-Appellants

On Appeal from the Second Judicial District Court of the State of Nevada in and for the County of Washoe
No. CV20-00755

RESPONDENTS/CROSS-APPELLANTS' ANSWERING BRIEF AND OPENING BRIEF ON CROSS-APPEAL

GREGG D. OTT
Chief Deputy Attorney General
NV Bar # 10950
ROBERT A. WHITNEY
Deputy Attorney General
NV Bar # 8726

JEFFREY M. CONNER
Deputy Solicitor General
NV Bar # 1154
100 N. Carson St.
Carson City, Nevada 89701
775-684-1200
jconner@ag.nv.gov

Attorneys for Respondents/ Cross-Appellants

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INTRODUCTION

Respondents/Cross-Appellants' (DETR) focus is, and has always been, ensuring that every *eligible* claimant receives the wage replacement benefits they are entitled to as quickly as possible. The question, if any, that is properly on appeal is whether DETR has a clear duty to issue payment prior to making individual determinations on each claimant's eligibility.

The district court correctly recognized the answer is "No." Appellants/Cross-Respondents (Appellants) conceded below that just as DETR has an obligation to pay benefits that *are* due, it has an obligation to refrain from paying benefits that *are not* due. 24 App. 2424. That point definitively supports the district court's dispositive determination that DETR must balance promptness with accuracy. 1 App. 24. If DETR does not, it risks forfeiting Nevada's administrative grants under the Social Security Act *and* tax credits for Nevada employers under the Federal Unemployment Tax Act. 10 App. 1077.

Thus, Appellants fall far short of carrying their burden of showing that the district court abused its discretion to the extent that it denied their petition. The district court recognized that COVID-19 delivered a "perfect storm." 1 App. 22. The week-to-week increase in claims for unemployment at the end of March exceeded the peak of that metric from the Great Recession by *twentyfold*, an increase in workload that DETR was ill-equipped to handle because DETR's

staffing and funding levels are determined based on statistics from the prior year. 9 App. 864-65. Additionally, the district court correctly recognized a unique vulnerability to fraud hinders DETR's ability to identify valid claims for the benefits at issue. Indeed, many states around the country have paid out hundreds of millions, and in some cases billions, of dollars on fraudulent claims.

Contrary to Appellants' suggestions of malfeasance, the district court correctly recognized that DETR has shown "extraordinary vision and leadership" in its efforts to weather the storm. 1 App. 24. Amid record levels of claims for benefits, DETR propped up a new system for providing benefits to the self-employed and independent contractors, while implementing processes necessary to avoid overpayments and identify fraudulent claims. This Court should affirm the aspects of the district court's order denying Appellants' petition.

Despite its praise of DETR, however, the district court still issued a writ in Appellants' favor on a singular issue not pleaded in the petition: termination of payments after DETR discovered evidence of the claimant's ineligibility for PUA benefits. The district court lacked proper legal authority for doing so because Appellants lacked standing to raise the issue. Appellants never pleaded any allegations suggesting that DETR improperly stopped making payments to any of them. Thus, the district court clearly erred in concluding that it had jurisdiction to

issue the writ. Additionally, the district court erred in granting relief to non-parties.

The district court's legal basis for granting the writ is also flawed. The district court grounded its decision to issue a writ on *Cal. Dep't of Hum. Resources v. Java*, 402 U.S. 121 (1971). But *Java* only held that California could not *automatically* suspend payments simply because an employer appealed an initial determination of the claimant's eligibility for traditional unemployment benefits (UI). This case presents a materially different issue.

States generally decide eligibility for UI through an adversarial process. The nature of that process, including the opportunity for the prior employer to participate in the initial determination on eligibility, drove the Supreme Court to the conclusion that benefits remained "due" under 42 U.S.C. § 503(a)(1), pending the outcome of the employer's appeal. *Java*, 402 U.S. at 133 (concluding that due "when construed in light of the purposes of the Act, means the time when payments are first administratively allowed as a result of a hearing of which both parties have notice and are permitted to present their respective positions").

Here, there is no adversarial party to challenge eligibility. Instead, DETR is left to its own devices to confirm eligibility. DETR only stopped payment on certain claims after discovery of evidence establishing a particular claimant's ineligibility.

As a result, *Java*'s statutory analysis does not fit with this case. Instead, the due process analysis required by *Mathews v. Eldridge*, 424 U.S. 319 (1976), controls. And the holding of *Mathews*—that due process does not always require a hearing before termination of benefits—undermines the idea that DETR has a *clear duty* to continue paying benefits to an ineligible claimant pending the outcome of a hearing.

The absence of a clear duty is dispositive on the issuance of a writ. For that reason, this Court should affirm the district court's order to the extent that it denied Appellants' petition, but this Court should reverse the order issuing a writ directing DETR to reinstate payments without suspension "for reasons other than the applicant did not weekly file, the applicant has earnings in excess of that which would otherwise qualify the applicant for benefits, or if DETR has clear and convincing evidence of fraud…." 1 App. 26.

JURISDICTIONAL STATEMENT

Respondents agree with Appellants' jurisdictional statement, which conveys that this Court has jurisdiction to review the district court's order resolving matters raised by Appellants' Petition for Writ of Mandate. OB at 6.

Respondents add that this Court has jurisdiction over Respondents' cross-appeal under NRAP 3A(b)(1). Respondents filed a timely notice of cross-appeal on September 8, 2020, cross-appealing the district courts final order granting in

part Appellants' petition for writ of mandamus dated August 28, 2020. NRAP 4(a)(2).

ROUTING STATEMENT

Respondents agree with Appellants' position that the Supreme Court presumptively retains this case under NRAP 17(a)(11)-(12), as it presents important issues of first impression on questions that are both of a constitutional nature and have statewide public importance. OB at 7.

ISSUES PRESENTED ON APPEAL

Whether the district court correctly denied Appellants' request for a writ of mandate compelling DETR to issue payments of benefits to claimants before DETR makes individual determinations on eligibility for benefits.

ISSUES PRESENTED ON CROSS-APPEAL

Whether the district court erred in issuing a writ of mandamus on DETR's termination of payments when DETR identified fraud or other ineligibility after initially making payments on those claims.

STATEMENT OF THE CASE

I. CONGRESS RESPONDS TO THE NATIONAL EMERGENCY CREATED BY THE COVID-19 PANDEMIC WITH AN UNPRECEDENTED FEDERAL STIMULUS PACKAGE.

Governor Sisolak declared a state of emergency in relation to the COVID-19 Pandemic on March 12, 2020. *See Declaration of Emergency for COVID-19*, State

of Nevada (March 12, 2020).[1] In the week that followed, Governor Sisolak closed Nevada's schools and state offices, and he issued emergency directives that required closure of "non-essential" business. 9 App. 859.

After President Trump similarly declared a state of emergency on a national level, Congress passed an emergency stimulus package totaling $2 trillion commonly known as the CARES Act. 9 App. 857. Within the CARES Act, Congress did two important things: (1) it established Federal Pandemic Unemployment Compensation (FPUC), a temporary benefit of an additional $600 per week for any claimant eligible for some form of wage replacement benefits, and (2) it created Pandemic Unemployment Assistance (PUA), a new program for providing wage replacement benefits to individuals like independent contractors and the self-employed, who are not eligible for traditional unemployment insurance. 9 App. 857-58.

II. APPELLANTS FILE A HYBRID PETITION FOR WRIT OF MANDAMUS/CLASS ACTION COMPLAINT, WHICH THEY LATER AMEND BY ADDING NAMED PLAINTIFFS AND SLIGHTLY MODIFYING THEIR CLAIMS FOR RELIEF.

In mid-May, Amethyst Payne and Iris Podesta-Mireles filed a Petition for Writ of Mandamus And/Or Class Action Complaint For Damages against the State through DETR, Heather Korbulic in her official capacity as Director of DETR Director, Kimberly Gaa in her official capacity as Administrator of the

[1] *Available at* 2020-03-12 - COVID-19 Declaration of Emergency (nv.gov), (last viewed December 30, 2020).

Employment Security Division (hereinafter "ESD"), and 100 DOES. 2 App. 32-59. The petition presented three causes of action: (1) the violation of a federal statute based on DETR not having provided a mechanism to apply for PUA benefits; (2) a denial of due process based on a theory that the CARES Act creates a property interest in the right to payment of PUA benefits; and (3) a request for a writ mandating payment of PUA benefits. 2 App. 32-59.

A little more than a month later, Appellants amended their pleading. 2 App. 60. They added 10 plaintiffs—Anthony Napolitano, Isaiah Pavia-Cruz, Victoria Waked, Charles Ploski, Dariush Naimi, Tabitha Asare, Scott Howard, Ralph Wyncoop,[2] Elaina Abing, and William Turnley. 2 App. 60. Appellants also added a defendant, Dennis Perea in his official capacity as Deputy Director of DETR. 2 App. 60.

Appellants continued to assert their original causes of action with slight modifications: (1) a claim that nonpayment of PUA benefits breaches a clear duty and requesting a specific order directing payment of PUA benefits; (2) a denial of due process premised on the CARES Act creating a property interest in receipt of PUA benefits; and (3) a request for backpay and damages, including interest, against DETR. 2 App. 82-89. In support of their challenges to DETR's

[2] At first Appellants called this individual Ralph Wyncoopon, but they now call him Ralph Wyncoop. *Compare* 2 App. 60, *and* 25 App. 2572; *with* OB at 42 n.40. For consistency purposes, DETR refers to him as Appellant Wyncoop.

nonpayment of PUA benefits, Appellants added new allegations asserting that DETR had engaged in a practice of first determining that claimants were eligible to receive benefits—pointing to claimants receiving a "monetary determination letter" or another form letter containing conflicting language on eligibility—before making a retroactive redetermination on eligibility and declining to issue payment because the claimant either had other program eligibility or other unresolved issue(s) prevented approval of their application for benefits. 2 App. 81. Appellants also urged that where claimants are denied PUA benefits based on other program eligibility, DETR should still be paying those claimants the additional $600 FPUC payment that they are entitled to if they are eligible under any program for wage replacement benefits. 2 App. 81.

III. THE DISTRICT COURT ORDERS DETR TO SHOW CAUSE WHY A WRIT OF MANDAMUS SHOULD NOT ISSUE.

Along with their petition, Appellants filed an *ex parte* motion seeking issuance of a writ of mandamus with an accompanying memorandum of points and authorities in support of the motion and other supporting documentation. 4 App. 213-339, 5 App. 340-388. The crux of Appellants' argument in their memorandum of points and authorities tracked with the new factual allegations presented in the amended petition/complaint.

The Court issued an order for a response to the petition. 1 App. 5-8. DETR then responded explaining the demands placed upon it in determining eligibility for

each claimant before paying out benefits. 6 App. 413-33. In particular, DETR repeatedly emphasized the need for it to ensure that it only pays PUA benefits to claimants that meet the eligibility requirements for PUA, and that a system of "pay now and recover later" was not feasible. 6 App. 413-18, 420-25.

DETR also explained that (1) it could not simply payout FPUC before making a final determination on eligibility for benefits; (2) it was not redetermining eligibility after sending out letters that purportedly established final determination on eligibility, and (3) it was facing record levels of claims that far exceeded peak levels of claims experienced ten years ago during the "Great Recession." 6 App. 425-30. Finally, DETR argued that claimants do not have a constitutional right to unemployment benefits. 6 App. 432.

The next day, Appellants replied, reiterating their arguments seeking a writ directing payment of PUA benefits. 6 App. 475-92. And the morning of the hearing on Appellants' petition, DETR filed a supplemental declaration from Administrator Gaa. 8 App. 575-95. The declaration, in part, addressed concerns about a form letter that DETR had issued in response to resolution of individual issues on several claims. 8 App. 578-59. Although acknowledging that the language of the letter is confusing, Administrator Gaa's declaration explains that DETR sent those letters to notify a claimant that DETR had resolved a specific issue with their claim, but the letter *did not* establish that DETR had resolved *all*

issues with the claim and made a final determination on the claimant's eligibility. 8 App. 579.

IV. THE DISTRICT COURT CONVEYS ITS EXPECTATIONS OF A HEROIC EFFORT FROM DETR BUT APPOINTS A SPECIAL MASTER TO FURTHER AID THE COURT IN UNDERSTANDING THE ISSUES.

The district court held a hearing on its order to show cause in early July. 8 App. 596-703. During the hearing, the Court recognized the extensive effort DETR appeared to be putting forth. 8 App. 697-98. But the court expressed continued concern about timely processing of PUA applications, suggesting that "good" and "great" efforts by DETR were inadequate, it wanted "heroic." 8 App. 697. And the court also recognized that it needed more information before it could make an ultimate determination on the issues, which led to the district court appointed a special master to prepare a report. 8 App. 695-96, 698.

The Special Master produced a comprehensive report that is 310 pages in length. 9 App. 843-1022; 10 App. 1023-1152. The report begins with a description of the Pandemic and the Structure of DETR's Employment Security Division. 9 App. 853-75. Then, before addressing specifics of the newly created PUA program, the report details the existing process for addressing UI claims. 9 App. 875-1007. The report references other states' efforts to address the crushing economic effect of the Pandemic. 9 App. 1008-22. Finally, before concluding with recommendations on improving existing procedures and suggestions of

additional issues for consideration, the Special Master provided information on his communications with the parties and the Department of Labor. 10 App. 1023-1151.

V. APPELLANTS FILE A MOTION RAISING NEW THEORIES FOR RELIEF AND, FOR THE FIRST TIME, BREAK THEIR PUTATIVE CLASS INTO "SUB-CLASSES."

The day before the Special Master issued his report, and four days before the hearing the district court set to address that report, Appellants filed Plaintiffs' Renewed Motion and Supplemental Argument In Support of Writ of Mandamus. 8 App. 704-48. For the first time, without amending their petition, Appellants began to identify "sub-classes" of individuals within their putative class and requesting new relief specific to each sub-class that Appellants did not seek in their petition. 8 App. 705-11, 733-46.

In particular, Appellants raised new theories for relief not addressed in their petition related to (1) "dual eligibility," (2) termination of payments, (3) denial because unemployment "not disaster related," (4) denial related to "backdating," (5) the lack of an appeal process, (6) duplicate applications not being considered "fraudulent and/or in bad faith," and (7) providing claimants with a chance to correct or supplement claims. 8 App. 705-11, 733-46. Yet the Appellants' motion does not link those claims to the circumstances of a particular a named plaintiff. 8 App. 705-11, 733-46.

VI. THE DISTRICT COURT DETERMINES IT HAS JURISDICTION BASED ON THE MOOTNESS EXCEPTION FOR CLAIMS CAPABLE OF REPETITION, YET EVADING REVIEW.

After the Special Master completed his report, the district court conducted another hearing. At the beginning of the hearing, the court invited the parties to provide argument on whether the case was mooted by DETR had beginning to pay most of the Appellants, while also recognizing that no class certification had occurred. 24 App. 2333-34. Appellants responded by turning to the mootness exception for claims that are capable of repetition, yet evading review. 24 App. 2234-35. And DETR responded by arguing that individual circumstances of claimants are different, particularly because of the possibility of fraud, and the court should not permit Appellants' attempts to present claims of non-parties. 24 App. 2336-37.

The district court determined that the case was not moot and that Appellants had "standing" to proceed because "at least one of the allegations here is that the State is abusing its discretion or acting arbitrarily and capriciously by stopping payments to people who apparently have had payments begin." 24 App. 2338. But then the district court acknowledged that it based that decision on some of Appellants receiving payments that "may be subject to similar treatment *as alleged that others have in the complaint*, and for other reasons, the Court finds that the case is not moot." 24 App. 2338-39 (emphasis added).

After the Special Master gave an overview of his report, the Court invited additional argument. At this point, DETR reiterated that it was paying all but two of the Appellants, and that "the stopped-payments issue is not something that is specific" to the "named plaintiffs that remain unpaid at this time." 24 App. 2406. DETR also noted several things that might explain why payments stopped but Appellants did not link the allegations of stopped payments to any particular person, making it impossible for DETR to respond to Appellants' allegations. 24 App. 2406-07. Finally, addressing the allegations of the petition, DETR noted that the relief Appellants sought is "is not required by the law" and "in most cases it is specifically prohibited by law." 24 App. 2410.

VII. THE DISTRICT COURT ISSUES AN ORDER GRANTING RELIEF IN PART, WHILE ALSO CONVEYING ITS INTENT TO CONSIDER OTHER ISSUES.

After a brief recess, the district court issued an oral ruling and directed the Appellants to prepare a proposed order. 24 App. 2427-46. The district court's order made specific factual findings acknowledging the catastrophic impact of the COVID-19 pandemic and the difficulties DETR has encountered as a result of what the court characterized as a perfect storm. 1 App. 22-24. The court also made specific findings about the purpose of the CARES Act and the twin goals of "thoroughness" and "swiftness," while also finding that "the CARES Act is particularly vulnerable to fraud. 1 App. 24. But despite recognizing that DETR

had shown "extraordinary vision and leadership in extremely difficult times," the Court order that a writ of mandamus issue on two points:

> (1) that DETR is to interpret the term "covered individual" to include "an individual with a reportable income, and is wither 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 cause substantial interference with his or her work activities"; and
>
> (2) that "once payments have started, payments cannot be withheld and must be restarted 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."

1 App. 26-27.

Finally, the district court identified three new issues it wanted to address at a subsequent hearing: (1) "[t]he statuts of resolving the 'UI/PUA loop" or UI/PUA dichotomy, including their relationship to the FPUC payments"; (2) "[w]hat steps DETR has made to move the first filers to the front of the line"; and (3) retroactive eligibility for people that sought benefits the for the week overlapping the end of February and beginning of March. 1 App. 27.

VIII. THE DISTRICT COURT ISSUES AN ORDER DENYING MANDAMUS IN ALL OTHER RESPECTS AND SEVERS THE REQUEST FOR MANDAMUS FROM THE COMPLAINT.

After issuing the July 22nd order, the district court conducted another hearing at the end of July to assess the State's compliance with the writ of mandate and progress on the other issues the Court had identified in its order. 25 App. 2540-2625. After argument from the parties, the district court determined that it did not need to make any changes to the order and set another hearing in the middle of August. 25 App. 2617-18. The district court also directed the Special Master to communicate with the parties in the interim and produce a second report. 25 App. 2618-20.

Before the originally scheduled hearing, the district court held a hearing to address a new development about the possibility that the parties filing of notices of appeal divested the district court of jurisdiction over the three unresolved issues the district court identified in the July 22nd order. 25 App. 2646-75. At the end of the hearing, the district court ordered both parties to file submissions on whether the notices of appeal divested the district court of jurisdiction. 25 App. 2668-69.

The parties submitted their arguments, and the Special Master submitted a second report along with a related erratum on the unresolved issues. 25 App. 2676-2690; 26 App. 2703-2817; 38 App. 3533-38. The district court then conducted hearing where the district court made a final determination that it would

deny writ relief in all other aspects. 38 App. 3651-53. Finally, the district court issued a written order, which severed the request for mandamus relief from the rest of the complaint under NRCP 21 and certified its ruling on the request for mandamus relief to be final under NRCP 54(b). 1 App. 1-4.

SUMMARY OF THE ARGUMENTS

With every new filing, Appellants move the goalposts on DETR by raising new factual allegations and challenges to DETR's practices. But Appellants chose to amend their petition only once back in June, leaving their everchanging arguments a moving target unmoored to the specific circumstances of a named party. As a result, many of Appellants' arguments on appeal improperly focus on issues that Appellants did not plead in their petition and lack standing to assert.

What is properly on appeal, if anything, is Appellants' challenge to the denial of their *petition*. After sweeping their procedurally deficient arguments to the side, this Court can distill Appellants' remaining challenge to the denial of their petition to a single contention: Appellants assert that the district court erred because DETR has a duty to begin paying PUA benefits without first conducting an individualized consideration of whether a claimant is entitled to benefits.

About that, the district court correctly determined Appellants' are wrong. First, Appellants lack statutory standing because 42 U.S.C. § 503(a)(1) does not include a private right of enforcement. Second, Department of Labor guidance

undercuts the proposition that DETR can pay now and determine eligibility later. *See Unemployment Insurance Program Letter (UIPL) 16-20* at I-9, I -11*; UIPL 16-20 Change 1* at I-6*; UIPL 23-20* at 2. Thus, DETR must balance its obligation to ensure that it does not pay benefits when they are *not* due with any obligation DETR has in paying PUA benefits "when due." *See UIPL 23-20* at 3-4.

The Special Master confirmed this point through direct communication with the Department of Labor. 10 App. 1077. DETR's obligation to avoid payments to ineligible claimants requires DETR to evaluate each application for PUA benefits with, at a minimum, three important things in mind: (1) DETR must be sure that each claimant has exhausted entitlement to benefits from any other program before paying benefits under PUA, (2) DETR must evaluate each application to avoid overpaying persons eligible for PUA benefits, and (3) DETR must evaluate each application to avoid making payments on fraudulent claims. 10 App. 1075-80. The importance of these three things is manifest; without them, the unemployment system nationwide would be unsustainable.

Additionally, Appellants' attempt to establish that a claimant's receipt of one of two form letters that DETR sent out sufficiently established a final determination on eligibility that required DETR to begin making payments also falls short. Appellants position fails because (1) a determination on monetary eligibility alone does not address other non-monetary factors that affect a

claimant's eligibility, and (2) the record from the district court, as noted by the Special Master, rebuts Appellants' claim that a letter that DETR acknowledges included confusing language establishes a final determination on the claimant's eligibility.

Finally, the district court's decision to grant relief based on *Java* misses the mark. Even though Appellants never *pleaded* the issue of DETR terminating payments without a hearing below, and despite their lack of standing to assert such a claim, Appellants' legal theory fails to establish that mandamus is a proper remedy. *Java* does not establish that a state can never stop payments before holding a hearing. *Java* only held that, in a traditional UI process, a state cannot *automatically* suspend payments if an employer appeals an initial determination on eligibility.

This case is different than *Java*, and *Mathews* should control. In *Mathews*, the Supreme Court approved of a pre-hearing termination of benefits where a subsequent state investigation established a claimant was no longer eligible for Social Security disability. This case is like *Mathews* because of important distinctions between how eligibility is established for UI and PUA and the evidence-based reason for determining subsequent ineligibility to receive continued benefits.

And even if the district court correctly applied *Java*, its writ is overbroad and forces DETR to continue paying claims where DETR has to a duty to stop payment. For instance, the writ mandates DETR to continue payment of PUA claimants even after it determines the claimant is eligible for UI. That result is explicitly prohibited by the Department of Labor's guidance.

For these reasons, this Court should affirm the district court's decision denying the petition and reverse the district court's decision issuing a writ directing DETR to reinstate payments that DETR had stopped due to the claimant's ineligibility.

ARGUMENT ON APPEAL

I. APPELLANTS LACK STANDING TO SEEK REDRESS FOR HARMS THEY DID NOT PERSONALLY SUFFER.

Except in limited circumstances not presented here, a party lacks standing to assert the rights of a non-party. *Beazer Homes Holding Corp. v. Dist. Ct.*, 128 Nev. 723, 730, 291 P.3d 128, 133 (2012). As a result, this Court should reject Appellants' requests that this Court award affirmative relief to anyone other than the named Appellants based on the facts specific to each Appellant's circumstances.

Standing is a jurisdictional question that this Court reviews de novo and must address before proceeding to the merits of Appellants' claims. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011); *Heller v.*

Legislature of State of Nevada, 120 Nev. 456, 460, 93 P.3d 746, 749 (2004). "Under Nevada law, an action must be commenced by the real party in interest—'one who possesses the right to enforce the claim and has a significant interest in the litigation." *Beazer Homes Holding Corp.*, 128 Nev. at 730, 291 P.3d at 133 (*quoting Szilagyi v. Testa*, 99 Nev. 834, 838, 673 P.2d 495, 498 (1983)); *see also* NRCP 17(a). As a result, "a party generally has standing to assert only its own rights and cannot raise the claims of a third party not before the court." *Id.* (*citing Deal v. 999 Lakeshore Association*, 94 Nev. 301, 304, 579 P.2d 775, 777 (1978)).

Appellants included allegations in their original petition and their amended petition suggesting that they could satisfy the requirements for certification as a class action under NRCP 23. 2 App. 35-36, 64-67. But they never pursued the issue of class certification, nor have they identified any legal authority suggesting they have standing to assert the individual rights of a non-party.

The lack of third-party standing is important here for two reasons. First, because Appellants lack standing to assert the rights of non-parties, Appellants improperly request relief on behalf of non-parties. This Court can adjudicate any claim alleging that DETR has violated any of the Appellants' rights and provide Appellants with relief to remedy that harm. And if this Court does so, particularly in a binding published opinion, a non-party may rely on that decision to support an action they bring in their own name. But because Appellants lack standing to

assert the rights of another individual, this Court lacks authority to adjudicate the rights of, and grant relief to, any non-parties.

Second, Appellants' opening brief raises issues about (1) the need for hearings on all adverse determinations, (2) procedures for collecting overpayments, (3) issuance of letters on denials "with no proof of individual ineligibility," and (4) violation of certain federal regulations and guidance. OB at 32-49. But with the sole exception of a reference to Appellant Ralph Wyncoop being denied benefits apparently based on a question of identity—an issue Appellants did not properly develop in the district court[3]—Appellants have not identified a single instance of any of them suffering any harm based on those allegations. OB at 42 n.40.

As a result, this Court lacks jurisdiction to adjudicate claims of harm to anyone other than the Appellants.

II. APPELLANTS LACK STATUTORY STANDING

The statute at issue, 42 U.S.C. § 503(a), focuses on the Secretary of Labor's certification process for issuing grants to state agencies that administer unemployment compensation. The "when due" clause lies within 42 U.S.C. §

[3] Appellants' reference to Appellant Wyncoop relies on evidence attached to a motion for contempt. OB at 42 n.40. The first conceivable reference to this issue—assuming Appellant's were identifying Appellant Wyncoop—is a nondescript reference to a letter of denial at the district court's hearing at the end of July, which DETR argued was not properly before the court. 25 App. 2568-70. And Appellants later noted their intent to *amend their pleading* to include this claim, but they never followed through with an amendment. 25 App. 2677 n.1. This Court should reject Appellants' continued attempts to develop new claims for relief in piecemeal fashion.

503(a)(1), which precludes the Secretary from certifying a state agency administrative grants unless the Secretary finds that state law provides for "methods of administration" that the Secretary finds "to be reasonably calculated to insure full payment of unemployment compensation when due. . . ."

Because standing is a jurisdictional question, it may be raised at any time, including sua sponte on appeal. *Vaile v. Eighth Jud. Dis. Ct. ex rel. County of Clark*, 118 Nev. 262, 276, 44 P.3d 506, 515-16 (2002).[4] If Congress did not intend to create a private cause of action under a statute, a private party lacks standing to enforce the statute's provisions. *See*, *e.g.*, *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *see also Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 958-59, 194 P.3d 96, 100-01 (2008).

Although *Java* can be read as implying the existence a private right of action under 42 U.S.C. § 503(a)(1), the existence of such a right is in doubt. In a concurring opinion issued in the weeks before the United States Supreme Court decided *Gonzaga*, Judge Easterbrook anticipated the outcome of that case. *Zambrano v. Reinert*, 291 F.3d 964, 971-76 (7th Cir. 2002) (Easterbrook, J., concurring). In doing so, he recognized that "[t]he When Due Clause does not

[4] Although DETR did not raise this issue below, this argument should not surprise Appellants. Appellants cited *Zambrano* in the district court and in the opening brief. OB at 27; 8 App. 746. Additionally, Appellants' counsel acknowledged the possibility that this Court could resolve this case based on the lack of a private cause of action in the district court. 25 App. 2659 (noting that this Court may conclude that there is not a private right of action).

create rights in favor of workers or impose duties on states to pay particular benefits; it just tells the Secretary of Labor which states' administrative overhead may be reimbursed" and leaves the Secretary, not courts, to "determine whether a given state's apparatus is 'reasonably calculated to insure full payment of unemployment compensation when due.'" *Id*. at 973-74.

Without a private right of action under the 42 U.S.C. § 503(a)(1), Appellants lack standing. This Court should affirm the denial of the petition.

III. APPELLANTS IMPROPERLY RAISE SEVERAL THEORIES FOR RELIEF NOT ALLEGED IN THEIR PETITION.

Unless a conflict with the specific statutory provisions for addressing a petition for writ of mandamus exists, the Nevada Rules of Civil Procedure control. NRS 34.300. And this Court has long recognized that a petition for writ of mandamus is the equivalent of a complaint. *See*, *e.g.*, *State ex rel. Piper v. Gracey*, 11 Nev. 223, 232 (1876). A party cannot raise new claims for relief on appeal. *Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 437, 245 P.3d 542, 544 (2010).

The sole issue properly on appeal is whether the district court erred in denying Appellants' *petition*. The petition's request for mandamus relief, as amended, focused only on the delay resulting from DETR's practice of considering eligibility of each claimant individually. 2 App. 60-89. The petition did not

address (1) providing hearings on all adverse determinations,[5] (2) DETR's attempts to recover overpayments, (3) DETR issuing denials without a sufficient written explanation for the denial, or (4) DETR denying PUA benefits based on other program eligibility without paying benefits from the other program in violation of 20 C.F.R. § 625.4. 2 App. 60-89.

If Appellants want to litigate those issues, this Court should require them to properly plead their claims and present them to the district court in the first instance. This Court should decline to consider Appellants' arguments beyond their challenges to DETR's practices of conducting an individual review for eligibility on each claim for benefits and not treating the letters DETR sent to claimants as evidence of a final determination on eligibility.

IV. THE DISTRICT COURT CORRECTLY DENIED APPELLANTS' PETITION BECAUSE APPELLANTS FAIL TO ESTABLISH THAT DETR HAS A CLEAR DUTY TO PAY PUA AND FPUC BENEFITS PRIOR TO A FINAL DETERMINATION ON ELIGIBILITY OF EACH CLAIM.

Appellants' amended petition for writ of mandamus alleged that DETR violated a clear duty to issue PUA and FPUC payments simply because DETR was taking too long to do so. 2 App. 82-84. Appellants' amended petition also asserted that certain letters DETR sent to individual claimants should be treated as

[5] Although the district court correctly recognized that DETR did not abuse its discretion in rolling out the PUA program before completing development of a mechanism for appealing, Appellants did not plead, nor did the district court adjudicate, a claim that DETR has improperly deprived any Appellant of an appeal from an "adverse determination." 1 App. 26; 2 App. 60-89.

final determinations on eligibility. 2 App. 84. The district court did not abuse its discretion in denying Appellants' petition on either of these points.

DETR does not have a *clear duty*—statutory or constitutional—to issue any payments prior to determining eligibility. To the contrary, as Appellants conceded at argument in the district court, concomitant to any obligation to issue payments "when due," is DETR's obligation to ensure it does not pay individuals that are ineligible. That point is dispositive in this case.

A. Mandamus may only issue to compel the performance of a clear duty or correct an arbitrary and capricious exercise of discretion.

This Court reviews a decision to grant or deny a petition for writ of mandamus for an abuse of discretion. *Reno Newspapers v. Sheriff*, 126 Nev. 211, 214, 234 P.3d 924 (2010). But this Court reviews any related questions of law, including statutory construction, de novo. *Id*.

A court may issue a writ of mandamus "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station," or to control a manifest abuse of or arbitrary or capricious exercise of discretion. NRS 34.160; *Rugamas v. Eighth Jud. Dist. Ct.*, 129 Nev. 424, 430, 305 P.3d 887, 892 (2013) (citing *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981)). Mandamus will not issue unless the petitioner shows a clear legal right to the relief demanded. *State ex rel. Blake v.*

Daugherty, 48 Nev. 299, 304, 231 P. 384, 385 (1924). The writ may not issue where the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.170.

Mandamus is an extraordinary remedy, and the decision to entertain a petition lies within the discretion of this Court. *Hickey v. District Ct.*, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989). To justify the issuance of a writ of mandamus requiring the performance of an act by a public officer, the act must be one the performance of which the law requires as a duty resulting from the office, and there must be an actual omission on the part of the officer to perform it. *Mineral County v. Dep't of Conserv. & Natural Res.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001); *Brewery Arts Center v. State Bd. Of Examiners*, 108 Nev. 1050, 1054, 843 P.2d 369, 372 (1992); *State ex rel. Blake v. County Comm'rs*, 48 Nev. 299, 231 P. 384 (1924).

An actual default or omission of a duty is a prerequisite to the issuance of a writ of mandamus. *State ex rel. Lawton v. Public Serv. Com.*, 44 Nev. 102, 112, 190 P. 284, 286-87 (1920). "[A] writ of mandamus will not to be 'granted in anticipation of an omission of a duty, however strong the presumption may be'" that the relevant officer "'will refuse to perform their duty when the time for performance arrives.'" *Brewery Arts Center*, 108 Nev. at 1054, 843 P.2d at 372 (*quoting Lawton*, 44 Nev. at 112, 190 P. at 286-87). And the performance of the

duty must have been due "'at the time of the application.'" *Id.* (*quoting Gracey*, 11 Nev. at 233

B. DETR did not default on a clear legal duty.

Appellants build their case on two points: (1) that DETR has an obligation to make unemployment payments "when due," and (2) that they have a property right in receiving wage replacement benefits that triggers due process protections. OB at 26-28. But Respondents conceded below that DETR must balance its obligations to make payments "when due" and to avoid making payments that are not due. 24 App. 2424. Appellants' concession definitively undercuts the availability of mandamus relief.

1. DETR does not have a clear duty to pay benefits prior to determining a claimant's eligibility for those benefits.

Appellants insist that the "when due" clause of 42 U.S.C. § 503(a)(1) creates a clear duty that DETR breached by waiting to issue payment on applications for benefits before DETR made an individualized determination on the claimant's eligibility. And they also insist that because the "when due" clause requires DETR to pay Appellants' claims, they have a property interest in their benefits that triggers the protections of the due process clause. But because DETR must determine eligibility before payments are due, Appellants statutory claim fails. And because Appellants ground their due process claim on a statutory right to

payment, their due process theory must fall with their statutory claim because there is no legitimate claim for payment before an individual determination on eligibility. *See*, *e.g.*, *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 576-77 (1972) (recognizing that mere "unilateral expectation" of receiving a benefit does not establish a protectable property interest under a statute).

Appellants are right to concede that DETR must balance making payments that are due with ensuring it does not make payments that are not due: 42 U.S.C. § 503(a)(1) "recognizes an interest in both prompt payment of unemployment to eligible individuals *and* in keeping ineligible individuals from receiving compensation." *Jenkins v. Bowling*, 691 F.2d 1225, 1230 (7th Cir. 1982) (emphasis added). With that concession, however, their statutory claim fails. It is an unavoidable truth that if DETR must only make payments that *are* due and avoid making payments that are *not* due, then DETR has an obligation to evaluate each claim to determine the claimant's eligibility before issuing payment.[6] There

[6] The Amicus Brief from Nevada Legal Services misses this point and fails to address the issues within the context of the relevant legal standard for mandamus relief in suggesting DETR "should not place fraud protection over its central goal of providing assistance to idled workers." *Br. Amicus Curiae of Nevada Legal Services* at 8. Identifying the tipping point in balancing fraud detection against making prompt payment in the middle of largescale economic downturn is really a political question for DETR and the Secretary of Labor to address. *N. Lake Tahoe Fire v. Washoe Cnty. Commm'rs*, 129 Nev. 682, 688, 310 P.3d 583, 587 (2013) (quoting *United States v. Munoz-Flores*, 495 U.S. 385, 389-90 (1990); *see also Acosta v. Brown*, 213 Cal. App. 4th 234, 152 Cal. Rptr. 3d 340 (2013), as modified on rehearing (Feb. 28, 2013) (affirming California's doctrine

is no right to payment before DETR has the opportunity to make that determination.

The Seventh Circuit's majority opinion in *Zambrano* crystalizes this point. There, the court recognized that the first step in assessing a challenge to whether a state practice violates the "when due" clause is determining whether the challenged state practice "is an administrative provision or an eligibility requirement." *Zambrano*, 291 F.3d at 968. According to the Seventh Circuit, administrative actions govern *when* things are to happen during the application process. *Id*. In

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of judicial abstention in writ proceeding seeking payment of unemployment benefits during the Great Recession).

While comparing Nevada to California and Washington, NLS does not address readily available information on the excessive amount of money that California and Washington have paid in fraudulent claims. California is believed to have paid anywhere between two and eight *billion* dollars in fraudulent claims, and Washington around $600 *million* dollars, though it appears to have successfully recovered about half of that amount. Patrick McGreevy, *California Dropped its Guard Before it was Hit With $2 Billion in Unemployment Fraud*, Los Angeles Times (Dec. 21, 2020), *available at* EDD didn't guard against unemployment fraud, legislators say - Los Angeles Times (latimes.com) (last visited Dec. 30, 2020); CBS Los Angeles Staff, 'An Information Coverup': New Study Says California's EDD Fraud Could Top $8B, CBS Los Angeles, *available at* New Study Says California's EDD Fraud Could Top $8B – CBS Los Angeles (cbslocal.com) (last visited Dec. 30, 2020); Jim Camden, *Employment Security Department Faces Critical State Audit, Thousands Struggling With Overpayment Notices*, The Spokesman Review (Dec. 18, 2020), *available at* Employment Security Department faces critical state audit, thousands struggling with overpayment notices | The Spokesman-Review (last visited Dec. 30, 2020). In light of the foregoing, the district court correctly recognized that PUA is particularly vulnerable to fraud, and that fraud detection—among other things—is an important aspect of DETR's obligation to balance promptness with accuracy. 1 App. 24.

contrast, an eligibility requirement focuses on *who* is eligible and *what* they are eligible to receive. *Id*. at 968-69.

DETR's practice of reviewing each application to (1) ensure the claimant has expired all possible eligibility to receive benefits under another program are exhausted, (2) avoid overpayment of benefits, and (3) identify fraudulent claims, fits comfortably within what the Seventh Circuit characterizes as an eligibility requirement that is beyond the purview of the "when due" clause. Each inquiry focuses on *who* is eligible or *what* they are eligible to receive. As a result, DETR's practice of individually reviewing PUA claims for individual eligibility does not trigger concerns of the "when due" clause of 42 U.S.C. § 503(a)(1).

The cases that Appellants repeatedly cite—*Fusari v. Steinberg*, 419 U.S. 379 (1975), *Wilkinson v. Abrams*, 627 F.2d 650 (3d Cir. 1980), and *Jenkins*—are not to the contrary. First, *Fusari*'s discussion of the holding from *Java* is dicta. In *Fusari*, the Supreme Court only decided that, because Connecticut law had changed, it was "inappropriate to decide the issues tendered by the parties." 419 U.S. at 380. So, the Court "vacated the decision of the District Court and remanded for reconsideration in light of the intervening changes in Connecticut law." *Id*. Even so, *Fusari* expressly recognized the need to balance "timeliness, accuracy, and administrative feasibility" under the statute. *Id*. at 388 n. 15.

Respondents are correct that *Wilkinson* and *Jenkins* identify concerns about practices that could indefinitely delay a determination on eligibility. But there is no allegation here that DETR is indefinitely delaying payment to otherwise eligible claimants. DETR is processing claims as quickly as it can in the face what the district court correctly characterized as a "perfect storm." And neither *Wilkinson* nor *Jenkins* endorses the proposition that DETR can start paying claims without making individual determinations of eligibility. Instead, both cases recognize the need to balance promptness against ensuring benefits are not paid to those that are ineligible. *Jenkins*, 691 F.2d at 1230; *Wilkinson*, 627 F.2d at 627.

Because there is no statutory duty to pay before DETR makes an individual determination on eligibility, Appellants due process theory also fails. *Roth*, 408 U.S. at 576-77. And because there is no statutory or due process requirement to pay benefits before determining eligibility, mandamus is unavailable as a remedy.

2. Appellants claims of "contingent" approvals are not final determinations on eligibility.

Appellants assert that some of them received one of two form letters from DETR about the status of the claims, which Appellants read as constituting a determination on eligibility to receive benefits. OB at 28-32. Yet neither letter establishes that DETR made a final determination on eligibility that triggers a right to payment. This point also forecloses mandamus relief.

Appellants identify a monetary determination letter, which reflects *what* Appellants would receive *if* they satisfy other requirements for eligibility. OB at 28 n.29.[7] Merely identifying how much a claimant will be eligible to receive only addresses one component of eligibility. A claimant must also meet the other conditions for PUA eligibility—e.g that they do not have eligibility for benefits under any other program, that their unemployment or underemployment is as the result of COVID-19, and that they are otherwise able and available to work. Thus, a monetary determination alone does not establish eligibility for benefits.

Second, Appellants assert that a letter that DETR had been issuing after resolving an issue about Appellants' claim definitively established eligibility. OB at 29. DETR has acknowledged the confusing nature of the language in that letter. But as the Special Master's report indicated, the letter *did not* signify that DETR made a final determination on eligibility. 10 App. 1089-90; *see also* 8 App. 578-79. Instead, the letter issued when DETR had resolved a single issue on an individual claim, while other issues continued to remain unresolved. 8 App. 578-79; 10 App. 1089-90. And the letter made clear that if resolution of any other issues with the claim led to a determination of ineligibility, the determination on

[7] Although Appellants state they "do not argue that Monetary Determination letters create an entitlement to benefits," they equivocate and suggest that issuing a "Monetary Determination letters without payment do not satisfy the requirements for a prompt initial determination." OB at 29 n.2. Accordingly, Respondents address the Monetary Determination letter out of an abundance of caution.

ineligibility would control. 10 App. 1089-90; *see also* 9 App. 842. Thus, this second form letter, which DETR has since abandoned, did not establish eligibility for benefits.

Because neither letter that Appellants identify evidenced a final determination on eligibility, Appellants have not established that DETR's failure to begin issuing payments after sending any of the Appellants one of the foregoing letters violates the "when due" clause or otherwise violates due process. Until DETR has had a chance to complete evaluating a claimant's eligibility to receive benefits, no benefits are due. And if no payment is due under the statute, there is no property right that triggers due process protections.

* * *

Much of what Appellants present in their Opening Brief is not properly before this Court because Appellants failed to properly present it in the district court and they lack standing. As to what is properly before this Court—the district court's order denying Appellants' petition for writ of mandamus—Appellants fail to identify reversible error. In addition to the lack of a private right of action, the district court correctly concluded that mandamus should not issue on Appellants request for a writ directing DETR to begin making payments to a claimant before DETR determines the claimant's eligibility. For these reasons, this Court should affirm the denial of Appellants' petition.

ARGUMENT ON CROSS-APPEAL

The district court granted Appellants' petition on a singular, narrow issue: termination of payments before holding a hearing. But Appellants lacked standing to raise the issue, leaving the district court without authority to issue the writ. Furthermore, the district court's legal analysis is flawed. The circumstances presented here are distinguishable from *Java*, and the Appellants' claim for mandamus relief should fail when considering *Mathews*.

I. APPELLANTS LACK STANDING TO ASSERT A CLAIM BASED ON THE ALLEGED IMPROPER TERMINATION OF PAYMENTS

Appellants lack standing to litigate the issue on whether termination of payments violated due process for two reasons. First, the petition never alleged, nor do Appellants now show, that DETR improperly stopped payment on any of their claims. Second, Appellants' claim that they have a property interest in payments under the "when due" clause fails because there is no privately enforceable right to payment under 42 U.S.C. § 503(a)(1).

A. Appellants' Petition Did Not Allege That DETR Improperly Stopped Paying A Named Plaintiff.

Once again, a party my not assert the rights of a non-party, except in limited circumstances not presented in this case. *Beazer Homes Holding Corp.*, 128 Nev. at 730, 291 P.3d at 133. Appellants' *amended petition* for writ of mandamus does not allege that DETR improperly stopped paying any of the individual Appellants.

2 App. 60-89. Instead, Appellants improperly raised this issue for the first time by motion just days before the district court's *continued* hearing on the petition. 8 App. 740. And they did so based on a statement from DETR without tying the allegations of improper termination of payments to the circumstances of any of the individual Appellants. 8 App. 740. As a result, the district court erred in concluding it had jurisdiction to issue the writ. The district court also erred to the extent its writ extends relief to any non-parties.

The district court's conclusion that it had jurisdiction to proceed fails on two important points. First, Appellants did not plead any facts showing they had standing to litigate this issue. 2 App. 60-89. The district court's determination that "the complaint" included allegations of individuals being improperly denied payments is clearly erroneous because Appellants' amended petition did not include such allegations. 2 App. 60-89; 24 App. 2338-39.

The district court then mismatched standing and mootness by relying on the exception to mootness for claims capable of repetition yet evading review as sustaining Appellants' standing. 1 App. 26; 24 App. 2338-39. The mootness exception does not excuse the requirement that a party have suffered a legally cognizable injury. The exception to mootness for claims capable of repetition, yet evading review, excuses the need for an *ongoing* dispute because the circumstances causing the alleged injury dissipate before the judicial process

allows for adjudication of the plaintiff's claim, but the issue is likely to recur. *Valdez-Jimenez v. District Ct.*, 136 Nev. 155, 158-69, 460 P.3d 976, 982-93 (2020). As a result, the district court clearly erred in determining Appellants had *standing* to assert a claim based on an improper termination of payments because Appellants never pleaded a claim that DETR improperly stopped payment any of the individual Appellants' PUA claims.

Additionally, in addition to the lack of statutory standing addressed below, even if DETR stopped payment to a particular Appellant, Appellants did not have standing to assert the rights of a non-party. *Beazer Homes Holding Corp.*, 128 Nev. at 730, 291 P.3d at 133. Although Appellants pleaded allegations to establish a class action, they never pursued class certification in the district court. 2 App. 64-67. And they have not otherwise cited any authority supporting their ability to seek relief on behalf of a non-party. Accordingly, at a minimum, the district court erred in issuing an order that granted relief to anyone other than the Appellants.

B. Appellants Lack Statutory Standing

Appellants lack standing to assert a right to payment under 42 U.S.C. § 503(a)(1). *See supra* Argument on Appeal Part II. As a result, they lack standing to challenge whether DETR's decision to stop payment on certain claims without a hearing violates the "when due" clause. As Judge Easterbrook's concurring opinion from *Zambrano* acknowledges, whether DETR's conduct is inconsistent

with the need for benefits to be paid "when due" is for the Secretary of Labor to decide, not a court. *Zambrano*, 291 F.3d at 973.

Accordingly, this Court should reverse the district court's order because Appellants lacked standing to pursue this issue. Alternatively, to the extent this Court determines that an individual Appellant had standing, it should reverse the district court order to the extent that it grants relief to non-parties.

II. THE DISTRICT COURT ERRED IN ISSUING THE WRIT BECAUSE *JAVA*'S STATUTORY ANALYSIS DOES NOT APPLY AND *MATHEWS* COMPELS THE OPPOSITE OUTCOME.

Java does not fit this case. The circumstances of this case are more like *Mathews*, which undermines the district court's determination that DETR had a clear duty to keep making payments after additional evidence indicated the claimant was ineligible for PUA benefits.

In *Java*, the Supreme Court determined that California's *automatic* suspension of payments pending resolution of an appeal by an employer violated the "when due" clause of 42 U.S.C. § 503(a)(1). The termination of payments here, however, is grounded upon evidence of a claimant's ineligibility. This point, along with important differences between the eligibility processes for traditional UI and PUA, distinguishes this case from *Java* and puts it in the realm of *Mathews*, undercutting the district court's basis for issuing the writ.

Traditional UI is designed in a way that creates an adversarial process. *Java*, 402 U.S. at 125-29, 134. This is done through the creation of an incentive on the part of employers to oppose an award of unemployment benefits for which a former employee is not eligible. *Id*. at 126. In the initial phase of the UI process, the claimant and the former employer may present evidence on the claimant's eligibility to receive UI. *Id*. at 126-27. Then the relevant state agency adjudicates the claimant's eligibility. *Id*. at 127. And then an appeals process follows that determination, if needed. *Id*. 127-29.

In *Java*, despite having the right to do so, the former employer did not participate in the initial adjudication of eligibility. *Id*. at 123. Instead, the employer waited to do anything until *after* the initial determination on eligibility. *Id*. And California's procedure at the time required an *automatic* suspension of payment pending resolution of the appeal, despite the prior determination on eligibility. This, the Court found to violate the "when due" clause, because the Court characterized "due" as meaning "the time when payments are first administratively allowed as a result of a hearing of which both parties have notice and are permitted to present their respective positions…." *Id*. at 133.

Thus, in *Java*, California automatically stopped payment, despite the prior determination on eligibility. And the effectiveness of the initial process for determining eligibility played a critical role in the Supreme Court's rationale. It

was the prior determination, which the State made after the claimant and the former employer had an opportunity to make their case on the claimant's eligibility, that established that payments were due under the statute. *Java*, 402 U.S. at 133 (concluding that "due" "means the time when payments are first administratively allowed as a result of a hearing of which both parties have notice and are permitted to present their respective positions").

As a result of the foregoing, Appellant's statutory theory should fail because the evidence-based reason for stopping payments here is reconcilable with *Java*'s statutory analysis. And because *Java*'s statutory analysis is not on point, Appellants must prevail on their due process theory to win. But *Mathews* establishes that the flexibility of due process does not always demand a hearing before benefits can be terminated, which undermines the proposition that DETR has a *clear duty* to keep making payments when subsequent information confirms the claimant is ineligible to receive PUA benefits.[8]

In *Mathews*, the Supreme Court addressed whether due process requires a hearing before the government could terminate Social Security disability benefits. 424 U.S. at 323. Like unemployment, disability insurance "is administered jointly

[8] This is particularly true circumstances where, after beginning payments under PUA, it becomes evident that the claimant is ineligible for PUA because they are eligible under another program. Although the district court's order does not permit a stoppage of payment if a claimant is ineligible for PUA because they have UI eligibility, Department of Labor guidance requires the stoppage. *UIPL 16-20* at I-9.

by state and federal agencies." *Id*. at 335. States make determinations on the existence of a disability, including when it began and when it ends. *Id*. After a claimant proves their eligibility for benefits, the government may terminate payment of benefits after determining the claimant is no longer disabled. *Id*.

The relevant state agency had a team that would investigate the claimant's continued eligibility. *Mathews*, 424 U.S. at 337. If the investigation revealed that the claimant no longer remains disabled, the Court held that the Social Security Administration could cease making payment benefits even when considering that the claimant's appeal may not be decided for up to a year later. *Id*. at 338-42.

The circumstances of the PUA system are different from *Java* and more like *Mathews*. Unlike in *Java*, which was dealing with traditional UI, there is no adversarial party to challenge the application for an initial determination of eligibility for PUA benefits. DETR must evaluate eligibility for a PUA application based on the information in the claim and the other tools available to DETR for confirming a claimant's eligibility. But if, after making an initial determination on eligibility, new evidence comes to DETR's attention establishing ineligibility for PUA, the rationale of *Mathews* displaces any suggestion that DETR has a *clear duty* to continue making payments to a claimant that is ineligible for benefits.[9]

[9] At a minimum, because *Java*'s statutory analysis does not control here, this Court should vacate and remand with instructions to conduct the fact-intensive due process analysis required by *Mathews*.

For these reasons, the district court erred in concluded that *Java* supported issuance of a writ of mandamus because *Java*'s statutory analysis does not apply and, as *Mathews* establishes, the flexibility of due process does not always require a hearing before terminating payment of federal benefits. The absence of a clear duty to hold a pre-termination hearing is dispositive. This Court should reverse the district court's order granting Appellant's petition.

Finally, even assuming the district court did not err in relying on *Java*, the district court did err in issuing a writ that does not carve out an exceptions to its order requiring DETR to resume making PUA payments for circumstances where DETR has a duty to stop payment. For instance, Department of Labor guidance requires DETR to stop payment of PUA benefits if a claimant may be eligible for other benefits. *UIPL 16-20* at I-9.

CONCLUSION

The district court correctly denied Appellants request for a writ of mandamus compelling DETR to institute a practice of issuing payments before making a determination on whether the claimant is eligible for payment. But the district court erred in granting Appellants' request for a writ compelling DETR to reinstate payment on claims where DETR had stopped making payments after identifying ineligibility. As a result, this Court should affirm the aspects of the

district court's order denying Appellants' petition and reverse the district court's decision to issue the writ mandating DETR to reinstate certain stopped payments.

RESPECTFULLY SUBMITTED this 30th day of December 2020,

AARON D. FORD
Attorney General

By: /s/ Jeffrey M. Conner

JEFFREY M. CONNER
Deputy Solicitor General
NV Bar # 1154
100 N. Carson St.
Carson City, Nevada 89701
775-684-1200
jconner@ag.nv.gov

GREGG D. OTT
Chief Deputy Attorney General
NV Bar # 10950
ROBERT A. WHITNEY
Deputy Attorney General
NV Bar # 8726

Attorneys for Respondents/ Cross-Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that:

This brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Version 2011 in 14-point Times New Roman font.

This brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding 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 9,867 words.

Dated this 30th day of December 2020,

/s/ Jeffrey M. Conner
Jeffrey M. Conner

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2020, the RESPONDENTS/CROSS-APPELLANTS' ANSWERING BRIEF AND OPENING BRIEF ON CROSS-APPEAL was served on the following by using the Nevada Supreme Court's eFlex System:

Mark R. Thierman
Kristopher S. Pre

By electronic transmission to the following e-mail accounts:

mark@therimanbuck.com
leah@theirmanbuck.com
josh@thiermanbuck.com
joshh@thiermanbuck.com
kpre@nlslaw.net

Dated this 30th day of December 2020,

/s/ Jeffrey M. Conner
Jeffrey M. Conner