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9
10 **IN THE SECOND JUDICIAL DISTRICT COURT OF**
11 **THE STATE OF NEVADA IN AND FOR THE**
12 **COUNTY OF WASHOE**

13
14 AMETHYST PAYNE and IRIS PODESTA-
MIRELES, on behalf of themselves and all
15 others similarly situated,

16 Plaintiffs,

17 v.

18
19 STATE OF NEVADA ex rel Nevada
20 Department of Employment, Training and
Rehabilitation (DETR), Heather KORBULIC
21 in her official capacity only as Nevada
22 Director of Employment, Training and
Rehabilitation, and KIMBERLY GAA in her
23 official capacity only as the Administrator for
the Employment Security Division (ESD);
24 DOE 1-100, inclusive,

25 Defendants.
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Case No.: CV20-0075

**MOTION FOR AN ORDER TO SHOW
CAUSE WHY WRIT OF MANDAMUS
SHOULD NOT ISSUE AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

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MOTION

1
2 COME NOW Plaintiffs-Petitioners AMETHYST PAYNE and IRIS PODESTA-
3 MIRELES, on behalf of themselves and all others similarly situated, and moves this Court for an
4 ORDER TO SHOW CAUSE, if any there be, why this court should not issue a writ of mandamus
5 compelling DEFENDANTS-RESPONDENTS STATE OF NEVADA ex rel NEVADA
6 DEPARTMENT OF EMPLOYMENT, TRAINING AND REHABILITATION (DETR) -
7 Employment Security Division (ESD), HEATHER KORBULIC in her official capacity only as
8 Nevada Director of Employment, Training and Rehabilitation, and KIMBERLY GAA in her
9 official capacity only as the Administrator for the Employment Security Division herein to
10 establish a system, scheme or mechanism, preferably a webpage, which allows all self-employed
11 individuals, independent contractors, and owners of sole proprietorships working in Nevada to
12 apply for unemployment compensation as provided by state and federal law, including but not
13 limited to the federal Coronavirus Aid, Relief, and Economic Security Act (“CARES” Act),
14 within three days of the date of issuance.

15 Plaintiffs-Petitioners and all those similarly situated were forced to cease operations as a
16 result of the March 15, 2020, Governor Sisolak Executive Order. Plaintiffs-Petitioners bring
17 this motion because Defendants-Respondents have failed to execute their clear, present legal duty
18 by virtue of their office, and by the federal Social Security Act, 42 U.S.C. § 503(a)(1) (3) to
19 administer a governmental system that pays unemployment compensation: “. . . reasonably
20 calculated to insure full payment of unemployment compensation when due;” and which since
21 the March 27, 2020 passage of the federal CARES Act includes all self-employed individuals,
22 independent contractors and/or the owners of sole proprietorships located within the State of
23 Nevada who do not pay their own wages as a W-2 employee and who have been ordered to cease
24 working on March 15, 2020 by the State of Nevada, Governor Sisolak.

25 This motion is based upon the accompanying Memorandum of Points and Authorities in
26 Support of this motion, the declarations of Plaintiffs-Petitioners AMETHYST PAYNE and IRIS
27 PODESTA-MIRELES, the proposed Order to Show Cause filed herewith and all the other
28 pleadings and files on record in this action.

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The purpose of this lawsuit is not to fix blame but to expedite the federally mandated payment of unemployment compensation to many tens of thousands of Nevada citizens who lawfully earn their living as self-employed individuals, independent contractors, and/or the owners of sole proprietorships with no regular employees other than themselves, and who, like so many others, have been ordered on March 15, 2020 by the State of Nevada, Governor Sisolak to cease working. These people, including many lower paid, marginalized, and vulnerable workers therefore are in desperate need of money to feed themselves and their families and to provide for the necessities of life in this time of crisis. Yet, for more than six weeks, Defendants have not done their duty to provide any mechanism for Plaintiffs and those similarly situated to even begin the process of applying for unemployment compensation.

By this Order to Show Cause, Plaintiffs seek an Order from this Court directing Defendants and each of them, within three business days, to provide relief in three specific ways:

(1) To establish a website and/or modify an existing website to accept applications for unemployment compensation from self-employed individuals, independent contractors and/or the owners of sole proprietorships, who are properly licensed (if any such license is required by law) and who have paid taxes or will pay taxes on past income but have ceased earning a living as a result of the March 15, 2020 executive order of Nevada Governor Sisolak ordering Plaintiffs and all those similarly situated to cease operating;

(2) Direct Defendants and each of them, immediately upon completion of any application for unemployment compensation from a self-employed individual, independent contractor and/or the owner of sole proprietorships, make an initial determination whether or not to pay such unemployment benefits that are due under state and federal law retroactively to March 15, 2020 based upon the information submitted, as well as to provide a procedure for appealing any denial of said benefits; AND

(3) Issue payment as soon as practical only from the Defendant State of Nevada, and not from any individual defendant, of all sums due and owing in unemployment compensation to

1 such self-employed individuals, independent contractors and/or the owners of sole
2 proprietorships that were required to cease doing business by Governor Sisolak’s March 15, 2020
3 Executive Order from the date of that order until such time as they are no longer entitled to
4 unemployment compensation benefits under state and federal law.

5 **STATEMENT OF FACTS**

6 Plaintiffs bring this action on behalf of themselves and all other self-employed individuals,
7 sole proprietors and/or independent contractors who earned their income from working in the
8 State of Nevada prior to March 15, 2020, and who were ordered by Nevada State Governor
9 Sisolak to cease doing business as of March 15, 2020. Under recently enacted federal law, such
10 people are each entitled to unemployment compensation of not less than the federally mandated
11 \$600 per week, plus whatever amount the State of Nevada would pay in unemployment
12 compensation to them, if any. Plaintiffs are entitled this Unemployment Compensation from
13 March 15, 2020 until they return to earning the income they earned previously, either as a self-
14 employed individual or an employee of another.

15 In an April 2, 2020 article by Subrina Hudson in the Las Vegas Review-Journal,¹ Rosa
16 Mendez, a spokeswoman for the Department of Employment, Training and Rehabilitation
17 (“DETR”), which oversees the state’s unemployment insurance program acknowledged that the
18 Defendant DETR is required to pay unemployment insurance to self-employed individuals,
19 independent contractors and owners of a sole proprietorship but stated that Defendant DETR was
20 waiting for guidance from the United States Department of Labor (“DOL”). On April 10, 2020
21 the U.S. Department of Labor’s Employment and Training Administration (“DOL ETA”) announced the publication of Unemployment Insurance Program Letter (“UIPL”) 17-20, which
22 provides *further* guidance to states as they implement the CARES Act, including the Pandemic
23 Emergency Unemployment Compensation (“PEUC”) program.² Under the PEUC program,

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26 ¹ <https://www.reviewjournal.com/business/nevada-unemployment-benefits-delayed-but-qualified-workers-to-get-back-pay-1997380/> (last visited May 10, 2020).

27 ² The cost of PEUC benefits is 100% federally funded Implementation costs and ongoing
28 administrative costs are also 100% federally funded. *See*,
<https://www.dol.gov/newsroom/releases/eta/eta20200410> (last visited May 10, 2020).

1 Defendant DETR must provide up to 13 weeks of federally funded benefits to self-employed
2 individuals, sole proprietors and/or independent contractors who earned their income from
3 working in the State of Nevada prior to March 15, 2020, and who were ordered by Nevada State
4 Governor Sisolak to cease doing business as of March 15, 2020. U.S. Secretary of Labor, Eugene
5 Scalia explained in the official DOL guidance:

6 The CARES Act provides valuable relief to American workers facing
7 unemployment, including unemployed workers who may not otherwise be
8 eligible for regular Unemployment Insurance benefits. . . The guidance
9 issued to states today follows significant guidance and support the
Department of Labor has already provided to our state partners, including
\$500 million in emergency administrative funding.

10 It has been more than six weeks since the March 15, 2020 Nevada state ordered shut down,
11 and more than four weeks after the DOL’s guidance. It could take a few days to a few weeks to
12 actually make payments after the initial application for benefits. And Defendant DETR has yet
13 to establish a procedure for applying for benefits online, and representatives from the Department
14 are simply unavailable by telephone. In an May 5, 2020 interview with the Nevada Independent
15 reporter Michelle Rindels, the Director of DETR, individual Defendant KORBULIC, was asked
16 “It looks like some other states have already gotten their modules up and running for the Pandemic
17 Unemployment Assistance program for independent contractors. Others, like Nevada, haven’t.
18 Why is that? And what goes into launching that program?” In response. Defendant KORBULIC
19 stated, “I don’t really know the details of why ...” It simply does not take six weeks to program
20 a website to accept applications for unemployment, including uploading all relevant scanned
21 documents as files (prior tax returns, licenses, etc.) and to begin payments based upon initial
22 determination of eligibility immediately or to provide a mechanism for speedy appeal of any
23 adverse determination or denial of benefits.

24 Plaintiffs herein are each single mothers of a dependent child living with them and are
25 unable to provide food and lodging and the necessities of life for themselves and their children
26 living without financial assistance. To put it bluntly, Plaintiffs have managed to survive this long
27 basically by begging others for help, but such help is not likely to continue indefinitely. It appears
28 more than likely that if they do not receive unemployment compensation shortly, or some other

1 form of public assistance, Plaintiffs will not be able to recover sufficient lost revenue to pay
2 accumulated rent and utility bills even after they return to work. In other words, the lack of work
3 through no fault of themselves, will likely make Plaintiffs, and many others similarly situated,
4 permanently destitute, and thus an even greater burden on the State of Nevada welfare system
5 than would be from paying the federally subsidized unemployment “when due.” Plaintiffs cannot
6 even apply for unemployment insurance, which means they cannot appeal the denial of such I court.
7 It is clear, that Plaintiffs, and thousands of others similarly situated, have no plain, speedy remedy
8 at law and cannot afford to wait until a judgment after trial to begin the process for applying for
9 unemployment compensation that Defendants have a clear duty under federal law to provide.

10 The individual Plaintiffs herein are typical of tens of thousands of others who pay taxes,
11 possess all required licenses, and are lawfully earning a living as self-employed individuals,
12 independent contractors, or owners of a sole proprietorship. For five years prior to the State of
13 Nevada ordering her to close her business on March 15, 2020 due to the COVID-19 Pandemic,
14 Plaintiff Amethyst Payne has earned her living and paid her taxes as a self-employed sole
15 proprietor, licensed medical massage therapist working in Reno, Nevada. Declaration of
16 Amethyst Payne (“Payne Dec.”) submitted herewith. She is a single mom of a teenage boy who
17 lives with her in her apartment in Reno. *Id.* at p. 2:11-12. She has not worked since March 15,
18 2020. *Id.* at p. 3:13-16. She tried to initiate a claim for unemployment compensation as a self-
19 employed individual and /or owner of a sole proprietorship. *Id.* at pp. 3-4. There was no such
20 avenue available on the website. Desperate, she filed a claim against herself as both her employer
21 and employee, and her claim was promptly rejected. *Id.* at p. 3.

22 For three years prior to March 15, 2020, Plaintiff Iris Podesta-Mireles earned her living
23 as a tax-paying self-employed sole proprietor, licensed by the City of Reno as an adult interactive
24 cabaret performer. Declaration of Iris Podesta-Mireles (“Mireles Dec.”) submitted herewith. She
25 is the single mother of a five-year-old boy who lives with here. *Id.* at p. 4:25-28. Prior to March
26 15, 2020, she worked a shift during the day at a local adult interactive cabaret in Reno. *Id.* at p.
27 1:7-21. She tried for hours and hours to file a claim for unemployment compensation with DETR
28 telephonically but has been unable to do so. *Id.* at p. 3:10-26. She has even researched other

1 states' unemployment compensation administrations hoping to get some direct but the DETR
2 website does not allow her to input her information, including her business license and/or an
3 accounting of her earnings that she herself keeps for tax purposes. *Id.* at pp. 3-4.

4 When Nevada State Governor Sisolak ordered Plaintiffs and all those engaged in
5 Plaintiffs' occupation, as well as thousands of others similarly situated, to cease doing business
6 until further notice as of March 15, 2020, Plaintiffs dutifully obeyed. Plaintiff Payne cancelled
7 many appointments, and Plaintiff Mireles stopped dancing at her at the local adult interactive
8 Cabaret, which was likewise closed by the Executive Order. At that time, Plaintiffs were not
9 entitled to unemployment compensation.

10 But on March 27, 2020, President Trump signed, effective immediately, the federal
11 CARES Act. Defendant DETR is responsible for administration of a system of unemployment
12 compensation paid for, by both state and federal funds. Under the federal Social Security Act, 42
13 U.S.C. § 503(a)(1) (3), the State of Nevada must provide a method of administration "reasonably
14 calculated to insure full payment of unemployment compensation *when due.*" (emphasis
15 supplied). On April 5, 2020, the DOL published its first guidance on PEUA which included
16 provisions for payment of Unemployment Insurance Compensation for Self-Employed
17 individuals by State operated unemployment compensation administrations, such as Nevada's
18 DETR. On April 10, 2020, the DOL published its second guidance.

19 Defendants, and each of them, were required as quickly as practical, but no longer than a
20 few days after April 10, 2020, to provide a mechanism for Plaintiffs, and tens of thousands of
21 other self-employed individuals, sole proprietorships, and /or independent contractors to be paid
22 the unemployment compensation benefits which they were due. In addition, under existing law,
23 Defendants were also obligated to provide, a reasonably timely procedure to appeal any adverse
24 determination or denial of benefits by the agency. But nothing has been done to effectuate this
25 legal obligation. To this date, there is no website, no phone script, and no other way any self-
26 employed individual, independent contractor or owner of a sole proprietorship who has not paid
27 themselves "wages" in the last year can initiate the process for collecting the federally mandated
28 unemployment compensation available as of March 27, 2020.

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ARGUMENT

I. THIS COURT HAS VENUE AND JURISDICTION

This court has jurisdiction over Defendant State of Nevada ex rel. Nevada Department of Employment, Training pursuant to Nevada Revised Statute (“NRS”) 41.031 because as of March 27, 2020, there was, and continues to be, a clear legal duty for Defendant State of Nevada to provide a mechanism for self-employed individuals, sole proprietors and independent contractors to obtain unemployment compensation benefits mandated by federal law. NRS 34.160 provides that mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station. “A writ of mandamus will issue when the respondent has a clear, present legal duty to act.” *Gill v. St. ex rel. Booher*, 75 Nev. 448, 345 P.2d 421 (1959). “A writ of mandamus will issue when the respondent has a clear, present legal duty to act.” *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 603 (Nev. 1981); *see also, Legrand v. Eleventh Judicial Dist. Court of State*, No. 69133 (Nev. Dec. 16, 2015). Even if there are disputed issues of fact, jurisdiction is proper in the District Court. *Reynolds v. Justice Court of Reno* No. 75638 (Nev. App. Apr. 27, 2018).

Because failing to administer a federally mandated unemployment compensation benefit is a denial of due process, this Court has jurisdiction to award non-monetary relief against the individual Defendants acting in the official capacity. *See e.g., Fusari v. Steinberg*, 419 U.S. 379 (1975); *Gray v. Department of Employment Sec*, 681 P.2d 807 (Sup. Ct. Utah 1984). As stated in *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 at note 10 (1989): “Of course, a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because ‘official-capacity actions for prospective relief are not treated as actions against the State.’” *Citing Kentucky v. Graham*, 473 U.S., at 167, n. 14; *Ex parte Young*, 209 U.S. 123, 159-160 (1908). *Knight v. Nimrod*, No. C 00-0290 SBA, [Docket No. 59], at *4 (N.D. Cal. Sep. 6, 2007).

Venue is proper in the Second Judicial District because Plaintiffs worked and attempted to apply for unemployment in Reno, Washoe County, Nevada and therefore the cause of action arose within this District.

1 **II. THE COURT SHOULD ISSUE AN ORDER TO SHOW CAUSE**

2 This case presents an urgent situation involving the welfare of thousands of Nevada
3 workers, where the time for normal litigation will defeat the very emergency relief requested.
4 Both the State of Nevada and President of the United States have declared that the COVID-19
5 pandemic has created a state of emergency, and thousands of Nevadans are now not allowed to
6 earn income from working. Included in that group of non-working residents, are thousands, if
7 not tens of thousands of self-employed individuals, independent contractors, and the owners of
8 sole proprietorships, who, prior to March 15, 2020, lawfully worked in Nevada. Plaintiffs request
9 immediate relief, based on a prima face showing that Plaintiffs are entitled to relief sought and
10 the exigent circumstances which prompted this request. *Gilliam v. State*, 996 So. 2d 956 (Fla.
11 Dist. Ct. App. 2008) Therefore, Plaintiffs seek an order of the court that the Defendants appear
12 in this Court on a specified date and at a specified time to give reasons (show cause) why this
13 Court should not issue a writ of mandamus directing Defendants to provide Plaintiffs and all other
14 self-employed individuals, independent contractors, and the owners of sole proprietorships,
15 within the State of Nevada, immediate access to mechanism or a process (preferably a website)
16 so they can apply for unemployment insurance now made available to them by the federal
17 government acting through the State of Nevada.

18 **III. PLAINTIFFS ARE ENTITLED TO UNEMPLOYMENT BENEFITS AS A**
19 **MATTER OF STATUTE AND AS A MATTER OF DUE PROCESS**

20 Nevada's unemployment insurance programs is financed in part by the government of the
21 United States pursuant to the federal Social Security Act, 42 U.S.C. § 501-503. In Nevada,
22 Defendant DETR through its Employment Security Division is responsible for the administration
23 of all unemployment compensation.³ As precondition to accepting the grant, the State of Nevada
24 has agreed to follow federal law regarding benefit claims. Defendant DETR is bound to all federal

25
26 ³ The Employment Security Division (ESD) is a combination of Unemployment Insurance,
27 Workforce Development, and the Commission on Postsecondary Education. Unemployment
28 Insurance is responsible for collection of employment taxes and provides temporary wage
replacement for workers who are unemployed through no fault of their own.
https://detr.nv.gov/Page/Employment_Security_Division (lasted visit May 10, 2020).

1 statutes and regulations regarding the administration of unemployment insurance, whether
2 through state or federal funding.

3 Section 303(a)(1) of the federal Social Security Act, 42 U.S.C. § 503(a)(1) (3) requires “a
4 method of administration ‘reasonably calculated to insure full payment of unemployment
5 compensation when due.’” *California Department of Human Resources Development v. Java*,
6 402 U.S. 121 (1971). In the *Java* case, the Supreme Court held that a seven week delay in the
7 payment of benefits violated the statutory mandate of prompt payment when due, noting that four
8 weeks was the longest waiting period for benefits mentioned as tolerable in the legislative history
9 of 42 U.S.C. § 503(a)(1)(3).

10 The Court in *Java* made clear that the “payment when due” requirement has crucial
11 significance to the administration of unemployment compensation. Chief Justice Burger, writing
12 for a unanimous Court held that the basic aim of the Unemployment Compensation Act is to make
13 payments available “precisely on the nearest payday following the termination” as is
14 administratively feasible. 402 U.S. at 130, 91 S.Ct. at 1353; *accord Burtton v. Johnson*, 538 F.2d
15 765 (7th Cir. 1976). The Court in *Java* explained:

16 Other evidence in the legislative history of the Act and the commentary
17 upon it supports the conclusion that “when due” was intended to mean at
18 the earliest stage of unemployment that such payments were
19 administratively feasible after giving both the worker and the employer an
20 opportunity to be heard. The purpose of the Act was to give prompt if only
21 partial replacement of wages to the unemployed, to enable workers “to tide
22 themselves over, until they get back to their old work or find other
23 employment, without having to resort to relief.” Unemployment benefits
24 provide cash to a newly unemployed worker “at a time when otherwise he
25 would have nothing to spend,” serving to maintain the recipient at
26 subsistence levels without the necessity of his turning to welfare or private
27 charity. Further, providing for "security during the period following
28 unemployment" was thought to be a means of assisting a worker to find
substantially equivalent employment. The Federal Relief Administrator
testified that the Act “covers a great many thousands of people who are
thrown out of work suddenly. It is essential that they be permitted to look
for a job. They should not be doing anything else but looking for a job.”
Finally, Congress viewed unemployment insurance payments as a means of
exerting an influence upon the stabilization of industry. “Their only
distinguishing feature is that they will be specially earmarked for the use of
the unemployed at the very times when it is best for business that they

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should be so used.” Early payment of insurance benefits serves to prevent a decline in the purchasing power of the unemployed, which in turn serves to aid industries producing goods and services.

Id. at 402 U.S. 121, 131-32 (1971).

A statutory scheme providing for the receipt of government benefits may give rise to a property interest protected by the due process clause. *Mathews v. Eldridge*, 424 U.S. 319 (1976). In *Mathews*, entitlement to social security payments was considered a property right. Property interest in a benefit was defined by the United States Supreme Court in *Board of Regents of State Colleges v. Roth*:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

In this case, the federal government requires payment under the same Social Security Act at issue in *Mathews*. “State statutes providing for the payment of unemployment compensation benefits create in the claimants for those benefits property interests protected by due process.” See e.g., *Wilkinson v. Abrams*, 627 F.2d 650, 664 (3d Cir. 1980); *N.M. Dep’t of Workforce Sol’s. v. Garduño*, 363 P.3d 1176, 1180-81 (N.M. 2015). Since it is a property right, denial of payment of unemployment compensation requires due process. As stated in *Roth*, “The Fourteenth Amendment’s procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits.” *Roth*, 408 U.S. at 576, 92 S.Ct. 2701.

But unlike the plaintiffs in *Mathews* and *Roth*, Plaintiffs in this case can’t even start the application process, much less challenge a decision based upon the individual facts of the case. There is no website application process for self-employed individuals, independent contractors, or owners of sole proprietorships like there is for traditional employees. It is impossible to contact a representative of Defendant DETR, and there is no way for any self-employed individual, independent contractor, or owner of a sole proprietorship to initiate a claim. See, *Mireles Dec.* at

1 pp. 3-4. Likewise, if the individual files a claim against herself as both employer and employee,
2 she is sent a rejection letter. *See Payne Dec.* at p. 3:18-25.

3 And, it appears that Defendant DETR only pays unemployment compensation based upon
4 the amount earned as wages in the last four quarters, a pre-condition of zero-wage earning and
5 thus zero payment of unemployment compensation for each and every person who was an
6 independent contractor, self-employed individual, or owner of a sole proprietorship during that
7 same period of time. The federal \$600 per week has no such pre-condition, nor would it ever,
8 since prior wage earnings are antithetical to the concept of a non-employee independent
9 contractor, self-employed individual, and owner of a sole proprietorship. In other words,
10 Defendant DETR seems to be conditioning payment of even federally mandated benefits on
11 factors that by definition cannot apply to the very group for whom benefits are now mandated.

12 **IV. IF DEFENDANTS CAN'T SHOW CAUSE, THEN THE COURT SHOULD ISSUE**
13 **A WRIT OF MANDAMUS AS REQUESTED**

14 “A writ of mandamus is available to compel the performance of an act which the law
15 especially enjoins as a duty resulting from an office, trust or station, or to control manifest abuse
16 of discretion.” *State of Nevada v. Dist. Ct.*, 118 Nev. 140, 146 (Nev. 2002) (internal quotations
17 omitted). Plaintiffs maintain that Section 303(a)(1) of the federal Social Security Act, 42 U.S.C.
18 § 503(a)(1) (3) clearly requires the Defendants DETR to pay unemployment benefits to self-
19 employed sole proprietors and independent contractors pursuant to the CARES Act. And it is the
20 duty of each of the individual Defendants by virtue of their office, trust, or station to implement
21 a method for paying those benefits “when due”.

22 “The writ will not issue, however, if a petitioner has a plain, speedy, and adequate remedy
23 in the ordinary course of the law.” . *The State v. Eighth Judicial Dist. Court of Nevada*, 267 P.3d
24 777, 779 (Nev. 2011) *citing* NRS 34.170. The only way “at law” to seek judicial review from a
25 denial of unemployment benefits is an action for review under NRS 233B.130. But because
26 Plaintiffs and all those similarly situated are not given a way to even apply for benefits, Plaintiffs
27 cannot become a party of record in an administrative proceeding, and therefore cannot institute
28 an action “at law” under NRS 233B.130. Since March 15, 2020, Plaintiffs, like so many similarly

1 situated, have now been out of work with no income for the food or the necessities of life for
2 themselves or their dependent family members. They are in desperate need of financial
3 assistance. Low paid and vulnerable workers need immediate economic relief. Even a two-week
4 delay in assistance will propel low paid workers into poverty, thus becoming even a greater
5 burden on the State of Nevada. When time is measured paycheck by weekly paycheck, plaintiffs
6 have no “speedy” remedy at law available to them.

7 Yet, Defendants DETR still has not paid these self-employed individuals, sole proprietors,
8 and/or independent contractors. Worse yet, there is not even a way that these self-employed
9 individuals, sole proprietors, and/or independent contractors to begin the process by applying to
10 Defendant DETR for unemployment compensation. The individual Defendants have utterly
11 failed to discharge the duty of their office which would require them to provide a mechanism so
12 that the process by which self-employed individuals, sole proprietors, and/or independent
13 contractors are paid unemployment compensation is, to the extent practicable, the same as, or at
14 least as available as, all other employees who lost income as a result of Governor Sisolak’s March
15 15, 2020 Executive Order.

16 “To establish a claim under § 1983, the plaintiff must prove that the conduct complained
17 of: (1) was committed by a person acting under color of state law, and (2) deprived the plaintiff
18 of rights, privileges, or immunities secured by the Constitution or laws of the United States. ”
19 *State of Nevada v. Dist. Ct.*, 118 Nev. 140, 153 (Nev. 2002). As more fully set forth herein,
20 Plaintiffs allege that the individuals Defendants each had a duty to act, and failed to act, under
21 Nevada state law which resulted in a denial of property without due process. And as of March
22 27, 2020, Plaintiffs and all those similarly situated had a property interest in obtaining the
23 federally mandated, unconditional payment of unemployment compensation to self-employed
24 individuals, independent contractors. and owners of sole proprietorships. The individual
25 defendants had a duty to effectuate that federal mandate by designing some scheme, preferably
26 an online system, so that those entitled to unemployment benefits can actually apply and
27 eventually receive them. Because failure to provide a way of obtaining the \$600 a week
28 entitlement of unemployment insurance is taking away a property right, it must be done with due

1 process, which at the very least means providing access to a method of obtaining this property.
2 In this case, the unconstitutional behavior of the individual Defendants that gives rise to the civil
3 rights action under 28 U.S.C. § 1983, is the same as the failure to perform a clear duty arising
4 from a governmental official's office under NRS 34.160.

5 **V. PLAINTIFFS SEEK A SIMPLE ORDER THAT DEFENDANTS PROVIDE**
6 **WITHIN THREE BUSINESS DAYS A MECHANISM FOR PLAINTIFFS AND**
7 **ALL OTHERS SIMILARLY SITUATED TO APPLY FOR THEIR FEDERALLY**
8 **MANDATED UNEMPLOYMENT BENEFITS**

9 The quickest, easiest and most accessible method for accomplishing its mandated task of
10 providing unemployment benefits to self-employed individuals, sole proprietorships, and
11 independent contractors would be for Defendants, and each of them, to cause the existing website
12 to be modified, and /or a new website established, on which applicants who were not employees
13 could supply all relevant information, including, if necessary, up loading in pdf format a copy of
14 all tax returns and licensing documents deemed necessary for an initial determination of eligibility
15 and the amount of Unemployment compensation to be paid. Many other states with a similar
16 situation have already processed and paid unemployment benefits to self-employed, independent
17 contractors, and sole proprietors who ceased work in their states because of governmental action.
18 As stated earlier, the United States Supreme Court in *Java* has stated that the statutory language
19 of "when due" means as soon as administratively possible. And it only takes a day or two to
20 modify a website to accept claims for unemployment on behalf of self-employed individuals,
21 independent contractors, and owners of sole proprietorships. A few questions, and the ability to
22 upload .pdf documents would suffice. Why it takes more than a month to do this, is beyond
23 reasons.

23 **CONCLUSION**

24 For the reasons stated herein, Plaintiffs ask this Court to issue an Order to Show Cause, if
25 any there be, why it should not issue of Writ of Mandate ordering Defendants herein to establish
26 within three days of the granting of a writ of mandate, a system, scheme or mechanism, preferably
27 a webpage, that allows all self-employed individuals, independent contractors, and owners of sole
28 proprietorships working in Nevada who were forced to cease operations as of the March 15, 2020

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as a result of Governor Sisolak’s Executive Order to apply for unemployment benefits as provided by state and federal law.

AFFIRMATION

The undersigned does hereby affirm that the preceding document filed in the Second Judicial District Court of the State of Nevada, Country of Washoe, does not contain the social security number of any person.

Dated: May 13, 2020

THIERMAN BUCK LLP

By: /s/ Mark R. Thierman
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Joshua D. Buck
Leah L. Jones
Joshua R. Hendrickson
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8 *Attorneys for Plaintiffs-Petitioners*

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IN THE SECOND JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA IN AND FOR THE
COUNTY OF WASHOE

AMETHYST PAYNE and IRIS POSADA-
MIRELES, on behalf of themselves and all
others similarly situated,

Plaintiffs-Petitioners,

v.

STATE OF NEVADA ex rel NEVADA
DEPARTMENT OF EMPLOYMENT,
TRAINING AND REHABILITATION
(DETR) HEATHER KORBULIC in her
official capacity only as Nevada Director of
Employment, Training and Rehabilitation, and
KIMBERLY GAA in her official capacity
only as the Administrator for the Employment
Security Division (ESD); and DOES 1-100,
inclusive,

Defendants-Respondents

Case No.:

DECLARATION OF AMETHYST PAYNE
IN SUPPORT OF ORDER TO SHOW
CAUSE RE: PETITION FOR WRIT OF
MANDAMUS

1 State of Nevada
2 County of Washoe

3
4 **DECLARATION OF AMETHYST PAYNE**

5
6 I, Amethyst Payne, hereby declare and state:

7 I have been a self-employed Licensed Massage Therapist (NVMT-7902) for over 5 years, doing
8 business as “Therapeutic Massage by Amethyst” which is licensed by the Secretary of State for Nevada
9 as a sole proprietorship. My massage studio is located on Ridge Street in Reno, Nevada but I receive all
10 my business mail and do all my non-massage work like booking appointments and paying bills at my
11 home office which is located at South Meadowood Parkway in Reno. I am a single mother and live with
12 my minor son who is now attending middle school by computer. I am the sole support for my household.

13 I file federal tax returns that reflect both my gross income and my net after expenses. My gross
14 receipts for 2019 are about \$34,000. My net income is the amount of money remaining after I pay rent
15 on my studio, buy supplies, pay licensing fees and taxes, pay vendors for services to the business and pay
16 any other expenses necessary to maintain my business. I do not treat profits as payment of wages for tax
17 purposes. In other words, even though I pay all taxes due on my net income, I do not declare any -w-2
18 income. I have been informed by my tax accountant that if and when I earn a lot more money there are
19 certain tax and employee benefit advantages to making my income w-2 income rather than a distribution
20 of profits, but I am not anywhere near that level of income yet. Instead, I take my income as profits on
21 my tax returns, which my tax preparer assures me is perfectly proper.

22 I believe I am typical of most licensed massage therapists in Nevada, the vast majority of whom
23 are self-employed and do not claim any w-2 wage income. I agree with, and adopt as my estimate, the
24 following statement in Massage Magazine, available on line at [https://www.massagemag.com/nevada-](https://www.massagemag.com/nevada-massage-therapist-requirements-2/)
25 [massage-therapist-requirements-2/](https://www.massagemag.com/nevada-massage-therapist-requirements-2/) (last visited May 12, 2020) that:

26
27 Throughout the 110,567 square miles of the Silver State, approximately 3,800
28 massage therapists work to help the more than 2.8 million people in their state find relief from pain, rehabilitation from injuries, and comfort in the midst of stress and anxiety.

1 I grossed about \$1,150 for the week before May 15, 2020 and was looking forward to a great year
2 financially in 2020 before Governor Sisolak’s executive order forcing me to cease business operations
3 until further notice. I applied for Unemployment Insurance from the State of Nevada. I was informed that
4 the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was signed into law by the
5 President on Friday, March 27, 2020 and that on or about April 5, 2020, the United States Department of
6 Labor published its guidance of Pandemic Unemployment Assistance which included details on payment
7 by State Unemployment agencies of at least \$600 of federally mandated and federally paid Unemployment
8 Compensation for Self-Employed individuals, like me.

9
10 There is no federal agency that distributes this federally mandated \$600 to self-employed,
11 independent contractors, and the owners of sole proprietorships that do not pay themselves as w-2
12 employees. From what I read in the press, the State of Nevada is contractually obligated to administer
13 this program and to provide unemployment benefits to self-employed people like myself. But despite the
14 desperate situation for self-employed persons forced to shut down recognized by both the state and federal
15 governments, and despite a government ordered shut down of my business on March 15, 2020 by Nevada
16 Governor Sisolak, the State of Nevada Unemployment office has yet to establish a procedure for applying
17 for benefits on line, and representatives from the Department are simply unavailable by telephone.

18 Despite a lack of a method for filing an Unemployment Compensation claim with the Nevada
19 State Department of Employment, Training and Rehabilitation (DETR), I tried to apply for these federal
20 benefits online as best I could by claiming to be the employee of my own business. However, since I had
21 no W-2 income from this business I was denied any recovery. This would be true for every self-employed
22 individual, independent contractor and/or owner of a sole proprietorship that dis not pay themselves as w-
23 2 employees, which upon informant and belief, is the vast majority of sole proprietorships in this state. I
24 filed an appeal, but I believe it is futile since I don’t have w-2 earnings, and a can’t complain about the
25 math used by DETR that zero w-2 income means zero benefit amount under prior law.

26 Unemployment benefits are paid from the date of application by a claimant forward, except for a
27 short look back period. In my case, there is no method for me or any other self-employed individuals to
28 apply for benefits, or appeal their denial, even though the federal government tells us we are entitled to at

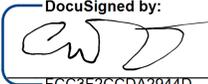
1 least \$600 per week. By this lack of access, I cannot even start the benefit process, and would not receive
2 benefits from the time I was legally entitled to receive them. I would argue that failure to apply or appeal
3 cannot be a reason for denial of my claim since the State of Nevada failed to provide a mechanism by
4 which to apply and/or appeal, but I am uncertain that DETR will waive its normal time limits, and there
5 are no regulations of which I am aware allowing it to do so.

6 In fact, I remember that the DETR website somewhere says that all eligible self-employed
7 individuals, independent contractors, and owners of sole proprietorships not to apply until "Mid-May"
8 2020. To me, "Mid May" is vague and does not assure me that I will get a check from DETR in time to
9 pay my bills. I must pay rent on my home, food for myself and my child and buy other necessities of life.
10 I also have a legal obligation to pay the lease payments on my massage studio space. Even though the
11 court may not process an eviction (although it may for a tenant of commercial real estate), I still legally
12 owe this money. I am worried that I cannot earn any money to pay this mounting debt, with or without
13 various fees and penalties for being late, and that the further behind I get, the less likely I will be able to
14 emerge debt-free and be able to reestablish my business to profitable again.

15 I have been given a copy of a brochure from my attorneys explaining my duties as a class
16 representative, a copy of which is attached hereto as exhibit 1. I was told that this same brochure is given
17 to all the named Plaintiffs in this case. I have read it thoroughly and understand and agree that I am
18 bringing this action for the benefit of the collective or class, which must always take priority over my own
19 individual situation. In addition to my job to tell the truth and be available to help my attorneys, I am
20 responsible as a class representative to oversee their work. I agree to this as well.

21 I have read the forgoing declaration consisting of this page and three others and declare under
22 penalty of perjury that it is true and correct, except as to matters stated upon information and belief, and
23 as to those, I believe them true.

24 Executed this 12th day of May 2020 in Reno, Nevada.

25 
26 Amethyst Payne
27
28

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8 *Attorneys for Defendant*

9 IN THE SECOND JUDICIAL DISTRICT COURT OF
10 THE STATE OF NEVADA IN AND FOR THE
11 COUNTY OF WASHOE

12 AMETHYST PAYNE and IRIS POSADA-
13 MIRELES, on behalf of themselves and all
14 others similarly situated,

15 Plaintiffs-Petitioners,

16 v.

17 STATE OF NEVADA ex rel Nevada
18 Department of Employment, Training and
19 Rehabilitation (DETR) - Employment Security
20 Division (ESD), HEATHER KORBULIC in
21 her official capacity only as Nevada Director
22 of Employment, Training and Rehabilitation,
23 DR. TIFFANY TYLER in her official capacity
24 only as the former Nevada Director of
25 Employment, Training and Rehabilitation and
26 KIMBERLY GAA in her official capacity
27 only as the Administrator for the Employment
28 Security Division; and DOES 1-100, inclusive,

Defendants-Respondents

Case No.:

DECLARATION OF IRIS POSADA-
MIRELES IN SUPPORT OF ORDER TO
SHOW CAUSE WHY WRIT OF
MANDAMUS SHOULD NOT ISSUE:

1 State of Nevada
2 County of Washoe

3
4 **DECLARATION OF IRIS POSADA-MIRELES**

5
6 I, Iris Posada-Mireles, hereby declare and state:

7 I am the single mother of a five-year-old son who lives with me in Reno, Nevada. For at
8 least the last three years, I have earned my living mostly as an adult interactive cabaret performer.
9 I am licensed by the city of Reno. I am registered with the state of Nevada as a sole proprietorship.
10 I have filed my federal income tax returns when due for this entire period and have paid all taxes.
11 I make approximately \$24,000 a year from dancing. I do not pay myself on a w-2 nor do I file a
12 1099 on myself. I am usually scheduled to workday shift during the week at the Spice House, a
13 licensed adult interactive cabaret in Reno. Upon information and belief, I think there are about
14 300 or more adult interactive cabaret performers licensed by the City of Reno who are similarly
15 self-employed.

16 On March 15, 2020, I was informed that the Spice House was closed for business
17 because of the executive order of Nevada Governor Sisolak. All the other licensed adult
18 interactive cabarets in Reno were likewise closed as a result of that order. I don't know when the
19 licensed adult interactive cabarets in Reno will reopen, but my guess is that because the work
20 requires close customer contract, these establishments will not re-open soon. In addition, the bars,
21 and restaurants where I worked part time were all closed by the executive order.

22 In addition to my main job as an adult interactive cabaret performer, I work part time as a
23 bartender and food server. I was a regular (w-2) employee for these part-time jobs. When the
24 March 15, 2020 executive order closed down the businesses where I worked part time, I applied
25 for unemployment based upon my part time work earnings but was rejected as I did not earn
26 enough to qualify. I did not apply for unemployment compensation at that time based upon my
27 main job as an adult interactive entertainer for two reasons: 1) I was under the impression that
28

1 this type of work would not be covered by Unemployment Compensation, and 2) there was no
2 way to actually apply as a self-employed person or to include this work on the website application.

3 The on or about March 27, 2020, I learned from the news that Congress had passed and
4 President Trump had signed a new law granting unemployment compensation to all self-
5 employed individuals including independent contractors and owners of sole proprietorships like
6 me who don't report themselves as w-2 employees. Upon information and belief, the federal
7 unemployment compensation for all self-employed individuals, independent contractors, and
8 owners of sole proprietorships (who don't report themselves as w-2 employees) is \$600 per week
9 for up to 13 weeks starting as of the date of Governor Sisolak's executive order.

10 I then looked at the Nevada Department of Employment, Training, and Rehabilitation
11 (hereinafter "DETR") website at [https://detr.nv.gov/Page/COVID-
12 19_\(Coronavirus\)_Information_for_Claimants_and_Employers](https://detr.nv.gov/Page/COVID-19_(Coronavirus)_Information_for_Claimants_and_Employers) a copy of the page as of May
13 11, 2020 is attached hereto as exhibit 1. The website states that "Under the "Pandemic
14 Unemployment Assistance (PUA): Unemployment support for otherwise ineligible workers,
15 including self-employed." The website further states "Status: Vendor selection completed. Start
16 date for PUA intake is expected for mid-May." As can be seen from the document, the page was
17 updated as of May 2, 2020.

18 According to DETR and its website, there is no way for me to apply for the federal
19 unemployment compensation that is administered exclusively through the state of Nevada DETR
20 online. I have tried for days and days to call DETR to file a claim telephonically, but the lines
21 are always busy. I am unaware of any income or earnings requirements necessary to receive this
22 money, but I am ready, willing, and able to supply whatever documentation within my possession
23 that is reasonably related to pursuing my claim for unemployment compensation. Frankly, I
24 don't know what kind of documentation that the DETR could possibly want from me, except
25 perhaps a copy of my state business license issued by the secretary of state, and I believe that
26 information is already accessible to DETR online directly.

27 Typically, I will make less than a few hundred dollars from any one customer in a year. I
28 may make several hundred dollars in an evening and not even know the identity of the person

1 who is tipping me. I know that some self-employed individuals who are independent contractors
2 and owners of sole proprietorships report their income on a 1099 form or have 1099 forms issued
3 to them by their customers. But like almost all licensed adult interactive cabaret performers, and
4 many, many other self-employed people to sell a service to the general public for a small price to
5 each customer, my adult interactive cabaret “customers” do not issue me a 1099 form for the
6 amount they pay me in tips and fees for dances. Nonetheless I do track my earnings to report
7 them for income tax purposes as best I can and am willing to make this information available to
8 the DETR as well.

9 I have researched the web and found other states unemployment compensation
10 administrations have no trouble in accepting applications from self-employed individuals. As of
11 May 11, 2020, the State of Texas has a single page website for self-employed individuals to apply
12 for unemployment benefits at [https://www.twc.texas.gov/news/self-employed-texans-and-cares-](https://www.twc.texas.gov/news/self-employed-texans-and-cares-act)
13 [act](https://www.twc.texas.gov/news/self-employed-texans-and-cares-act) a copy of which is attached hereto as exhibit 2. The first few lines at the top of the website
14 state:

15 Self-Employed Texans and the CARES Act

16 Ver esta página en español

17 On this page:

18 Self-employed/independent contractors- Do I qualify?

19 How do I apply?

20 What is Pandemic Unemployment Assistance (PUA)?

21 Proof of Income Notice for Self-Employed, Independent Contractors (1099),
22 and Gig Workers

23 I have a full-time job which continue to pay me but I lost my part-time gig, contract
24 or self-employed work. Do I qualify?

25 Are UI benefits taxable?

26 I need this unemployment compensation to pay for food for myself and my son, as well
27 as rent, and the necessities of life. So far, I have begged other individuals to help me, but I cannot
28 expect that they will continue doing so. I do not want to be out on the street begging for spare
change, but if necessary, I will do whatever is legal to support my family. If I fall further behind

1 in paying my bills and obligations, I am afraid that I may just have to file for bankruptcy and seek
2 welfare. I fear that going bankrupt will make it almost impossible for me to get an apartment in
3 the future.

4 I have read the forgoing declaration consisting of this page and three others and declare it
5 is true and correct to the best of my knowledge. Executed this 11th day of May 2020 at Reno,
6 Nevada.

7  DocuSigned by:
8 
9 Iris Posada-Mireles
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