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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Hon. R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2021-000883

Sheena Brannon, Shane Stencil, Tina Sullivan, and Brandon Beaty

Appellants

v.

Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina, and G. Daniel Ellzey, in his official capacity as Director of the South Carolina Department of Employment and Workforce

Respondents.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

Civil Action No. 2021-CP-40-03774

S.B., S.S., T.S. and B.B.,

Plaintiffs,

v.

HENRY DARGAN MCMASTER, in his official capacity as Governor of the State of South Carolina; and G. DANIEL ELLZEY, in his official capacity as the Director of the South Carolina Department of Employment and Workforce,

Defendants.

[Proposed]
Order Granting Motion to Dismiss, Denying Motion for Preliminary Injunction, and Denying as Moot Motion to Require Plaintiffs to Identify Themselves

S.B., S.S., T.S., and B.B. filed this lawsuit challenging Governor Henry McMaster's decision to instruct S.C. Department of Employment and Workforce Executive Director G. Daniel Ellzey to terminate South Carolina's participation in three federal COVID-19-related unemployment-benefits programs: Pandemic Unemployment Assistance, Pandemic Emergency Unemployment Compensation, and Federal Pandemic Unemployment Compensation. Plaintiffs seek a preliminary injunction to require South Carolina to reenroll in these three programs. Defendants, meanwhile, have moved to dismiss and to require Plaintiffs to identify themselves.

Ultimately, this case is not about whether you agree with the Governor's decision and whether South Carolina should be participating in these three programs. Rather, it is a case concerning whether Defendants have the discretion to opt in—and, conversely, opt out—of these

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programs. For the reasons explained in this Order, the Court **GRANTS** the Motion to Dismiss, **DENIES** the Motion for Preliminary Injunction, and **DENIES AS MOOT** the Motion to Require Plaintiffs to Identify Themselves.

Background

When COVID-19 disrupted life in this country, Congress quickly enacted the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, Pub. L. 116-136, 134 Stat. 281 (Mar. 27, 2020), for the laudable purpose of providing safeguards to the unemployed. Among the many things Congress did in the CARES Act was enact three new benefits.

First, there was Pandemic Unemployment Assistance ("PUA"). *See* 15 U.S.C. § 9021. This provided unemployment benefits to people who were ineligible for them under existing state and federal unemployment programs, including the self-employed, the underemployed, and independent contractors.

Second, there was Pandemic Emergency Unemployment Compensation ("PEUC"). *See id.* § 9025. This provision provided up to 51 weeks of federal unemployment benefits for claimants who exhausted the traditional 20 weeks they can receive under state law. Thus, it allowed claimants to extend their time on unemployment by almost an entire year.

Third, there was Federal Pandemic Unemployment Compensation ("FPUC"). Here, Congress created a program to pay an additional $600 per week to claimants receiving benefits under state or federal law. *See* 15 U.S.C. § 9023. Congress initially allowed this benefit to lapse, before reinstating it at $300 per week starting December 27, 2020. *See* Consolidated Appropriations Act, 2021, Pub. L. 116-260, § 203, 134 Stat 1182, 1953 (Dec. 27, 2020); American Rescue Plan Act of 2021 ("ARPA"), Pub. L. 117-2, § 9013, 135 Stat. 4, 119 (Mar. 11, 2021).

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Like every other state in the country, South Carolina agreed to participate in these programs when they were first enacted, and Governor McMaster delegated to Director Ellzey his authority to enter into the necessary agreement with the U.S. Secretary of Labor. More than a year later, on May 6, 2021, Governor McMaster directed Director Ellzey and DEW to terminate South Carolina's participation in PUA, PEUC, and FPUC effective June 30, 2021. That termination took place as scheduled and consistent with the 30-day prior-notice requirement in the CARES Act.

Plaintiffs are four anonymous individuals who allege that they are South Carolina residents and that they began receiving unemployment, including the new federal benefits, after the COVID-19 pandemic began. Each also allege that they received notice in June 2021 that the extra federal unemployment benefits would not be continuing. On July 28, 2021, Plaintiffs sued Governor McMaster and Director Ellzey and challenged the decision to stop participating in PUA, PEUC, and FPUC.

Legal Standard

A motion to dismiss should be granted whenever a plaintiff fails "to state facts sufficient to constitute a cause of action." Rule 12(b)(6), SCRCP. A circuit court's "ruling on a 12(b)(6) motion must be based solely upon the allegations set forth on the face of a complaint." *Stiles v. Oranato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995). "Viewing the evidence in favor of the plaintiff, the motion must be granted if facts alleged in the complaint and inferences reasonably deducible therefrom do not entitle the plaintiff to relief on any theory of the case." *Brown v. Theos,* 338 S.C. 305, 309–10, 526 S.E.2d 232, 235 (Ct. App. 1999).

A plaintiff "must establish three elements" to obtain a preliminary injunction: (1) irreparable harm, (2) likelihood of success on the merits, and (3) no adequate remedy at law. *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011). Whether to grant

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a preliminary injunction is in a trial court's discretion. *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). A preliminary injunction "is a drastic remedy," *id.*, that should "preserve the status quo," *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010). It is more drastic when, like here, the movant seeks a mandatory injunction that changes the status quo. *See Wetzel v. Edwards*, 635 F.2d 283, 286 (4th Cir. 1980); *Gantt v. Clemson Agr. Coll. of S.C.*, 208 F. Supp. 416, 418 (W.D.S.C. 1962) ("at the preliminary stage of proceedings," a mandatory injunction should be granted only "in rare instances in which the facts and law are clearly in favor of the moving party").

Analysis

I. Motion to Dismiss

A. Plaintiffs do not have a private right of action.

As a threshold issue, Plaintiffs cannot bring any cause of action here. The General Assembly has specifically prohibited such an action against Director Ellzey. *See* S.C. Code Ann. § 41-29-25(D) ("Nothing in this section gives rise to a cause of action against the executive director or any decision made by the executive director concerning departmental operations or development.").

The fact that they also sued Governor McMaster and rely heavily on another provision—section 41-29-230—does not change the result. "In determining whether a statute creates a private cause of action, the main factor is legislative intent." *Georgetown Cty. League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 353, 713 S.E.2d 287, 289 (2011) (cleaned up). Where a private right of action is "not expressly provided," it may still "be created by implication"—but only "if the legislation was enacted for the special benefit of the private party." *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 121, 678 S.E.2d 430, 433 (2009). "If the overall purpose

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of the statute is to aid society and the public in general, the statute is not enacted for the special benefit of a private party." *Id.* Section 41-29-230(1) focuses on advantages for "this State and its citizens." Such a general command demonstrates that this statute is about society generally, not a particular individual.

Nor is the Uniform Declaratory Judgments Act of any help to Plaintiffs. That act "is not an independent grant of jurisdiction." *Tourism Expenditure Rev. Comm. v. City of Myrtle Beach*, 403 S.C. 76, 81, 742 S.E.2d 371, 374 (2013). In other words, the act provides a remedy, not a right.

B. PUA, PEUC, and FPUC are not part of the Social Security Act.

Even if Plaintiffs could bring a private right of action, their claims fail. Section 41-29-230(1) of the South Carolina Code of Laws provides:

> In the administration of Chapters 27 through 41 of this title, the department must cooperate with the United States Secretary of Labor to the fullest extent consistent with the provisions of these chapters, and act, through the promulgation of appropriate rules, regulations, administrative methods and standards, as necessary to secure to this State and its citizens all advantages available under the provisions of the Social Security Act that relate to unemployment compensation, the Federal Unemployment Tax Act, the Wagner-Peyser Act, and the Federal-State Extended Unemployment Compensation Act of 1970.

S.C. Code Ann. § 41-29-230(1). Plaintiffs insist that PUA, PEUC, and FPUC are advantages under the Social Security Act. Defendants, on the other hand, contend that PUA, PEUC, and FPUC are actually provisions under the CARES Act—not the Social Security Act—and, thus, section 41-29-230(1) has no relevance to PUA, PEUC, or FPUC. The Court agrees with Defendants.

As an initial matter, the historical structure of unemployment insurance supports Defendants' position. The Social Security Act provides federal funds to cover administrative costs for running the State's unemployment-insurance program. *See* 42 U.S.C. § 501; *id.*

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§ 1101(c)(1)(A). At its simplest, the Social Security Act incentivizes states to create unemployment-insurance programs with the carrot of federal funding to administer those programs. Importantly, the Social Security Act does not provide any unemployment benefits (*i.e.*, a check) to any individual claimant. Those benefits to individual claimants are established by state law and paid from state-imposed unemployment taxes on employers. *See* S.C. Code Ann. § 41-31-5 *et seq.*

Plaintiffs, however, claim that benefits under the CARES Act—PUA, PEUC, and FPUC—are advantages under the provisions of the Social Security Act that relate to unemployment compensation. The Court disagrees. The benefits provided under the CARES Act are new benefits, never previously available to unemployed workers, and are provided by legislation separate and apart from the Social Security Act. Although the federal government chose to use the funding mechanisms available through the Social Security Administration, that does not mean these new benefits fall under the Social Security Act. It simply shows Congress used an existing mechanism to put PUA, PEUC, and FPCU into place quickly.

Additionally, the way Congress enacted various provisions related to unemployment benefits during the COVID-19 pandemic supports Defendants' position. Congress adopted all three programs in the CARES Act, without amending the Social Security Act. *See* CARES Act, Div. A, Title II, § 2102, 134 Stat. at 313 (PUA, codified at 15 U.S.C. § 9021); *id.* Div. A, Title II, § 2107, 134 Stat. at 323 (PEUC, codified at 15 U.S.C. § 9025); *id.* Div. A, Title II, § 2107, 134 Stat. at 323 (FPUC, codified at 15 U.S.C. § 9023).

In contrast with Congress's decision not to amend the Social Security Act for PUA, PEUC, and FPUC, Congress expressly amended the Social Security Act to make changes regarding unemployment benefits for employees of governmental entities and nonprofits. *See* CARES Act,

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Div. A, Title II, § 2103, 134 Stat. at 317. Likewise, Congress amended the Social Security Act regarding funding for administrative costs of running unemployment-insurance programs just days before the CARES Act. These distinctions show Congress knew how to and very well could have amended the Social Security Act to provide that PUA, PEUC, and FPUC were part of the Social Security Act. *See* Families First Coronavirus Response Act, Pub. L. 116-127, § 4102, 134 Stat. 178, 192–93 (Mar. 18, 2020). But Congress decided not to do so.

Because PUA, PEUC, and FPUC are not provisions of the Social Security Act, section 41-29-230(1) does not require Defendants to do anything related to those three programs.

C. Defendants have discretion to determine what is an "advantage."

Even if PUA, PEUC, and FPUC were part of the Social Security Act and section 41-29-230(1) had some application, Plaintiffs' claims nevertheless fail because Governor McMaster[1] and Director Ellzey have discretion in determining whether these programs are an "advantage" for the State and its citizens.

The General Assembly has given DEW multiple purposes and goals, which require Director Ellzey to balance the competing goals and exercise his discretion. One purpose (and the one on which Plaintiffs focus) is paying unemployment benefits to individuals unemployed through no fault of their own. But other coequal purposes include "reduc[ing] and prevent[ing] unemployment" and "promot[ing] the reemployment of unemployed workers throughout the State in every other way that is feasible." S.C. Code Ann. § 41-29-120(A)(1)(a), (d). Director Ellzey is

[1] Section 41-29-230 actually never refers to the Governor, so the statute cannot possibly limit the Governor's discretion. Contrary to Plaintiffs' contention, the statute still serves a logical purpose because it ensures DEW enacts the necessary rules and regulations for the State to obtain administrative funding under the Social Security Act and other enumerated federal statutes.

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charged with acting "in good faith" and "in a manner he reasonably believes to be in the best interests of the department." *Id.* § 41-29-25(A)(1), (3).

All of these statutes must be construed together to produce a harmonious result. *See Beaufort Cty. v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011) (discussing the *in pari materia* doctrine). Director Ellzey (and to the extent the statute applies to him, Governor McMaster as well) has discretion to determine what benefits from the federal government actually put the State and its citizens in a "superiority of position or condition." *Advantage*, Merriam-Webster (2021), https://tinyurl.com/9a2ph5cy (last visited Aug. 11, 2021). Plaintiffs 'assertion that the Director and Governor have no discretion under section 41-29-230(1) therefore is misplaced and ignores basic tenets of statutory construction. To the extent Plaintiffs ' claims boil down to a disagreement over whether terminating the State's participation in PUA, PEUC, and FPUC is an advantage for the State and its citizens, that determination is a policy decision that belongs to the executive and legislative branches, not the judiciary.

* * *

Dismissals under Rule 12(b)(6) are typically without prejudice. *See Skydive Myrtle Beach, Inc. v. Horry Cty.*, 426 S.C. 175, 189, 826 S.E.2d 585, 592 (2019). But when an amendment clearly would be futile, allowing such an amendment is not appropriate. *See id.* Here, any amendment would be futile. The defects in the Complaint are legal ones that cannot possibly be cured. Therefore, Plaintiffs shall not be given the opportunity to amend their pleadings. This dismissal is therefore with prejudice.

II. Motion for Preliminary Injunction

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Even if dismissal were not appropriate, Plaintiffs are not entitled to a preliminary injunction. The Court finds that Plaintiffs have likely met their burden to show irreparable harm and the lack of an adequate remedy at law, even assuming there is a private right of action. But Plaintiffs have not shown a likelihood of success on the merits. *Cf. Scratch Golf Co.*, 361 S.C. at 121–22, 603 S.E.2d at 908 (stating "an injunction was not appropriate remedy" because "[a]lthough [the plaintiff] may be able to satisfy" two elements, it could not satisfy the third); *Gantt*, 208 F. Supp. at 417 (stating an injunction "has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff").

As an additional note, preliminary injunctions generally "should issue only if necessary to preserve the status quo." *Poynter Invs., Inc.*, 387 S.C. at 586, 694 S.E.2d at 17. Plaintiffs here seek a mandatory injunction to change the status quo. South Carolina is no longer participating in PUA, PEUC, and FPUC, and Plaintiffs want the Court to order the State to reenroll in those programs. Plaintiffs' action was not filed until 83 days after Governor McMaster's announcement that South Carolina would terminate its participation in the CARES Act programs and 28 days after that termination took effect. Accordingly, Plaintiffs are not seeking to preserve the status quo, and the Court denies their Motion for Preliminary Injunction.

III. Motion to Require Plaintiffs to Identify Themselves

In light of the Court's decision to grant Defendants' Motion to Dismiss, the Court denies their Motion to Require Plaintiffs to Identify Themselves as moot.

That said, if this case were to proceed, the Court would grant this motion. It is a "rare dispensation" for a plaintiff to be allowed to proceed anonymously. *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993); *see also* S.C. Const. art. I, § 9. ("All courts shall be public"); Rule 10(a), SCRCP (providing that the summons and complaint "shall include the names of all parties").

Plaintiffs bear the burden of showing they warrant such exceptional treatment. *CTH 1 Caregiver v. Owens*, No. CA 8:11-2215-TMC, 2012 WL 2572044, at *3 (D.S.C. July 2, 2012). None of the factors in *Doe v. Howe*, 362 S.C. 212, 217–18, 607 S.E.2d 354, 356–57 (Ct. App. 2004), support Plaintiffs' attempt to proceed anonymously, and the Court finds their identical, generic assertions that they are "concerned that if it becomes public that [they were] part of this lawsuit, [they] could face harassment, retaliation, or the loss of job opportunities" are insufficient to carry their heavy burden.

Conclusion

For the forgoing reasons, the Court **GRANTS** Defendants' Motion to Dismiss, **DENIES** Plaintiffs' Motion for Preliminary Injunction, and **DENIES AS MOOT** Defendants' Motion to Require Plaintiffs to Identify Themselves.

[Electronic signature of the Honorable R. Lawton McIntosh to follow.]

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Richland Common Pleas

Case Caption: S B , plaintiff, et al vs Henry Dargan Mcmaster , defendant, et al

Case Number: 2021CP4003774

Type: Order/Dismissal

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

The South Carolina Court of Appeals

S.B., S.S., T.S., and B.B., Appellants,

v.

Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina, and G. Daniel Ellzey, in his official capacity as Director of the South Carolina Department of Employment and Workforce, Respondents.

Appellate Case No. 2021-000883

ORDER

This case is transferred to the Supreme Court pursuant to Rules 203(d)(1)(A)(ii) and 204(a) of the South Carolina Appellate Court Rules because the order on appeal involves a challenge to the separation of powers in this state.

FOR THE COURT

BY _____
CLERK

Columbia, South Carolina

cc:
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Susan B. Berkowitz, Esquire
Thomas Ashley Limehouse, Jr., Esquire
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FILED
August 17, 2021

Steven A Jordan, Jr., Esquire
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The Supreme Court of South Carolina

Sheena Brannon, Shane Stencil, Tina Sullivan, and Brandon Beaty, Appellants,

v.

Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina; and G. Daniel Ellzey, in his official capacity as the Director of the South Carolina Department of Employment and Workforce, Respondents.

Appellate Case No. 2021-000883

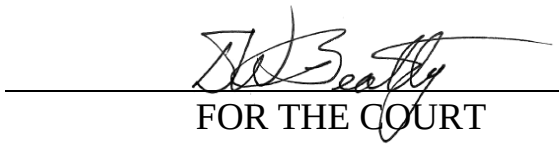
ORDER

Appellants ask this Court to certify this action pursuant to Rule 204(b), SCACR, and expedite the case. The motion to certify is granted. The request to expedite also is granted. Appellants shall serve and file a brief and the record on appeal by noon on Tuesday, August 24, 2021. Respondents shall serve and file a brief by noon on Friday, August 27, 2021. Any reply brief shall be filed by noon on Monday, August 30, 2021.

No initial briefs or designations of matter shall be filed, and the briefs shall be in the form of a final brief under Rule 211, SCACR, with the content specified by Rule 208(b), SCACR. The record on appeal shall comply with the requirements of Rule 210, SCACR.

The parties shall serve all documents by utilizing the AIS email address(es) of counsel in accordance with Section (g)(3) of the Supreme Court's order dated May 29, 2020, titled *RE: Operation of the Appellate Courts During the Coronavirus Emergency*. Further, all parties shall file all documents with this Court by electronic means under Section (c)(4), (5), or (6) of *RE: Operation of the Appellate Courts During the Coronavirus Emergency*.

Except for the most extraordinary of circumstances, no extensions of time will be granted in this appeal.


C.J.
FOR THE COURT

Columbia, South Carolina
August 19, 2021

cc:
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The Honorable Jenny Abbott Kitchings

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF RICHLAND	)	**FIFTH JUDICIAL CIRCUIT**
S.B., S.S., T.S., and B.B.,	)	**Civil Action No.:**
	)	
Plaintiffs,	)	
	)	
vs.	)	**SUMMONS**
	)	
Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina, and G. Daniel Ellzey, in his official capacity as Director of the South Carolina Department of Employment and Workforce,	)	
	)	
Defendants.	)	

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
S.B., S.S., T.S., and B.B. Plaintiffs vs. Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina, and G. Daniel Ellzey, in his official capacity as Director of the South Carolina Department of Employment and Workforce; Defendants	**COMPLAINT**

INTRODUCTION

Recognizing the severe economic hardship visited on millions of Americans by the COVID-19 pandemic, Congress passed the Coronavirus Aid, Relief, and Economic Security ("CARES") Act which included, among its many relief programs, enhancements to existing unemployment benefits programs. These programs have provided billions in unemployment benefits to South Carolinians affected by the pandemic and are currently scheduled to continue through September 6, 2021. These benefits, including the costs of their administration, are 100% federally funded.

Effective June 27, 2021, Defendants, Governor McMaster and Director Ellzey, prematurely ended South Carolina's participation in these enhanced unemployment benefits. In doing so, they would forfeit more than half a billion dollars in benefits that would otherwise go to Plaintiffs and tens of thousands of other workers and their families for their benefit and the benefit of the South Carolina economy. In the first week following Defendants' action, there was a more than 82% decrease in the number of South Carolinians receiving any kind of unemployment benefit. That week alone, South Carolina saw a reduction of more than $39 million in the amount of unemployment benefits paid to South Carolina families.

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South Carolina law requires the South Carolina Department of Employment and Workforce ("DEW") to act as necessary to secure all benefits available under the Social Security Act, like the enhanced unemployment benefits at issue in this case, for the benefit of the State of South Carolina and her citizens. Defendants' actions are plainly contrary to this statutory obligation. They have caused, and will continue to cause, Plaintiffs and tens of thousands of other South Carolinians severe and irreparable harm.

Plaintiffs bring this action seeking relief that would require Defendants to renew South Carolina's participation in these enhanced unemployment benefits programs and enjoin Defendants from terminating South Carolina's participation in those programs prior to their expiration.

PARTIES

1. Plaintiffs are citizens and residents of the State of South Carolina who are eligible for one or more Pandemic Unemployment Benefits established by the CARES Act.[1] As a result of Defendants' premature termination of these benefits, Plaintiffs have each suffered, and will continue to suffer, hardships related to the loss or reduction of their Unemployment Insurance benefits.

2. Plaintiffs are identified by initials only due to the highly personal and sensitive nature of the relevant circumstances and the risk of ridicule and retaliation if they are personally identified.

3. Defendant Henry Dargan McMaster is the Governor of the state of South Carolina and is named in his official capacity. Governor McMaster has directed Director Ellzey and DEW, a cabinet agency within the executive branch of South Carolina state government, to opt out of Pandemic Unemployment Benefits established by the CARES Act.

4. Defendant Daniel Ellzey is the Director of the South Carolina Department of Employment and Workforce ("DEW") and is named in his official capacity. DEW

[1] These benefits include Pandemic Unemployment Assistance ("PUA"), Pandemic Emergency Unemployment Compensation ("PEUC"), and Federal Pandemic Unemployment Compensation ("FPUC"). These benefits are described in more detail beginning at paragraph 10 below.

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processes individual claims for unemployment benefits, including Pandemic Unemployment Benefits, and distributes payments to eligible individuals. At Governor McMaster's direction, Director Ellzey prematurely terminated DEW's agreement with the U.S. Department of Labor ("DOL") to administer Pandemic Unemployment Benefits.

JURISDICTION AND VENUE

5. This Court has jurisdiction pursuant to S.C. Const. art. V, 11, the South Carolina Uniform Declaratory Judgment Act, S.C. Code Ann. § 15-53-10 *et seq.*, and S.C. Code Ann. § 36-2-803.

6. Venue is proper in this Court pursuant to S.C. Code Ann. § 15-7-30 because the most substantial part of the acts or omissions alleged herein occurred in Richland County and, on information and belief, one or more individual defendants is a resident of Richland County.

STATEMENT OF FACTS

7. The COVID-19 pandemic visited severe economic hardship on South Carolinians and disproportionately affected those least able to afford it. From June 2019 to June 2020, South Carolina's economy lost 126,100 seasonally adjusted, nonfarm jobs, an outcome largely driven by COVID-19.[2] By far, the hardest hit industry has been leisure and hospitality with 62,500 jobs lost over that period in an industry whose workers earn the lowest average wage of workers in any industry group - $373.00 per week.[3]

8. While recovery is underway, it is incomplete. Many thousands of South Carolina families are still struggling to recover financially. The number of unemployed South Carolinians in May 2021 is approximately 78% higher than it was in January 2020.[4] The U.S. Census

[2] S.C. Department of Employment and Workforce, *Labor Market Trends,* Vol. 1: Issue 5, June 2020.
[3] *Id.*
[4] U.S. Bureau of Labor Statistics, Local Area Unemployment Statistics, available at https://data.bls.gov/pdq/SurveyOutputServlet (accessed July 14, 2021)

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Bureau estimates that 176,832 South Carolina households are behind on rent and collectively owe $481,923,073 in back rent.[5]

Congress Provides Pandemic Unemployment Benefits to Alleviate the Economic Hardship Caused by COVID-19.

9. To alleviate some of the economic hardship that the COVID-19 pandemic caused, Congress enacted the Coronavirus Aid, Relief, and Economic Security ("CARES") Act. Signed into law on March 27, 2020, the CARES Act provides for a variety of pandemic relief programs including several types of enhanced unemployment benefits (collectively "Pandemic Unemployment Benefits"). 15 U.S.C. § 9001 *et seq*.

10. Pandemic Unemployment Assistance ("PUA") is one type of Pandemic Unemployment Benefit and is available to workers who would not otherwise be eligible for regular Unemployment Insurance ("UI") benefits including the self-employed, underemployed, independent contractors, and others whose unavailability or inability to work was caused by COVID-19. 15 U.S.C. § 9021.

11. Pandemic Emergency Unemployment Compensation ("PEUC") is a second type of Pandemic Unemployment Benefit and provides additional weeks of benefits for workers who have exhausted their regular UI benefits. 15 U.S.C. § 9025.

12. Federal Pandemic Unemployment Compensation ("FPUC") is a third type of Pandemic Unemployment Benefit which increased the amount of regular UI benefits by $600 per week from March 27, 2020, through July 31, 2020. 15 U.S.C. § 9023. From December 27, 2020, through September 6, 2021, FPUC increases regular UI benefits by $300 per week. Continued Assistance for Unemployed Workers Act of 2020 ("CAUWA"). Pub. L. No. 116-260, § 200–01, 206; American Rescue Plan Act of 2021 ("ARPA"). Pub. L. No. 117-2, § 9013 (March 11, 2021). Workers receiving PUA and PEUC also receive an additional $300 per week included in their benefit payments although this technically is not an FPUC payment.

[5] https://nationalequityatlas.org/rent-debt (accessed July 14, 2021)

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13. Funds have been appropriated by congress for Pandemic Unemployment Benefits and are available in the Unemployment Trust Fund to be distributed to eligible South Carolinians through September 6, 2021. ARPA §§ 9011, 9013, and 9016.[6]

14. The costs of Pandemic Unemployment Benefits and the costs to states of administering these programs, including startup costs and ongoing administration costs, are 100% federally funded. 15 U.S.C. §§ 9021(f)(2), 9023(d)(1)(A), 9025(d)(2)(A).[7]

15. Pandemic Unemployment Benefits and administration costs are funded through Sections 901, 904, and 905 of the Social Security Act, 42 U.S.C. § §§ 1101(a), 1104(a), and 1105(a). 15 U.S.C. §§ 9021(g), 9025(d).[8]

16. As a result, Pandemic Unemployment Benefits are "advantages available under the provisions of the Social Security Act that relate to unemployment compensation" as that phrase is used in S.C. Code Ann. § 41-29-230(1).

17. Shortly after the CARES Act was enacted, DEW entered into an agreement with the United States Department of Labor ("DOL") to administer Pandemic Unemployment Benefits on behalf of the State of South Carolina. As of July 12, 2021, DEW had distributed the following amounts under these programs:

Pandemic Unemployment Benefit	**Amount Distributed as of July 12, 2021**[9,10]
FPUC	$3,699,971,279.20

[6] The CARES Act provided for three additional types of enhanced unemployment benefits which are not at issue in this case.
[7] See also Unemployment Insurance Program Letter ("UIPL") 15-20, p. 3 (FPUC); 16-20, p. 5 (PUA), 17-20, p. 3-4 (FPUC) (Exhibits A, B, and C attached hereto).
[8] PUA benefits, including FPUC and administration costs, are funded by 42 U.S.C. §§ 1104(a) and 1105(a). 15 U.S.C. § 9021(g). PEUC benefits, including FPUC, are funded by 42 U.S.C. §§ 1104(a) and 1105(a), while PEUC administration costs are funded by 42 U.S.C. § 1101(a). 15 U.S.C. § 9025(d).
[9] https://www.dew.sc.gov/data-and-statistics/data-dashboard (accessed July 14, 2021)
[10] Three Pandemic UI Benefit programs not at issue in this case are omitted from these totals.

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PEUC	$681,879,826.25
PUA	$543,498,066.88
Total	$4,925,349,172.33

18. Many tens of thousands of South Carolinians, including Plaintiffs, are entitled to receive and have been receiving Pandemic Unemployment Benefits since DEW began administering these programs.

Defendants Prematurely Terminate Pandemic Unemployment Benefits for Tens of Thousands of South Carolinians

19. On May 6, 2021, Director Ellzey issued a memorandum to Governor McMaster purporting to assess the impact should South Carolina decide to "opt-out" of Pandemic Unemployment Benefits effective June 27, 2021, rather than participate through the currently scheduled end of those programs in early September 2021.[11] In his memorandum, Director Ellzey estimated that such action would result in the loss of the following amounts of federal funding between June 27, 2021, and September 4, 2021:

Program	**Anticipated 10-Week Funding Loss (June 27, 2021 – September 4, 2021)**
FPUC	$370.0 million
PEUC	$146.0 million

[11] Exhibit D attached hereto

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PUA	$62.0 million
Total	**$578 million**[12]

20. The same day Director Ellzey issued his memorandum, Governor McMaster directed DEW to terminate South Carolina's participation in the Pandemic Unemployment Benefits effective June 30, 2021.[13]

21. The effects of Defendants' actions on vulnerable South Carolinians were swift and dramatic. In the first week after Defendants opted out of Pandemic Unemployment Benefits, the number of South Carolinians receiving unemployment benefits of any kind fell by more than 82% (71,604).[14]

	June 27 – July 3	**July 4 – July 10**	**Change**
Individuals receiving Unemployment Benefits of any kind	87,018	15,414	(71,604)

22. South Carolinians received over $39,000,000 less in Pandemic Unemployment Benefits between July 4, 2021, and July 10, 2021, than they did the week before Defendants' decision to opt out of those benefits took effect.[15] This weekly loss will most likely increase as Defendants' decision takes full effect.

[12] DEW estimates that an additional $7.3 million in benefits will be lost during this time under the three Pandemic UI Programs that are not at issue in this case.
[13] Exhibit E attached hereto
[14] https://www.dew.sc.gov/data-and-statistics/data-dashboard (accessed July 14, 2021, for June 27-July 3 data and accessed July 15, 2021, for July 4-July 10 data)
[15] https://www.dew.sc.gov/data-and-statistics/data-dashboard (accessed July 14, 2021, for June 27-July 3 data and accessed July 15, 2021, for July 4-July 10 data)

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	June 27 – July 3	July 4 – July 10	Change
FPUC Benefits Paid	$29,311,525.00	$3,479,806.00	($25,831,719.00)
PEUC Benefits Paid	$10,583,318.00	$1,062,149.00	($9,521,169.00)
PUA Benefits Paid	$4,276,299.00	$445,028.00	($3,831,271.00)
Total	**$44,171,142.00**	**$4,986,983**	**($39,184,159.00)**

23. While Defendants' decision to opt out of Pandemic Unemployment Benefits has taken effect, that action is not irrevocable. On July 12, 2021, DOL issued guidance to state workforce agencies which clarified that "[a]ny state that has provided notice to [DOL] of its intent to terminate any of the Pandemic Unemployment Benefits prior to the September 6, 2021, end date may reinstitute participation in any or all programs it previously indicated it would be terminating."[16]

24. DOL's July 12 guidance indicates that if the date on which a state has indicated it will terminate participation in Pandemic Unemployment Benefit programs has passed, as it has in South Carolina, the state may need to enter into a new agreement with DOL to reinstitute operations. Doing so may result in a lapse in FPUC and PEUC benefits because the new agreement would become effective the week of unemployment after that agreement is signed.[17]

25. Thus, every week that passes without an agreement between DEW and DOL to administer Pandemic Unemployment Benefits may result in the permanent loss of tens of

[16] Unemployment Insurance Program Letter No. 14-21, Change 1 (Exhibit F attached hereto and available at https://wdr.doleta.gov/directives/corr_doc.cfm?docn=9502)
[17] UIPL 14-21 at 7

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millions in federal unemployment benefits for needy South Carolinians, including Plaintiffs.

26. PUA benefits will not lapse if South Carolina enters into a new agreement with DOL because the state would be required to provide individuals receiving PUA an opportunity to certify for the missing weeks.[18]

Individual Plaintiffs and the Harms They Have Suffered as a Result of Defendants' Conduct.

Plaintiff S.B.

27. Plaintiff S.B. lives in Spartanburg with her three children ages 15, 11, and 7. Her youngest has cerebral palsy, is profoundly disabled, and receives $789.00 per month in Supplemental Security Income ("SSI") benefits.

28. She served for two years in the United States Air Force before being honorably discharged due to a disability. She receives approximately $170.00 per month in VA benefits from her service. Aside from her VA benefits and her child's SSI, there is currently no other income coming into her household.

29. In June of 2020, S.B. was terminated from her job as a front desk manager at a hotel. She applied for unemployment benefits and was initially determined to be ineligible because DEW found she was terminated from her job for misconduct.

30. S.B. appealed this initial determination and, in November 2020, DEW reversed its decision and found that she was eligible for unemployment benefits effective June 14, 2020, because she had been terminated without cause connected to her employment.

31. S.B. started receiving unemployment benefits of $299.00 per week in November of 2020.

32. In December of 2020, S.B. started receiving an additional $300.00 per week in FPUC.

[18] UIPL 14-21 at 7

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33. In April of 2021, S.B. received a notice that she was eligible for PEUC as of July 5, 2020.

34. In June of 2021, S.B. received an email from DEW saying that the following week would be the last week that she would be eligible for PEUC, and FPUC. She has not received any unemployment benefits since DEW stopped participating in these programs.

35. S.B. has continued to search for work since she became unemployed. She has applied for approximately 30-40 jobs through DEW's online portal since April of 2021. She was offered one phone interview as a result, but she was not able to take the job because it required 2nd or 3rd shift work and she cannot leave her youngest at home with her other children overnight.

36. S.B. has completed another 60-80 applications since she became unemployed but has not been able to find suitable employment. Until her youngest goes back to school, S.B. would need to make enough to pay for babysitting or daycare, which is particularly expensive for a special needs child.

37. S.B. is approximately 3 months behind on rent and 1.5 months behind on her utility and car payments. The unemployment benefits S.B. was receiving made it possible for her to stay much closer to current on these bills and pay other expenses for herself and her children.

38. S.B. is concerned that if it becomes public knowledge that she was a part of this lawsuit, she could face harassment, retaliation, or the loss of job opportunities.

39. S.B. is currently eligible for PEUC and FPUC and would be receiving those benefits had Defendants not prematurely ended South Carolina's participation in those programs.

Plaintiff S.S.

40. Plaintiff S.S. is 35 years old and lives in Easley, South Carolina. He lives with his mother who has cancer and has lived with her since 2012 to be her caregiver. S.S.'s mother receives approximately $830.00 per month in SSI survivor's benefits. Currently that is the only income coming into S.S.'s household.

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41. In February 2020, S.S. was let go from his job at a security company that he had held for about 6 months. He applied for unemployment benefits but was found ineligible from March 22, 2020, through July 11, 2020, because DEW said S.S. had been fired for cause. He appealed this decision, but it was upheld.

42. S.S. was preparing to start a new job doing janitorial work at a school in March of 2020 when he got notice that the school would be closing because of the pandemic.

43. S.S. was found eligible for PEUC in June of 2020 and started receiving $214.00 in weekly benefits before tax, $182.00 per week after tax.

44. In November of 2020, S.S. got notice that he was eligible for PUA benefits from March 22, 2020, because his place of employment closed as a result of COVID-19. This notice said the pandemic assistance period would end on September 4, 2021

45. In December of 2020, S.S. started receiving an additional $300.00 per week in FPUC.

46. In June of 2021, S.S. received notice from DEW that they were not going to be participating in PEUC, PUA, and FPUC after the end of that month. He received his last unemployment benefits check of $47.00 about two weeks ago.

47. S.S. has continued to search for work since he became unemployed in February of 2020. He has applied for hundreds of jobs in that time but has been unable to find suitable employment. S.S. has continued to go to appointments with DEW to help with his job search even though his benefits have ended, and he has been told that he does not have to do this anymore.

48. S.S. and his mother struggled to make ends meet before his unemployment benefits were stopped. Since then, they have struggled to put food on the table. They have borrowed money from family for necessities, but S.S. does not know how long those resources will last. S.S.'s car is more than 20 years old and he relies on it to get his mother to her frequent surgeries and doctor's appointments. They have remained current on their rent and utilities so far, but S.S. is unsure how long they will be able to do so without the unemployment benefits he was receiving.

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49. S.S. is concerned that if it becomes public knowledge that he was a part of this lawsuit, he could face harassment, retaliation, or the loss of job opportunities.

50. S.S. is currently eligible for PEUC and FPUC and would be receiving those benefits had Defendants not prematurely ended South Carolina's participation in those programs.[19]

Plaintiff T.S.

51. Plaintiff T.S. is 49 years old and a resident of Marion, South Carolina.

52. T.S. lost her job on March 11, 2020, when the company she was working for closed her division and moved its operations to Columbia, South Carolina.

53. T.S. applied for unemployment benefits and was approved for $151.00 per week in regular Unemployment Insurance ("UI"). After exhausting regular UI, she was moved to extended benefits under the PEUC program.

54. T.S. started receiving an additional $600.00 per week in FPUC in April of 2020. She received this benefit through July of 2020 when it ended.

55. After her FPUC assistance ended, T.S. lost her house and her car was repossessed. She was able to get her car back, but only by borrowing money from family. She moved in with a friend and their agreement is that T.S. is to pay half of the utilities.

56. In December 2020, T.S. started receiving an additional $300.00 per week when FPUC was re-started. She received FPUC and PEUC until DEW stopped participating in the programs in June of 2021.

57. T.S. is no longer receiving unemployment benefits of any kind since DEW stopped participating in PEUC and FPUC.

58. T.S. has been required to, and has continued to, search for work since she became unemployed. She has conducted at least 288 job searches using the DEW online portal

[19] DEW has also determined S.S. to be eligible for PEUC and has alternated paying benefits to him under that program and PUA.

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and has not received even an offer to interview. T.S. has been searching for jobs outside of the DEW online portal and has had four interviews, but no job offers.

59. Since her unemployment benefits ended, T.S. has gotten behind in her utility payments. If she is unable to continue these payments, she will not be able to live where she is anymore and she does not have any place else to go. While T.S. is current on her car payment now, she has no way to keep paying and her car will likely be repossessed again. Because she does not have health insurance right now, she must pay for prescriptions and copays out of pocket, and she is currently in need of medical treatment for kidney problems.

60. T.S. is concerned that if it becomes public knowledge that she was a part of this lawsuit, she could face harassment, retaliation, or the loss of job opportunities.

61. T.S. is currently eligible for PEUC and FPUC and would be receiving those benefits had Defendants not prematurely ended South Carolina's participation in those programs.

Plaintiff B.B.

62. Plaintiff B.B. is 41 years old and a resident of Myrtle Beach, South Carolina. She lives with her nephews ages 10 and 12 who she cares for.

63. B.B. started a cake-making business in Myrtle Beach in 2021 and operated it full time until lockdowns began due to the pandemic in March of 2020. B.B. had to close her business because very few events were happening, and few people were ordering cakes.

64. B.B. applied for unemployment benefits in March of 2020 and started receiving Pandemic Unemployment Assistance ("PUA") in June of 2020. B.B. has also received Federal Pandemic Unemployment Compensation ("FPUC") when it was available.

65. B.B. was receiving PUA and FPUC when DEW stopped participating in these programs in June of 2021. Because DEW stopped participating in these programs, B.B. currently has no income.

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66. Now that the economy seems to be recovering and people are holding events again, B.B. had planned to use PUA and FPUC benefits to get her business re-started. But she will not be able to do this without income because she will need to buy supplies and pay vendors to do this.

67. B.B. has applied for at least 50-60 jobs since she had to close her business, but she has not received a job offer nor has she been offered an interview.

68. B.B. has applied for PPP and SBA loans to get her business operating again but has always been told that there is no money available.

69. B.B. is currently behind on her house taxes because of the pandemic, and she is concerned that, unless she can get her business restarted, she will eventually lose her home.

70. B.B. has been able to stay current on most of her bills while she was receiving unemployment benefits. But because these benefits have been stopped, B.B. Does not know how she will keep paying for things like food and utilities.

71. B.B. is concerned that if it becomes public knowledge that she was a part of this lawsuit, she could face harassment, retaliation, or the loss of job opportunities.

72. B.B. is currently eligible for PUA and FPUC and would be receiving those benefits had Defendants not prematurely ended South Carolina's participation in those programs.

FIRST CLAIM FOR RELIEF
Declaratory Judgment

73. The Uniform Declaratory Judgements Act, S.C. Code Ann. § 15-53-10 *et seq.*, provides that "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." S.C. Code Ann. § 15-53-20.

74. South Carolina law provides that DEW

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must cooperate with the United States Secretary of Labor to the fullest extent consistent with the provisions of these chapters, and act, through the promulgation of appropriate rules, regulations, administrative methods and standards, as necessary to secure to this State and its citizens **all** advantages available under the provisions of the Social Security Act that relate to unemployment compensation . . . .

S.C. Code Ann. § 41-29-230(1) (emphasis added).

75. Pandemic Unemployment Benefits are "advantages available under the provisions of the Social Security Act that relate to unemployment compensation" within the meaning of Section 41-29-230(1).

76. By terminating DEW's participation in the Pandemic Unemployment Benefits, Director Ellzey has caused DEW to violate its statutory obligation to secure all advantages available under the provisions of the Social Security Act and has exceeded his authority.

77. By directing DEW to terminate its participation in the Pandemic Unemployment Benefits, in violation of DEW's statutory obligations, Governor McMaster has acted in direct contravention to legislative mandate and has exceeded his authority.

78. Plaintiffs have suffered and will continue to suffer direct, severe, and irreparable harm because of Defendants' actions.

79. An actual case or controversy exists between the parties to this action insofar as Defendants have acted or failed to act in a manner contrary to their obligations under S.C. Code Ann. § 41-29-230(1) and, in doing so, have caused and will continue to cause the Plaintiffs irreparable harm.

80. A declaration from this Court will terminate the controversy between the parties and remove existing uncertainty in their legal relations.

SECOND CLAIM FOR RELIEF
Preliminary and Permanent Injunctive Relief

81. The plain language of Section 41-29-230(1) requires DEW to act to secure all advantages available under the Social Security Act to this State and its citizens. By prematurely

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opting out of Pandemic Unemployment Benefits, Defendants have caused DEW to violate that obligation to the detriment of Plaintiffs and tens of thousands of other South Carolinians. As a result, Plaintiffs are likely to succeed on the merits of their claim for declaratory relief.

82. Plaintiffs have suffered and are likely to continue suffering irreparable harm including homelessness, loss of utility service, food insecurity, and lack of needed medical treatment.

83. Plaintiffs have no remedy at law which is as practical and efficient as injunctive relief, or which would otherwise prevent their constantly recurring grievances.

THIRD CLAIM FOR RELIEF
Writ of Mandamus

84. The plain language of Section 41-29-230(1) requires DEW to act to secure all advantages available under the Social Security Act to this State and its citizens.

85. Pandemic Unemployment Benefits are "advantages available under the provisions of the Social Security Act that relate to unemployment compensation" within the meaning of Section 41-29-230(1).

86. As a result, Defendants have a statutory obligation to secure Pandemic Unemployment Benefits to this State and its citizens.

87. The acts necessary to achieve this objective are ministerial in nature and leave nothing to the exercise of discretion.

88. Plaintiffs, by virtue of Section 41-29-230(1), have a specific legal right to receive continuing Pandemic Unemployment Benefits and it is necessary that Defendants discharge their duty in order for Plaintiffs to receive those benefits.

89. In the absence of declaratory and/or injunctive relief, Plaintiffs have no other legal remedy available to vindicate their rights.

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THEREFORE, Plaintiffs respectfully request that this Honorable Court grant them the following relief:

A. Hold a hearing on Plaintiffs' request for declaratory relief as soon as possible pursuant to Rule 57, SCRCP.

B. Declare that:

i. Section 41-29-230(1) requires DEW to secure Pandemic Unemployment Benefits for the benefit of South Carolina and her citizens;

ii. Governor McMaster's May 6, 2021, directive to Director Ellzey demanding that DEW terminate its participation in Pandemic Unemployment Benefits was unlawful and *ultra vires*;

iii. Director Ellzey's termination of DEW's participation in Pandemic Unemployment Benefits was unlawful and *ultra vires*;

C. Issue a preliminary and permanent injunction:

i. Requiring Director Ellzey to immediately enter into a new agreement with DOL to administer Pandemic Unemployment Benefits;

ii. Requiring Director Ellzey to provide all South Carolinians who were receiving PUA benefits prior to DEW's withdrawal from that program with notice of PUA reinstatement and an opportunity to certify for any weeks of benefits they did not receive because of DEW's withdrawal;

iii. Requiring Director Ellzey to pay prospective and retroactive PEUC and FPUC benefits to all South Carolinians who qualify for them or who would have qualified for them but for DEW's withdrawal from these programs;

iv. Enjoining Defendants, Governor McMaster and Director Ellzey, their officers, employees, agents, and all persons acting in concert or participation with them from taking any action that will prevent or delay the State of South Carolina or

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any individuals who qualify from receiving any and all Pandemic Unemployment Benefits.

v. Enjoining Defendants, Governor McMaster and Director Ellzey, their officers, employees, agents, and all persons acting in concert or participation with them, from withdrawing the State of South Carolina from Pandemic Unemployment Benefits for the duration of those programs.

D. In the alternative, issue a Writ of Mandamus directing the relief requested herein.

E. Allow Plaintiffs to proceed in this action anonymously and direct that neither counsel, the parties, nor any witnesses may directly or indirectly divulge their identities without further order of the Court;

F. Award Plaintiffs the costs of this action;

G. Award plaintiffs such other and further relief as the Court deems just and proper.

Respectfully Submitted,

July 28, 2021

SOUTH CAROLINA APPLESEED
LEGAL JUSTICE CENTER

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PLAINTIFF'S EXHIBIT A

EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210	CLASSIFICATION Unemployment Insurance
	CORRESPONDENCE SYMBOL OUI/DUIO
	DATE April 4, 2020

ADVISORY: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 15-20

TO: STATE WORKFORCE AGENCIES

FROM: JOHN PALLASCH
Assistant Secretary

SUBJECT: Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 – Federal Pandemic Unemployment Compensation (FPUC) Program Operating, Financial, and Reporting Instructions

1. **Purpose.** To provide states with operating, financial, and reporting instructions for the FPUC program authorized by Section 2104, Emergency Increase in Unemployment Compensation Benefits, of the CARES Act of 2020, Public Law (Pub. L.) 116-136.

2. **Action Requested.** The Department of Labor's (Department) Employment and Training Administration (ETA) requests that State Workforce Administrators provide the information in this Unemployment Insurance Program Letter (UIPL) and the Attachments I through V to appropriate program and other staff in state workforce systems as they implement the Unemployment Insurance (UI)-related provisions that respond to the economic effects of the Coronavirus Disease 2019 (COVID-19).

3. **Summary and Background.**

   a. Summary – On March 27, 2020, the President signed into law the CARES Act, which includes the Relief for Workers Affected by Coronavirus Act set out in Title II, Subtitle A. Section 2104 of the CARES Act provides for a temporary emergency increase in unemployment compensation benefits, referred to as FPUC, and includes funding to states for the administration of the program.

   b. Background – The CARES Act was designed to mitigate the economic effects of the COVID-19 pandemic in a variety of ways. The CARES Act includes provisions for providing certain benefits to individuals who have exhausted their entitlement to regular unemployment compensation (UC) and who are not eligible for regular UC, such as individuals who are self-employed or have limited recent work history.

RESCISSIONS	EXPIRATION DATE
None	Continuing

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This UIPL focuses on Section 2104 of the CARES Act, which authorizes the temporary FPUC program. This program provides eligible individuals with $600 per week in addition to the weekly benefit amount they receive from certain other UC programs.

Importance of Program Integrity. The programs and provisions in the CARES Act operate in tandem with the fundamental eligibility requirements of the Federal-State UI program which must be adhered to. In addition, some of the CARES Act programs include new eligibility requirements which states will need to apply. These requirements include that individuals are only entitled to benefits if they are no longer working through no fault of their own and that individuals must be able and available to work.

States play a fundamental role in ensuring the integrity of the UI program. While states have been provided some flexibilities as a result of COVID-19, those flexibilities are generally limited to dealing with the effects of COVID-19, as discussed in UIPL Nos. 10-20 and 13-20. States must ensure that individuals only receive benefits in accordance with these statutory provisions.

Further, quitting work without good cause to obtain additional benefits under the regular UI program or the CARES Act qualifies as fraud. Sections 2104(f) and 2107(e) expressly provide that if an individual has obtained these benefits through fraud, the individual is ineligible for any additional benefit payments, must pay back the benefits, and is subject to criminal prosecution under 18 U.S.C. §1001. States are expected to enforce these provisions.

The Department is actively working with states receiving funding under the Act to provide UI benefits only to those who are entitled to such benefits. The Department will also be actively engaged with its Office of the Inspector General (OIG) to ensure program integrity. The Act includes an appropriation of $26 million to the Department's OIG (Section 2115) to carry out audits, investigations, and other oversight activities related to states' adherence to existing UI laws and policies, as well as the provisions of the Act.

4. **Guidance.** The following section identifies the types of UC benefits that an individual must be receiving to be entitled to receive FPUC and includes important program dates and details about program administration. Refer to **Attachment I** for implementing and operating instructions and **Attachment II** for general provisions for administering FPUC. Section 2104 of the CARES Act is provided in **Attachment III**. **Attachment IV** and **Attachment V** provide the Supplemental Budget Request (SBR) Application and the Instructions for Completing the SF-424 and SF-424A respectively.

   a. **Programs which entitle an individual to receive FPUC.** This program provides an additional $600 per week to individuals who are collecting regular UC (including Unemployment Compensation for Federal Employees (UCFE) and Unemployment Compensation for Ex-Servicemembers (UCX)), as well as the following unemployment compensation programs:

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- Pandemic Emergency Unemployment Compensation (PEUC);
- Pandemic Unemployment Assistance (PUA);
- Extended Benefits (EB);
- Short-Time Compensation (STC);
- Trade Readjustment Allowances (TRA);
- Disaster Unemployment Assistance (DUA); and
- Payments under the Self-Employment Assistance (SEA) program.

A number of state laws include provisions for extending the potential duration of benefits during periods of high unemployment for individuals in approved training who exhaust benefits, or for a variety of other reasons.[1] Although some state laws call these programs "extended benefits," the Department uses the term "additional benefits" (AB) to avoid confusion with the Federal-State EB program. FPUC is not payable to individuals who are receiving AB payments.

b. **Important program dates.** FPUC is payable for weeks of unemployment beginning on or after the date on which the state enters into an agreement with the Department. In states where the week of unemployment ends on a Saturday, the first week for which FPUC may be paid is the week ending April 4, 2020, provided an agreement was in place no later than March 28, 2020. In states where the week of unemployment ends on a Sunday, the first week for which FPUC may be paid is the week ending April 5, 2020, provided an agreement was in place no later than March 29, 2020.

   FPUC is not payable for any week of unemployment ending after July 31, 2020. Accordingly, in states where the week of unemployment ends on a Saturday, the last week that FPUC may be paid is the week ending July 25, 2020. For states where the week of unemployment ends on a Sunday, the last week that FPUC is payable is the week ending July 26, 2020.

c. **Program administration funding for FPUC program.** The cost of these additional $600 payments to eligible individuals each week is 100% federally funded. States may not charge employers for any FPUC benefits paid.

   The FPUC program is administered through a voluntary agreement between a state and the Department. This program is available in the United States, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, provided the state/territory signs an agreement with the Department. Implementation costs and ongoing administrative costs for this program are also 100% federally funded.

1 Reference Table 4-4 of the *Comparison of State Unemployment Insurance Laws* found at https://oui.doleta.gov/unemploy/statelaws.asp.

If a state wishes to have the administrative costs for implementation of this program federally funded, the state must submit a SBR detailing such costs. SBRs are limited to one-time costs that are attributable to implementation of FPUC.

Permissible implementation costs include:

- Computer programming and other technology costs;
- Implementation of necessary business processes required for program implementation;
- Training and travel;
- Notices to beneficiaries; and
- Overhead related only to the above.

The basis for these estimated costs must be included in the SBR application. Calculations for costs for state staff and contractors should be shown in accordance with the SBR instructions in ET Handbook No. 336, *Unemployment Insurance State Quality Service Plan Planning and Reporting Guidelines*. States must submit the SBR application for implementation of FPUC, along with required SF-424 and SF-424A forms, by **April 21, 2020**. This may be electronically submitted to the National Office at covid-19@dol.gov, with a copy to the appropriate Regional Office. For application submission instructions refer to **Attachment IV**, SBR Application Template, and **Attachment V**, Instructions for Completing the SF-424 and SF-424A.

State agencies will be able to request on-going administrative costs for FPUC via the quarterly UI-3 report. More specific information is included in **Attachment I**, Section G, "Reporting Instructions."

5. **Inquiries.** States should direct inquiries to the covid-19@dol.gov and copy the appropriate Regional Office.

6. **References.**

- *Coronavirus Aid, Relief, and Economic Security (CARES) Act* (Pub. L. 116-136), including Title II Subtitle A Relief for Workers Affected by Coronavirus Act;
- 5 U.S.C. Chapter 85;
- Federal-State Extended Unemployment Compensation Act of 1970 (26 U.S.C. §3304 note);
- Trade Act of 1974 (19 U.S.C. §2291 et seq.);
- Robert T. Stafford Disaster Relief and Emergency Act (42 U.S.C. §5121 et seq.);
- Section 3304 of the Federal Unemployment Tax Act (FUTA) (26 U.S.C. §3304);
- Section 3306(v), FUTA (26 U.S.C. §3306(v));
- Section 303 of the Social Security Act (42 U.S.C. §503);
- 20 C.F.R. Part 603;
- ET Handbook No. 336 (18th Edition), *Unemployment Insurance State Quality Service Plan Planning and Reporting Guidelines,*

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https://wdr.doleta.gov/directives/attach/ETAHandbook/ET_Handbook_No.336_18th_Edition_Change_4_acc.pdf;

- ET Handbook No. 384, *Unemployment Compensation for Ex-servicemembers*, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=465;
- ET Handbook No. 391, *UCFE Handbook for State Agencies*, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=2233;
- ET Handbook No. 401, *UI Report Handbook*, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=7774;
- UIPL No. 14-20, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 – Summary of Key Unemployment Insurance (UI) Provisions and Temporary Emergency State Staffing Flexibility*, issued on April 2, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3390;
- UIPL No. 05-13, *Work Search and Overpayment Offset Provisions Added to Permanent Federal Unemployment Compensation Law by Title II, Subtitle A of the Middle Class Tax Relief and Job Creation Act of 2012*, issued January 10, 2013, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3698; and
- *Comparison of State Unemployment Insurance Laws* found at https://oui.doleta.gov/unemploy/statelaws.asp.

7. **Attachments.**

- Attachment I: Implementing and Operating Instructions for the FPUC Program;
- Attachment II: General Provisions for Administering the FPUC Program;
- Attachment III: Statutory Language of Section 2104 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020;
- Attachment IV: Supplemental Budget Request (SBR) Application; and
- Attachment V: Instructions for Completing the SF-424 and SF-424A.

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Implementing and Operating Instructions for the Federal Pandemic Unemployment Compensation (FPUC) Program

A. Introduction.

Section 2104 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 provides for a temporary emergency increase in unemployment compensation (UC) benefits, referred to as the Federal Pandemic Unemployment Compensation (FPUC) program. This program provides an eligible individual with $600 per week in addition to the weekly benefit amount he or she receives from certain other UC programs.

The cost of these additional $600 payments to eligible individuals each week is 100% federally funded. States may not charge employers for any FPUC benefits paid so as to impact the employer's experience rating.

The FPUC program is administered through a voluntary agreement between the state and the Department. Implementation costs and ongoing administrative costs for this program are also 100% federally funded.

This guidance explains the eligibility requirements and other administrative functions associated with the program.

B. Definitions.

This section contains the definitions of terms used throughout this document.

1. "Agreement" means the agreement between a state and the Department to administer FPUC. Under the agreement, the state agency makes payments of FPUC as the Department's agent. FPUC payments must be made in accordance with Section 2104 of the CARES Act as interpreted by the Department in these instructions and any other instructions issued by the Department.
2. "Applicable state" means, with respect to an individual, the state from which the individual is receiving compensation.
3. "Applicable state law" means the unemployment compensation law of the applicable state for an individual.
4. "Benefit year" means, with respect to an individual, the benefit year as defined in the applicable state law.
5. "Compensation" means cash benefits (including dependents' allowances) payable to individuals with respect to their unemployment. "Compensation" is also referred to as "Unemployment Compensation" or "UC."
6. "Department" means the U.S. Department of Labor.
7. "Extended compensation" means compensation (including additional compensation and compensation payable pursuant to 5 U.S.C. chapter 85) payable for weeks of unemployment beginning in an extended benefit period to an individual under those provisions of the state law which satisfy the requirements of EUCA. This is also referred to as "Extended Benefits" or "EB".

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8. "Federal Pandemic Unemployment Compensation" means the compensation payable under Section 2104 of the CARES Act and is referred to as FPUC.
9. " Pandemic Unemployment Assistance" means the compensation payable under Section 2102 of the CARES Act and is referred to as PUA.
10. " Pandemic Emergency Unemployment Compensation" means compensation payable under Section 2107 of the CARES Act and is referred to as PEUC.
11. "Regular compensation" means compensation payable to an individual under any state UC laws (including compensation payable pursuant to 5 U.S.C. chapter 85), other than extended compensation and state additional compensation. Throughout this document this is referred to as "regular UC."
12. "Secretary" means the Secretary of Labor of the United States.
13. "State" means the states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands.
14. "State Additional Benefits" means compensation totally financed by a state and payable under a state law by reason of conditions of high unemployment or by reason of other special factors. This is also referred to as "AB."
15. "State agency" means the agency of the state which administers its UC law.
16. "State law" means the UC law of a state, approved by the Secretary under Section 3304 of the Federal Unemployment Tax Act (FUTA). (26 U.S.C. §3304(a)).
17. "Week" means a week as defined in the applicable state law.
18. "Week of Unemployment" means a week of total, part-total, or partial unemployment as defined in the applicable state law, which shall be applied in the same manner to the same extent to claims filed under the requirements of the CARES Act.

C. Operating Instructions.

1. Eligibility for FPUC. For an individual to receive FPUC, the applicable state must have a signed agreement with the Department.

   FPUC is payable to individuals who are otherwise entitled under state or federal law to receive regular UC for weeks of unemployment (including Unemployment Compensation for Federal Employees (UCFE) and Unemployment Compensation for Ex-Servicemembers (UCX)). FPUC is also payable to individuals receiving the following unemployment compensation programs: PEUC, PUA, EB, Short-Time Compensation (STC), Trade Readjustment Allowances (TRA), Disaster Unemployment Assistance (DUA), and payments under the Self-Employment Assistance (SEA) program.

   A number of state laws include provisions extending the potential duration of benefits during periods of high unemployment for individuals in approved training who exhaust benefits, or for a variety of other reasons.[2] Although some state laws call these programs "extended benefits," the Department uses the term "additional benefits" (AB) to avoid confusion with the Federal-State EB program. FPUC is not payable to individuals receiving AB payments.

2 Reference Table 4-4 of the *Comparison of State Unemployment Insurance Laws* found at https://oui.doleta.gov/unemploy/statelaws.asp.

2. FPUC Eligibility and Relation to Other Types of Benefit Payments. Individuals receive FPUC payments concurrently with payments under those programs identified above. Refer to UIPL 14-20, *Coronavirus Aid, Relief, and Eocnomic Security (CARES) Act of 2020 – Summary of Key Unemployment Insurance (UI) Provisions and Guidance Regarding Temporary Emergency State Staffing Flexibility*, issued April 2, 2020, for additional information on how FPUC interacts with other programs authorized under the CARES Act.

   States that are unable to immediately pay benefits the week following the execution of the agreement with the Department to operate the program must provide retroactive payments to individuals eligible for FPUC for the weeks they would have been entitled.

3. Beginning and Ending Dates of the FPUC Program in a State. Under Section 2104(e) of the CARES Act, FPUC is payable in a state for weeks of unemployment beginning after the date on which the state enters into an agreement with the Department and ending with weeks of unemployment ending on or before July 31, 2020.

   Accordingly, in states where the week of unemployment ends on a Saturday, the last week that FPUC is payable is the week ending July 25, 2020. For states where the week of unemployment ends on a Sunday, the last week that FPUC is payable is the week ending July 26, 2020.

4. Termination of FPUC Agreement. Either party, upon 30-days written notice, may terminate the FPUC agreement. In the case of termination, the FPUC period will end 30 days from the date the state notifies the Secretary of its election to terminate the FPUC program. No FPUC will be payable for weeks which begin after the date the termination of the agreement is effective. However, FPUC is payable to individuals receiving the benefits under section C.1. for any weeks that end prior to the termination.

5. Nonreduction Rule. An agreement will no longer apply and FPUC will not be payable in a state upon the Department's determination that the state's method governing the computation of regular UC has been modified in a manner such that the number of weeks (the maximum benefit entitlement), or the average weekly benefit amount of regular UC, which will be payable during the period of the agreement (determined by disregarding any FPUC amount) will be less than the number of weeks, or the average weekly benefit amount, of regular UC which would otherwise have been payable during such period under the state law in effect on January 1, 2020. "Maximum benefit entitlement" means the amount of regular UC payable to an individual with respect to the individual's benefit year.

6. Disregard of FPUC for Purposes of Medicaid and State Children's Health Insurance Program (SCHIP). Under Section 2104(h) of the CARES Act, the monthly equivalent of any FPUC amount paid to an individual must be disregarded when determining income for any purpose under programs established under Titles XIX and Title XXI of the Social Security Act (SSA) (42 U.S.C. §1396 et seq., §1397aa et seq.).

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7. Record Maintenance and Disposal of Records.

   a. Record Maintenance. Each state must maintain records during the administration of the FPUC program and will make all such records available for inspection, examination, and audit by such federal officials, employees as the Department may designate, or as may be required by the law. Reference ET Handbook No. 401, *UI Report Handbook* for details.

   b. Disposal of Records. Each state must maintain records created during the administration of the FPUC program for three years after final action (including appeals or court action) on the payments, or for less than the three-year period if copied by microphotocopy or by an electronic imaging method. At the end of the three-year period, the FPUC records shall be transferred to state accountability under the conditions for the disposal of records that apply to UCFE and UCX records, as explained in Chapter X of ET Handbook No. 391 (1994 Edition) (OMB No. 1205-0179) and Chapter I of ET Handbook No. 384 (1994 Edition) (OMB No. 1205-0176).

8. Disclosure of Information. Information in records made and maintained by the state agency while administering the CARES Act must be kept confidential, and information in such records may be disclosed only in the same manner and to the same extent as information with respect to regular UC. This information may be disclosed under provisions of the applicable state law meeting the requirements of 20 C.F.R. Part 603. As provided under 20 C.F.R. Part 603.4(b), the confidentiality requirements do not apply when such information is being provided in the aggregate, provided it cannot be combined with other publicly-available information to reveal any such identifying particulars about an individual or the individual's past or present employer.

9. Inviolate Rights to FPUC. Individuals' rights to FPUC must be protected in the same manner and to the same extent as the individuals' rights to regular UC are protected under the applicable state law. Such measures must include protection of individuals' rights to FPUC from waiver, release, assignment, pledge, encumbrance, levy, execution, attachment, and garnishment. In the same manner and to the same extent, individuals must be protected from discrimination and obstruction in regard to seeking, applying for, and receiving FPUC.

D. Processing Payments for FPUC.

1. Notification to Claimants. The state must notify a potentially eligible individual of his or her entitlement to FPUC. Such notification should include both the beginning and ending dates for the FPUC program. As noted above, in states where the week of unemployment ends on a Saturday, the last week that FPUC is payable is the week ending July 25, 2020. For states where the week of unemployment ends on a Sunday, the lsat week that FPUC is payable is the week ending July 26, 2020. States have flexibility in the method of providing this notification. States will decide eligibility for FPUC based on eligibility for the underlying program eligibility; individuals do not have to separately apply for FPUC.

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2. Applicability of State Law and Underlying Eligibility Requirements. Except where inconsistent with the CARES Act or with the operating instructions promulgated to carry out the CARES Act, all terms and conditions of the state UC law or any federal law (related to the programs listed below) applicable to claims for and payment of regular UC or any of the underlying benefits listed below apply to the payment of FPUC. An individual is not entitled to receive FPUC for a week in which the individual is ineligible for regular UC or the underlying benefit from another federal program. Applicable federal law is cited below.

    a. UCFE: 5 U.S. Code CHAPTER 85;
    b. UCX: 5 U.S. Code CHAPTER 85;
    c. PEUC: Section 2107 of the CARES Act;
    d. PUA: Section 2102 of the CARES Act;
    e. EB: Federal-State Extended Unemployment Compensation Act of 1970 (26 U.S.C. §3304 note);
    f. STC: Section 3306(v), FUTA (26 U.S.C. §3306(v));
    g. TRA: Trade Act of 1974 (19 U.S.C. §2291 et seq.);
    h. DUA: Robert T. Stafford Disaster Relief and Emergency Act (42 U.S.C. §5121 et seq.); or
    i. SEA: Section 3306(t), FUTA (26 U.S.C. §3306(t)).

3. Allowable Methods of Payment. States must issue payments of FPUC as soon as administratively feasible. States have some flexibility in how they issue FPUC payments; states may pay the additional $600 either:

    a. as an amount which is paid at the same time and in the same manner as any regular UC otherwise payable for the week involved; or

    b. at the option of the state, by payments which are made separately from, but on the same weekly basis as, any regular UC otherwise payable.

4. Payment Calculations for FPUC.

    Section 2104(b)(1) of the CARES Act requires the additional $600 FPUC to be paid to individuals "in amounts and to the extent that they would be determined if the State law of the State were applied with respect to any week for which the individual is . . . otherwise entitled under the State law to receive regular compensation." This includes regular UC, PEUC, PUA, EB, STC, TRA, DUA, and SEA.

    a. Determining entitlement to FPUC.

        i. States will calculate the weekly benefit amount, for the programs outlined above.

        ii. If the individual is eligible to receive at least one dollar ($1) of underlying benefits for the claimed week, the claimant will receive the full $600 FPUC.

iii. Note: Individuals whose underlying benefit payments are intercepted to pay debts (*e.g.*, overpayments) are eligible for the $600 FPUC, even if 100% of their weekly benefit amount is intercepted. Benefits intercepted to pay debts are considered to be compensation for the week.

5. Child support. Child support obligations must be deducted from FPUC payments in the same manner and to the same extent as these obligations are deducted from regular UC.

6. Taxable Income. The $600 FPUC is taxable. Therefore, states must include FPUC when preparing 1099Gs, and must, consistent with Section 3304(a)(l8), FUTA (26 U.S.C. §3304(a)(18)), withhold taxes from the weekly benefit amount and from the $600 FPUC, when an individual elects to have taxes withheld.

E. Appeals and Hearings.

Section 2104(f)(4) of the CARES Act requires that FPUC determinations are subject to review in the same manner and to the same extent as determinations under the state UC law, and only in that manner and to that extent.

Individuals are automatically eligible for FPUC if they are eligibile for the underlying benefit. Therefore, the only grounds to deny FPUC to an individual is the individual's ineligibility for one of these benefits. If an individual files an appeal on the state's determination to deny an individual FPUC, all documents relevant to the denial of the underlying benefit determination must be transmitted to the appeals division, in addition to the determination documentation for the state's decision to deny FPUC. The appeals division must consider the merits of the state's denial of the underlying benefit when determining eligibility for FPUC payments.

F. Fraud and Overpayments.

1. Fraud. Under Section 2104(f)(1) of the CARES Act, an individual commits fraud if he or she knowingly has made or caused to be made by another, a false statement or representation of a material fact, or knowingly has failed, or caused another to fail, to disclose a material fact, and as a result of such false statement or representation or of such nondisclosure such individual has received an amount of FPUC to which such individual was not entitled.

   An individual who has committed fraud and was subsequently disqualified for a week that included a payment of FPUC is therefore ineligible for additional FPUC in accordance with the provisions of the applicable state UC law relating to fraud in connection with a claim for UC and is subject to prosecution under 18 U.S.C. §1001.

   Section 2104(f) only provides for an individual being ineligible for future benefits in accordance with the applicable provisions of state UC law, it does not permit the establishment of a penalty on FPUC that was fraudulently obtained, so states may not impose fraud penalty provisions on FPUC payments.

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2. Overpayments. An FPUC overpayment occurs when an individual has received an FPUC payment to which he or she is not entitled. If an individual is deemed ineligible for regular compensation in a week and the denial creates an overpayment for the entire weekly benefit amount, the FPUC payment for the week will also be denied. And the FPUC overpayment must also be created.

   Section 2104(f)(2) of the CARES Act requires individuals who have received FPUC overpayments to repay these amounts to the state agency, except as provided in the Waiver of Overpayments section below.

3. Opportunity for a Hearing. Under 2104(f)(3)(B) of the CARES Act, a state may not require repayment of an FPUC overpayment until it determines that the payment was an overpayment, the individual was provided notice of the determination, the individual had an opportunity for a fair hearing, and the determination is final.

4. Waiver of Overpayments. The state has authority to waive repayments of FPUC if the payment was without fault on the part of the individual and such repayment would be contrary to equity and good conscience.

5. Recovery Provisions. If the overpayment amount is not subject to waiver, the state agency must recover the amount of FPUC to which an individual was not entitled in accordance with the same procedures as apply to recovery of overpayments of regular UC paid by the state.

   FPUC benefits may only be offset from other state and federal UC for three years after the date such individual received the FPUC payment to which he or she was not entitled. After three years, a state may continue to recover FPUC overpayments through means other than benefit offsets, according to state law.

6. Benefit Offsets. Consistent with section 2104(f)(3), a state must recover FPUC overpayments from any additional FPUC payments to which the individual is entitled and from any other UC payments under state or federal law (including PEUC and PUA from the CARES Act).

   Additionally, FPUC payments must be reduced to recover overpayments from any other state and federal unemployment benefit programs, if the state has a cross-program offset agreement in place under Section 303(g)(2), SSA (42 U.S.C. §503(g)(2)). A state may not offset more than 50% from the FPUC payment to recover overpayments from other state and federal unemployment benefit programs.

   A states has significant flexibility in the way they implement the offset requirement. While a state must attempt to recover the full amount of the overpayment, a state may limit the amount that will be deducted from each payment as noted on page 4 of UIPL No. 05-13, *Work Search and Overpayment Offset Provisions Added to Permanent Federal Unemployment Compensation Law by Title II, Subtitle A of the Middle Class Tax Relief and Job Creation Act of 2012.*

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G. Financial Information.

1. Accessing FPUC Benefit Funds. Under the CARES Act, each state that has entered into an agreement to pay FPUC will be provided a monthly allotment projected to equal 100% of the estimated amount of FPUC to be paid to individuals by the state under the agreement. A state's drawdown of allotments will be monitored, and monthly amounts will be adjusted as needed. A state will request funds from a general fund account established by the U.S. Treasury to pay all FPUC amounts attributable to all applicable claim types. All requests will go through the Automated Standard Application for Payments (ASAP) system. Drawdown requests must adhere to the funding mechanism stipulated in the Treasury-State Agreement executed under the Cash Management Improvement Act of 1990. Requests will be funded in the same manner as all ASAP transactions elected by the states (Credit Gateway FEDWIRE or ACH to the state benefit payment account).

2. FPUC Administrative Costs. On-going FPUC administrative costs will be reimbursed through the quarterly UI-3 report (OMB No. 1205-0132).

H. Reporting Instructions.

1. ETA 2112. (OMB No. 1205-0154). Transactions involving FPUC must be reported in the aggregate on the electronic ETA 2112 report. Information reflecting FPUC transactions must be reported as follows:

   (1) **Line 23b.** Federal Pandemic Unemployment Compensation. Report on line 23b column F the amount of FPUC funds transferred from the general fund account to the state benefit payment account.

   (2) **Line 42b.** Federal Pandemic Unemployment Compensation. Report on line 42b column F the net amount of FPUC paid.

   Transactions should not be reported in column E, Unemployment Trust Fund Account.

2. ETA 5159. (OMB No. 1205-0010). Payment amounts reported by states on the ETA 5159 report, for any tier of benefits, should not include the supplemental FPUC payments.

   (1) **Line 302 on all ETA 5159 reports.** Amounts Paid. Report amounts of UC paid but do not include the supplemental FPUC payments.

   (2) **Line 402 on all ETA 5159 reports.** Amounts Paid. Report amounts of UC paid but do not include the supplemental FPUC payments.

3. UI-3. (OMB No. 1205-0132). Include on line 26 (labeled "Other") any on-going FPUC administrative costs. This amount must identified in the UI-3 comments section as "FPUC admin = $$$."

4. ETA 227. (OMB No. 1205-0173). States will report FPUC overpayments (established and recovered) in the comments section of the ETA 227 report as "FPUC Est. = $$$" and "FPUC Coll. = $$$."

Office of Management and Budget (OMB) Approval. Section 2116(a), Division B of Title II of the CARES Act provides that "Chapter 35 of Title 44, United States Codes, (commonly referred to as the "Paperwork Reduction Act of 1995"), shall not apply to the provisions of, and the amendments made by, this subtitle." As the OMB approval process is waived for these reporting instructions, these instructions are considered final.

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General Provisions for Administering the Federal Pandemic Unemployment Compensation (FPUC) Program

CERTIFICATIONS AND ASSURANCES

1. **Compliance with Federal Requirements.** States must comply with the provisions contained in the states' Agreements with the Department to administer FPUC and with all applicable FPUC funding instruments. States must perform such duties and functions in accordance with the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards at 2 C.F.R. Part 200 and 2 C.F.R. 2900 applicable to all grants and cooperative agreements. Additionally, the Department's administrative requirements for grants and cooperative agreements at 29 C.F.R. Parts 31, 32, 38, and 98 apply to grant funds provided for these activities.

2. **Prohibition on Subsidization of Forced or Indentured Child Labor.** States, consistent with Section 103 of the Further Consolidated Appropriations Act, 2020, Public Law 116-94, and in accordance with Executive Order No. 13126, must not obligate or expend funds made available to administer FPUC for the procurement of goods, mined, produced, manufactured, or harvested or services rendered, whole or in part, by forced or indentured child labor in industries and host countries already identified by the U.S. Department of Labor prior to enactment of the Department's 2008 appropriation.

3. **Salary and Bonus Pay Limitations.** States, in compliance with Section 101 of the Further Consolidated Appropriations Act, 2020, Public Law 116-94, must not use funds provided for FPUC administration to pay the salary and bonuses of an individual, either as direct costs or indirect costs, at a rate in excess of Executive Level II, except as provided for under Section 101 of Public Law 109-149. This limitation shall not apply to vendors providing goods and services as defined in 2 C.F.R. 200, Subpart F – Audit Requirements. Where states are recipients of such funds, states may establish a lower limit for salaries and bonuses of those receiving salaries and bonuses from sub recipients of such funds, taking into account FPUC, including the relative cost-of-living in the state, the compensation levels for comparable state or local government employees, and the size of the organizations that administer Federal programs involved including Employment and Training Administration programs. *See* Training and Employment Guidance Letter (TEGL) No. 5-06 for further clarification. The incurrence of costs and receiving reimbursement for these costs under this award certifies that the Grantee has read the above condition and is in compliance.

4. **Veterans' Priority Provisions.** This program, funded by the U.S. Department of Labor, is subject to the provisions of the "Jobs for Veterans Act" (JVA), Public Law 107-288 (38 U.S.C §4215). The JVA provides priority of service to veterans and spouses of certain veterans for the receipt of employment, training, and placement services. The Veterans' priority is implemented by 20 C.F.R. Part 1010 (73 Fed. Reg. 78132, Sept. 19, 2008). Please note that to obtain priority service a veteran must meet the program's eligibility requirements. TEGL No. 10-09 (November 10, 2009) provided general guidance on the scope of the veterans priority statute and its effect on current employment and training programs. In addition to TEGL 10-

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09, a series of questions and answers related to priority of service is posted at https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=2816 for fifteen (15) programs administered by ETA.

The Workforce Innovation and Opportunity Act (WIOA) State Plan requires states to describe the policies and strategies in place to ensure, pursuant to the JVA, that priority of service is provided to veterans (and certain spouses) who otherwise meet the eligibility requirements for all employment and training programs funded by the U.S. Department of Labor and administered by ETA. See *Required Elements for Submission of the Unified or Combined State Plan and Plan Modifications under the Workforce Innovation and Opportunity Act*. OMB Control No. 1205-0522. In addition, the states were required to provide assurances that they will comply with the Veterans' Priority Provisions established by the JVA. States must adhere to JVA requirements, as interpreted by the Department, in administering FPUC.

5. **Certifications and Assurances.** In administering FPUC, states must fully comply with the State Quality Service Plan (SQSP) assurances. These SQSP assurances are detailed in Chapter 1, Part VIII of the "Unemployment Insurance State Quality Service Plan (SQSP) Assurances," ET Handbook No. 336 (18th Edition, Change 4).

   A. Assurance of Equal Opportunity (EO).
   B. Assurance of Administrative Requirements and Allowable Cost Standards.
   C. Assurance of Management Systems, Reporting, and Recordkeeping.
   D. Assurance of Program Quality.
   E. Assurance on Use of Unobligated Funds.
   F. Assurance of Prohibition of Lobbying Costs.
   G. Drug-Free Workplace.
   H. Assurance of Contingency Planning.
   I. Assurance of Conformity and Compliance.
   J. Assurance of Automated Information Systems Security.
   K. Assurance of Confidentiality.

   The Office of Management and Budget (OMB), SF 424 B *Assurances-Non- Construction Programs*, signed and submitted by each state with its State Quality Service Plan annual submission, also apply.

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Statutory Language of Section 2104 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020

SEC. 2104. EMERGENCY INCREASE IN UNEMPLOYMENT COMPENSATION BENEFITS.

(a) Federal-State Agreements.--Any State which desires to do so may enter into and participate in an agreement under this section with the Secretary of Labor (in this section referred to as the "Secretary"). Any State which is a party to an agreement under this section may, upon providing 30 days' written notice to the Secretary, terminate such agreement.

(b) Provisions of Agreement.--

(1) Federal pandemic unemployment compensation.--Any agreement under this section shall provide that the State agency of the State will make payments of regular compensation to individuals in amounts and to the extent that they would be determined if the State law of the State were applied, with respect to any week for which the individual is (disregarding this section) otherwise entitled under the State law to receive regular compensation, as if such State law had been modified in a manner such that the amount of regular compensation (including dependents' allowances) payable for any week shall be equal to--

(A) the amount determined under the State law (before the application of this paragraph), plus

(B) an additional amount of $600 (in this section referred to as "Federal Pandemic Unemployment Compensation").

(2) Allowable methods of payment.--Any Federal Pandemic Unemployment Compensation provided for in accordance with paragraph (1) shall be payable either--

(A) as an amount which is paid at the same time and in the same manner as any regular compensation otherwise payable for the week involved; or

(B) at the option of the State, by payments which are made separately from, but on the same weekly basis as, any regular compensation otherwise payable.

(c) Nonreduction Rule.--

(1) In general.--An agreement under this section shall not apply (or shall cease to apply) with respect to a State upon a determination by the Secretary that the method governing the computation of regular compensation under the State law of that State has been modified in a manner such that the number of weeks (the maximum benefit entitlement), or the average weekly benefit amount, of regular compensation which will be payable during the period of the agreement (determined disregarding any Federal Pandemic Unemployment Compensation) will be less than the number of weeks, or the average weekly benefit amount, of the average weekly benefit amount of regular compensation which would otherwise have been payable during such period under the State law, as in effect on January 1, 2020.

(2) Maximum benefit entitlement.--In paragraph (1), the term "maximum benefit entitlement"' means the amount of regular unemployment compensation payable to an individual with respect to the individual's benefit year.

(d) Payments to States.--

(1) In general.--

(A) Full reimbursement.--There shall be paid to each State which has entered into an

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agreement under this section an amount equal to 100 percent of--

(i) the total amount of Federal Pandemic Unemployment Compensation paid to individuals by the State pursuant to such agreement; and

(ii) any additional administrative expenses incurred by the State by reason of such agreement (as determined by the Secretary).

(B) Terms of payments.--Sums payable to any State by reason of such State's having an agreement under this section shall be payable, either in advance or by way of reimbursement (as determined by the Secretary), in such amounts as the Secretary estimates the State will be entitled to receive under this section for each calendar month, reduced or increased, as the case may be, by any amount by which the Secretary finds that his estimates for any prior calendar month were greater or less than the amounts which should have been paid to the State. Such estimates may be made on the basis of such statistical, sampling, or other method as may be agreed upon by the Secretary and the State agency of the State involved.

(2) Certifications.--The Secretary shall from time to time certify to the Secretary of the Treasury for payment to each State the sums payable to such State under this section.

(3) Appropriation.--There are appropriated from the general fund of the Treasury, without fiscal year limitation, such sums as may be necessary for purposes of this subsection.

(e) Applicability.--An agreement entered into under this section shall apply to weeks of unemployment--

(1) beginning after the date on which such agreement is entered into; and

(2) ending on or before July 31, 2020.

(f) Fraud and Overpayments.--

(1) In general.--If an individual knowingly has made, or caused to be made by another, a false statement or representation of a material fact, or knowingly has failed, or caused another to fail, to disclose a material fact, and as a result of such false statement or representation or of such nondisclosure such individual has received an amount of Federal Pandemic Unemployment Compensation to which such individual was not entitled, such individual--

(A) shall be ineligible for further Federal Pandemic Unemployment Compensation in accordance with the provisions of the applicable State unemployment compensation law relating to fraud in connection with a claim for unemployment compensation; and

(B) shall be subject to prosecution under section 1001 of title 18, United States Code.

(2) Repayment.--In the case of individuals who have received amounts of Federal Pandemic Unemployment Compensation to which they were not entitled, the State shall require such individuals to repay the amounts of such Federal Pandemic Unemployment Compensation to the State agency, except that the State agency may waive such repayment if it determines that--

(A) the payment of such Federal Pandemic Unemployment Compensation was without fault on the part of any such individual; and

(B) such repayment would be contrary to equity and good conscience.

(3) Recovery by state agency.--

(A) In general.--The State agency shall recover the amount to be repaid, or any part thereof, by deductions from any Federal Pandemic Unemployment Compensation payable to such individual or from any unemployment compensation payable to such individual under any State or Federal unemployment compensation law administered by the State agency or under any other State or Federal law administered by the State agency which provides for the payment of any assistance or allowance with respect to any week of unemployment, during the 3-year period after the date such individuals received the payment of the Federal Pandemic Unemployment

Compensation to which they were not entitled, in accordance with the same procedures apply to the recovery of overpayments of regular unemployment benefits paid by the State.

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

(4) Review.--Any determination by a State agency under this section shall be subject to review in the same manner and to the same extent as determinations under the State unemployment compensation law, and only in that manner and to that extent.

(g) Application to Other Unemployment Benefits.--Each agreement under this section shall include provisions to provide that the purposes of the preceding provisions of this section shall be applied with respect to unemployment benefits described in subsection (i)(2) to the same extent and in the same manner as if those benefits were regular compensation.

(h) Disregard of Additional Compensation for Purposes of Medicaid and CHIP.--The monthly equivalent of any Federal pandemic unemployment compensation paid to an individual under this section shall be disregarded when determining income for any purpose under the programs established under titles XIX and title XXI of the Social Security Act (42 U.S.C. 1396 et seq., 1397aa et seq.) .

(i) Definitions.--For purposes of this section--

(1) the terms "compensation", "regular compensation", benefit year", "State", "State agency", "State law"', and "week"' have the respective meanings given such terms under section 205 of the Federal-State Extended Unemployment Compensation Act of 1970 (26 U.S.C. 3304 note); and

(2) any reference to unemployment benefits described in this paragraph shall be considered to refer to--

(A) extended compensation (as defined by section 205 of the Federal-State Extended Unemployment Compensation Act of 1970);

(B) regular compensation (as defined by section 85(b) of the Internal Revenue Code of 1986) provided under any program administered by a State under an agreement with the Secretary;

(C) pandemic unemployment assistance under section 2102; and

(D) pandemic emergency unemployment compensation under section 2107.

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Supplemental Budget Request (SBR) Application

Instructions: States must complete the application using the suggested format and instructions below for the projects/activities for which the state is seeking funding. This application is to be combined with a completed SF-424 and an SF-424A covering all projects/activities.

Unemployment Insurance Supplemental Budget Request Abstract		
State Name:		
Total Funds Requested for All Projects:		
Name, Title, and Address of Grant Notification Contact ***(Typically the State Workforce Agency Administrator)*** **Name:** **Title:** **Address:**		
Name, E-Mail Address, and Phone Number of SBR Project or Fiscal Manager **Name:** **E-Mail Address:** **Telephone Number:**		
Provide the following information for each project ***(add additional rows as needed)*****:**		
Project Name	**Total Cost of Project**	**Proposed Completion Date**

Project Description
Project Timeline

Description of Costs			
State Agency Staff Costs:			
Type of Position	**Total Hours**	**Cost Per Hour**	**Total**
Contract Staff Costs:			
Type of Position	**Total Hours**	**Cost Per Hour**	**Total**
Hardware, Software and Telecommunications Equipment:			
Item Description	**Cost Per Item**	**Quantity**	**Total**
Other Costs:			
Item	**Cost**	**Explanation**	

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SECTION INSTRUCTIONS

Name of Project: Provide the name of the proposed project.

Amount of Funding Request for this Project: Provide the total amount of funds requested in this individual project.

State Contact: Provide name, telephone number, and e-mail address of the individual who can answer any questions relating to the proposal.

Project Description: Provide a brief description of the projects/activities for which the state seeking funding.

Project Timeline: Provide a list of the dates and the milestones for this project.

Description of Costs: Provide an explanation of all costs included in the project.

- **State Agency Staff Costs:** Use the table format provided in this attachment to request state staff to support project implementation.

- **Contract Staff Costs:** Use the table format provided in this attachment to request contract staff to support project implementation.

- **Hardware, Software, and Telecommunications Equipment:** Provide an itemized list of hardware, software, and telecommunications equipment including the cost per item and the number of each item requested. A description of each item must provide any information needed to identify the specific item and a description of the size and capacity of each item if applicable.

- **Other:** Identify each item of cost not covered elsewhere and provide the expected cost per item. The need for each item must be explained.

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Instructions for Completing the SF-424 and SF-424A

I. **Application for Federal Assistance (SF-424)**

Use the current version of the form for submission. Expired forms will not be accepted. SF-424, Expiration Date 12/31/2022, Office of Management and Budget (OMB) Control No. 4040-0004 (Grants.gov).
http://www.grants.gov/web/grants/forms/sf-424-family.html.

Section # 8, APPLICANT INFORMATION:

- Legal Name: The legal name must match the name submitted with the System for Award Management (SAM). Please refer to instructions at https://www.sam.gov.
- Employer/Tax Identification Number (EIN/TIN) : Input your correct 9-digit EIN and ensure that it is recorded within SAM.
- Organizational DUNS: All applicants for Federal grant and funding opportunities are required to have a 9-digit Data Universal Numbering System (D-U-N-S®) number, and must supply their D-U-N-S® number on the SF-424. Please ensure that your state is registered with the SAM. Instructions for registering with SAM can be found at https://www.sam.gov. Additionally, the state must maintain an active SAM registration with current information at all times during which it has an active Federal award or an application under consideration. To remain registered in the SAM database after the initial registration, there is a requirement to review and update the registration at least every 12 months from the date of initial registration or subsequently update the information in the SAM database to ensure it is current, accurate, and complete. Failure to register with SAM and maintain an active account will result in a rejection of your submission.
- Address: Input your complete address including Zipcode+4; Example: 20110-831. For lookup, use link at https://tools.usps.com/go/ZipLookupAction!input.action.
- Organizational Unit: Input appropriate Department Name and Division Name, if applicable.
- Name and contact information of person to be contacted on matters involving this application. Provide complete and accurate contact information including telephone number and email address for the point of contact.

Section # 9, Type of Applicant 1: Select Applicant Type: Input "State Government".

Section # 10, Name of the Federal Agency: Input "Employment and Training Administration".

Section # 11, Catalog of Federal Domestic Assistance Number: Input "17.225"; **CFDA Title:** Input "Unemployment Insurance".

Section # 12, Funding Opportunity Number and Title: Input "UIPL No. 15-20, Federal Pandemic Unemployment Compensation Implementation Administrative Grants".

Section # 13, Competition Identification Number: Leave Blank.

Section # 14, Areas Affected by Project: Input the place of performance for the project implementation; Example "NY" for New York.

Section # 15, Descriptive Title of Applicant's Project: Input Federal Pandemic Unemployment Compensation Implementation Administrative Grants.

Section # 16, Congressional Districts of:

a. Applicant: Input the Congressional District of your home office. For lookup, use link at www.house.gov with Zipcode + 4.
b. Program/Project: Input the Congressional District where the project work is performed. If it's the same place as your home office, input the congressional district for your home office. For lookup, use link at www.house.gov with Zipcode+4.

Section # 17, Proposed Project:

a. Start Date: Input a valid start date for the project (earliest start date will be March 27, 2020);
b. End Date: Input a valid end date for the project.

Section # 18, Estimated Funding ($): Input the estimated funding requested. Ensure that the funding requested matches the TOTALS in Section B – Budget Categories of the SF-424A.

Section #s 19 – 20: Complete as per instructions for Form SF-424.

Section # 21, Authorized Representative: Please select the "I AGREE" check box and provide complete information for your authorized signatory including contact information such as telephone number and email address. If your Authorized Representative has changed from your previous application submission for this program, please include a letter from a higher level leadership authorizing the new signatory for the application submission.

Remember to get the SF-424 signed and dated by the Authorized representative.

II. **Budget Information -Non-Construction Programs (SF-424A)**

Use the current version of the form for the submission. Expired forms will not be accepted. SF 424A, Expiration Date 02/28/2022, OMB Control No. 4040-0006
https://apply07.grants.gov/apply/forms/readonly/SF424A-V1.0.pdf.

Section B – Budget Categories: Ensure that TOTALS in Section 6, Object Class Categories matches the Estimated Funding requested in the SF-424.

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PLAINTIFF'S EXHIBIT
B

EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210	CLASSIFICATION Unemployment Insurance
	CORRESPONDENCE SYMBOL OUI/DUIO
	DATE April 5, 2020

ADVISORY: **UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 16-20**

TO: STATE WORKFORCE AGENCIES

FROM: JOHN PALLASCH
Assistant Secretary

SUBJECT: Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 – Pandemic Unemployment Assistance (PUA) Program Operating, Financial, and Reporting Instructions

1. **Purpose.** To provide states with operating, financial, and reporting instructions for the PUA program authorized by Section 2102 of the CARES Act of 2020, Public Law (Pub. L.) 116-136.

2. **Action Requested.** The U.S. Department of Labor's (Department) Employment and Training Administration (ETA) requests that State Workforce Administrators provide the information in this Unemployment Insurance Program Letter (UIPL) and all attachments to appropriate program and other staff in state workforce systems as they implement the Unemployment Insurance (UI)-related provisions in the CARES Act that respond to the economic effects of the Coronavirus Disease 2019 (COVID-19).

3. **Summary and Background.**

   a. Summary – On March 27, 2020, President signed into law the CARES Act, which includes the Relief for Workers Affected by Coronavirus Act set out in Title II, Subtitle A. Section 2102 of the CARES Act creates a new temporary federal program called Pandemic Unemployment Assistance (PUA) that in general provides up to 39 weeks of unemployment benefits, and provides funding to states for the administration of the program. Individuals receiving PUA benefits may also receive the $600 weekly benefit amount (WBA) under the Federal Pandemic Unemployment Compensation (FPUC) program if they are eligible for such compensation for the week claimed.

   b. Background – The CARES Act was designed to mitigate the economic effects of the COVID-19 pandemic in a variety of ways. The CARES Act includes a provision of temporary benefits for individuals who have exhausted their entitlement to regular unemployment compensation (UC) as well as coverage for individuals who are not

RESCISSIONS	EXPIRATION DATE
None	Continuing

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eligible for regular UC (such as individuals who are self-employed or who have limited recent work history). These individuals may also include certain gig economy workers, clergy and those working for religious organizations who are not covered by regular unemployment compensation, and other workers who may not be covered by the regular UC program under some state laws.

Importance of Program Integrity. The programs and provisions in the CARES Act operate in tandem with the fundamental eligibility requirements of the Federal-State UI program must be adhered to. In addition, some of the CARES Act programs include new eligibility requirements which states will need to apply. These requirements include that individuals are only entitled to benefits if they are no longer working through no fault of their own and that individuals must be able and available to work.

States play a fundamental role in ensuring the integrity of the UI program. While states have been provided some flexibilities as a result of COVID-19, those flexibilities are generally limited to dealing with the effects of COVID-19, as discussed in UIPL Nos. 10-20 and 13-20. States must ensure that individuals only receive benefits in accordance with these statutory provisions.

Further, quitting work without good cause to obtain UI benefits is fraud under PUA. Specifically related to PUA, 20 C.F.R. 625.14 governs overpayments and disqualifications for fraud. States are expected to enforce this provision.

The Department is actively working with states receiving funding under the CARES Act to provide UI benefits only to individuals who are entitled to such benefits. The Department will also be actively engaged with its Office of the Inspector General (OIG) to ensure program integrity. The CARES Act includes an appropriation of $26 million to the Department's OIG (Section 2115) to carry out audits, investigations, and other oversight activities related to states' adherence to existing UI laws and policies, as well as the provisions of the CARES Act.

4. **Guidance.** An overview of key information about the PUA program is provided below.

a. **Program overview.**

PUA provides benefits to covered individuals, who are those individuals not eligible for regular unemployment compensation or extended benefits under state or Federal law or pandemic emergency unemployment compensation (PEUC), including those who have exhausted all rights to such benefits. Covered individuals also include self-employed, those seeking part-time employment, individuals lacking sufficient work history, and those who otherwise do not qualify for regular unemployment compensation or extended benefits under state or Federal law or PEUC.

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PUA is also generally not payable to individuals who have the ability to telework with pay or who are receiving paid sick leave or other paid leave benefits. However, individuals receiving paid sick leave or other paid leave benefits for less than their customary work week may still be eligible for PUA. The state must treat any paid sick leave or paid leave received by a claimant in accordance with the income restrictions set out in Disaster Unemployment Assistance (DUA) at 20 C.F.R. 625.13. Similarly, if an individual has been offered the option of teleworking with pay and does, but works less than the individual worked prior to the COVID-19 pandemic, income from such work must be treated in accordance with the income restrictions set out in DUA at 20 C.F.R. 625.13.

In general, PUA provides up to 39 weeks of benefits to qualifying individuals who are otherwise able to work and available for work within the meaning of applicable state UC law, except that they are unemployed, partially unemployed, or unable or unavailable to work due to one of the COVID-19 related reasons identified in Section 2102(a)(3)(A)(ii)(I) of the CARES Act and listed below:

- The individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
- A member of the individual's household has been diagnosed with COVID-19;
- The individual is providing care for a family member or a member of the individual's household who has been diagnosed with COVID-19;
- A child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work;
- The individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency;
- The individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- The individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency;
- The individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19;
- The individual has to quit his or her job as a direct result of COVID-19; or
- The individual's place of employment is closed as a direct result of the COVID-19 public health emergency.

For purposes of determining eligibility for PUA, regular UC includes state UC, Unemployment Compensation for Federal Employees (UCFE), Unemployment Compensation for Ex-servicemembers (UCX), Trade Readjustment Allowances (TRA), DUA, Short-Time Compensation (STC), and payments under the Self-Employment Assistance (SEA) programs. 20 C.F.R. 625.2(d)(1). Extended benefits mean compensation provided under the provisions of the Federal-State Extended

Unemployment Compensation Act of 1970. 20 C.F.R. 625.2(d)(3). *See* UIPL No. 14-20 for additional information regarding coordination across programs. PUA is not payable in conjunction with state additional compensation.

The PUA WBA is equal to the WBA authorized under state UC law where the individual was employed. In no case will the amount be less than the minimum WBA described in 20 C.F.R 625.6. For individuals without reported wages sufficient to establish a WBA, the WBA will be calculated according to processes for DUA benefits set out in 20 C.F.R. 625.6.

For weeks of unemployment beginning on or after March 27, 2020, and ending on or before July 31, 2020, individuals eligible to receive PUA are also eligible to receive FPUC, authorized under section 2104 of the CARES Act. FPUC provides an additional $600 per week. *See* UIPL No. 15-20 for additional information.

The duration of PUA benefits is generally limited to 39 weeks, minus any weeks of regular UC and Extended Benefits (EB) the individual received. The weeks for which an individual collected PEUC may not be deducted from the individual's PUA entitlement.

b. **Relationship between PUA and DUA.** Section 2102(h) of the CARES Act provides that regulations at 20 C.F.R. Part 625 shall apply to the PUA program "except as otherwise provided in this section or to the extent there is a conflict" between section 2102 and 20 C.F.R Part 625. These regulations "shall apply to this section as if (1) the term 'COVID-19 public health emergency' were substituted for the term 'major disaster' each place it appears in such 20 C.F.R Part 625; and (2) the term 'pandemic' were substituted for the term 'disaster' each place it appears in 20 C.F.R. Part 625."

Like DUA, the PUA program is an emergency program activated in response to a crisis and designed to provide benefits to certain individuals who are ineligible for or who have exhausted entitlement to regular unemployment compensation or extended benefits. Like DUA, PUA has a defined assistance period, and a set minimum WBA which is determined based on each state's WBA. In addition, PUA benefits and the cost of its administration are federally funded. To the extent possible, the PUA program should be administered using the same initial application, weekly certifications, adjudication, and appeal procedures utilized by the state for the DUA program. If an individual is eligible for DUA with respect to a week of unemployment, he or she is not eligible to receive PUA for that week.

c. **Important program dates.** PUA is payable for weeks of unemployment, partial unemployment, or inability to work caused by the COVID-19 related reasons listed above beginning on or after January 27, 2020. For states where the week of unemployment ends on a Saturday, the first week for which PUA may be paid is the week ending February 8, 2020. In states where the week of unemployment ends on a Sunday, the first week for which PUA may be paid is the week ending February 9, 2020.

PUA is not payable for any week of unemployment ending after December 31, 2020. Accordingly, in states where the week of unemployment ends on a Saturday, the last

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week that PUA may be paid is the week ending December 26, 2020. For states where the week of unemployment ends on a Sunday, the last week that PUA is payable is the week ending December 27, 2020.

d. **Program administration.** The cost of PUA benefits is 100%federally funded. Implementation costs and ongoing administrative costs are also 100%% federally funded.

The PUA program is administered through a voluntary agreement between states and the Department. The program is available in all 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau, provided the state/territory signs an agreement with the Department.

States that have entered into an agreement with the Secretary of Labor (Secretary) to operate a PUA program may enter into agreements to operate the PUA program on behalf of other states that have also entered into agreements with the Secretary.

e. **PUA Implementation Costs Reimbursement for One Time/Additional Administrative Costs.** Section 2102(f) provides for the payment of all additional administrative expenses, as determined by the Secretary, incurred by the states to implement and operate the PUA program. To aid in the determination of the necessity of additional administrative expenses to implement the program, states requesting payments of such costs are required to submit Supplemental Budget Requests (SBRs) detailing the program startup costs. These SBRs must be limited to one-time costs that are attributable to implementation of the PUA program.

Examples of permissible implementation costs include:

- Computer programming and other technology costs;
- Implementation of necessary business processes required for program implementation;
- Training and travel;
- Notices to beneficiaries; and/or
- Overhead related only to the above.

The estimated cost basis for all items must be included in the SBR Application. Calculations for costs of state staff and contractors must be shown in accordance with the SBR instructions in ET Handbook No. 336. For application submission instructions refer to Attachment IV, Supplemental Budget Request Application; and Attachment V, Instructions for Completing the SF424 and SF424A.

ETA requires a state to submit its PUA implementation SBR Application along with required SF424 and SF424A forms. ETA encourages states to submit these forms by April 30, 2020, by electronic submission to the National Office at covid-19@dol.gov with a copy to the appropriate Regional Office.

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State agencies will receive reimbursement for on-going workload costs through the new ETA902P report. More specific information is included in Attachment I, Section E, and "Reporting Instructions."

f. **Additional Guidance and Instructions.** Additional guidance and instructions on implementing and operating the PUA program are provided in the attachments to this UIPL. Attachment I of this UIPL provides states with the implementation and operating instructions, including definitions, administrative requirements, financial information, and reporting information. Attachment II provides the general provisions concerning conditions and assurances for PUA. Attachment III provides the statutory language in Section 2102 of the CARES Act creating PUA. Attachment IV is the SBR Application template. Attachment V is the Instructions for completing the Standard Form (SF) 424 and SF 424A.

g. **Inquiries.** We encourage states to contact the Department for technical assistance. Please direct inquiries to covid-19@dol.gov, with a copy to the appropriate Regional Office.

h. **References.**

- Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. 116-136), Title II, Subtitle A – Relief for Workers Affected by Coronavirus Act;
- Federal-State Extended Unemployment Compensation Act of 1970 (26 U.S.C. 3304 note);
- 20 C.F.R. Part 625 – Disaster Unemployment Assistance;
- Unemployment Insurance Program Letter (UIPL) No. 10-20, *Unemployment Compensation (UC) for Individuals Affected by the Coronavirus Disease 2019 (COVID-19)*, issued March 12, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=8893;
- UIPL No. 14-20, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 – Summary of Key Unemployment Insurance (UI) Provisions and Guidance Regarding Temporary Emergency State Staffing Flexibility*, issued on April 2, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3390;
- UIPL No. 15-20, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020—Federal Pandemic Unemployment Compensation (FPUC) Program Operating, Financial, and Reporting Instructions*, issued on April 4, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=9297;
- ETA Handbook No. 356 *Disaster Unemployment Assistance*, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=2124; and
- ET Handbook No. 401, *UI Report Handbook*, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=7774.

i. **Attachment(s).**

- Attachment I: Pandemic Unemployment Assistance (PUA) Implementation and Operating Instructions

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- Attachment II: General Provisions for Administering the Pandemic Unemployment Assistance (PUA) Program
- Attachment III: Statutory Language of Section 2102 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020
- Attachment IV: Supplemental Budget Request Application
- Attachment V: Instructions for Completing the SF424 and SF424A
- Attachment VI: Handbook No. 401 Reporting Instructions for ETA 902-Pandemic Unemployment Assistance

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Pandemic Unemployment Assistance (PUA) Implementation and Operating Instructions

A. Introduction:

On March 27, 2020, the President signed Public Law (Pub. L.) 116-136, the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020. Section 2102 creates a new federal program called Pandemic Unemployment Assistance (PUA) and provides funding to states for the administration of the program. The PUA program generally allows states that enter into an agreement with the Secretary of Labor to pay up to 39 weeks of benefits to individuals who are not eligible to receive or who have exhausted regular unemployment compensation (UC), Extended Benefits (EB), and Pandemic Emergency Unemployment Compensation (PEUC) under Section 2107, and who otherwise meet the eligibility requirements of the CARES Act. The costs of the new federal benefit and of program administration are 100% federally funded. This guidance explains the eligibility requirements and other administrative functions associated with the program.

B. Definitions:

This section contains the definitions of terms used throughout this document, using definitions in 20 C.F.R. 625.2 and in section 205 of the Federal-State Extended Unemployment Compensation Program (hereafter called the Federal-State EB Law). References to 5 U.S.C. chapter 85 relate to Unemployment Compensation for Federal Employees (UCFE) and Unemployment Compensation for Ex-Servicemembers (UCX).

1. "Act" means Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. 116-136), including Title II Subtitle A, The Relief for Workers Affected by Coronavirus Act.
2. "Additional compensation" means compensation totally financed by a state and payable under a state law by reason of conditions of high unemployment or by reason of other special factors, and when so payable, includes compensation payable pursuant to 5 U.S.C. chapter 85.
3. "Agreement" means the agreement between a state and the U.S. Department of Labor (Department) to administer the PUA Program. Under the agreement, the state agency makes payments of PUA as the Department's agent. PUA payments must be made in accordance with the Act as interpreted by the Department in these instructions and any other instructions issued by the Department.
4. "Applicable state" means, with respect to an individual, the state from which the individual is receiving compensation.
5. "Applicable state law" means the unemployment compensation law of the applicable state for an individual.
6. "Benefit year" means, with respect to an individual, the benefit year as defined in the applicable state law.
7. "Compensation" shall have the meaning provided in 20 C.F.R. 265.2(d).
8. "COVID-19" means the 2019 Novel Coronavirus or 2019-nCoV.

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9. "COVID-19 Public Health Emergency" means the public health emergency declared by the Secretary of Health and Human Services on January 27, 2020, with respect to the 2019 Novel Coronavirus.
10. "Covered Individual" means an individual who is not eligible for regular compensation or extended benefits under State or Federal law or pandemic emergency unemployment compensation under section 2107 of the Act, including an individual who has exhausted all rights to regular unemployment or extended benefits under State or Federal law or pandemic emergency unemployment compensation under section 2107; and provides self-certification that the individual meets the requirements in Section C.1, below.
11. "Department" means the U.S. Department of Labor.
12. "Extended compensation" means compensation payable to an individual for weeks of unemployment in an extended benefit period, under those provisions of the state law which satisfy the requirements of the Federal-State Extended Unemployment Compensation Act of 1970 (Pub. L. 91-373), and when so payable includes additional compensation and compensation payable pursuant to 5 U.S.C. chapter 85. Extended compensation is referred to as Extended Benefits or EB.
13. "Federal Pandemic Unemployment Compensation" means the compensation payable under section 2104 of the Act and is referred to as FPUC.
14. "Pandemic Unemployment Assistance" means the compensation payable under section 2102 of the Act and is referred to as PUA.
15. "Pandemic Emergency Unemployment Compensation" means compensation payable under section 2107 of the Act and is referred to as PEUC.
16. "Regular compensation" means compensation payable to an individual under any state law or the unemployment compensation plan of a political subdivision of a state and, when so payable, includes compensation payable pursuant to 5 U.S.C. chapter 85 (parts 609 and 614 of this chapter), but not including extended compensation or additional compensation.
17. "Secretary" means the U.S. Secretary of Labor.
18. "State" means the states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau.
19. "State agency" means the agency of the state which administers its state law and, for Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau it means the agency designated in the Agreements entered into with the Department.
20. "State law" means the unemployment compensation law of a state, approved by the Secretary under Section 3304 of the Federal Unemployment Tax Act (FUTA). (26 U.S.C. § 3304(a)).
21. "Week" means a week as defined in the applicable state law.
22. "Week of unemployment" is defined as used in 20 C.F.R. 265.2(w).

Note: Except as otherwise provided in Section 2102 of the Act or to the extent there is a conflict between Section 2102 and 20 C.F.R. Part 625, 20 C.F.R. Part 625 shall apply to Section 2102 as if the term "COVID–19 public health emergency" were substituted for the

term "major disaster" each place it appears in 20 C.F.R. Part 625 and the term "pandemic" were substituted for the term "disaster" each place it appears in 20 C.F.R. Part 625.

C. Operating Instructions:

1. Eligibility.

Section 2102 of the Act provides for payment of PUA to "covered individuals". "Covered individuals" are those individuals not qualified for regular unemployment compensation, extended benefits under state or Federal law, or pandemic emergency unemployment compensation (PEUC), including those who have exhausted all rights to such benefits. "Covered individuals" also include self-employed, individuals seeking part-time employment, individuals lacking sufficient work history, or those otherwise not qualified for regular UC, extended benefits under state or federal law, or PEUC.

For purposes of PUA coverage, an individual "lacking sufficient work history" means an individual (1) with a recent attachment to the labor force (2) who does not have sufficient wages in covered employment during the last 18 months to establish a claim under regular UC, and (3) who became unemployed or partially unemployed because of one of the COVID-19 related reasons identified under Section 2102. Demonstration of a recent attachment to the labor force for PUA coverage purposes also includes individuals who had a bona fide offer to start working on a specific date and were unable to start due to one of the COVID-19 related reasons identified under Section 2102.

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

PUA is generally not payable to individuals who have the ability to telework with pay, or who are receiving paid sick leave or other paid leave benefits. However, an individual receiving paid sick leave or other paid leave benefits for less than his or her customary work week may still be eligible for a reduced PUA WBA. The state must treat any paid sick leave or paid leave received by a claimant in accordance with the income restrictions set out in DUA at 20 C.F.R. 625.13, if the pay or paid leave exceeds the PUA WBA. Similarly, if an individual has been offered the option of teleworking with pay and does telework with pay, but is working less than the individual customarily worked prior to the COVID 19 pandemic, the individual may be eligible for a reduced PUA WBA. Income from such work would be treated in accordance with the income restrictions set out in DUA at 20 C.F.R. 625.13.

To be a "covered individual" under PUA, an individual must also self-certify that he or she is otherwise able to work and available for work, as provided under state law, except that the individual is unemployed, partially unemployed, unable to work or unavailable for work due to at least one of the following categories described below. Included for each of the categories are illustrative examples and explanations of circumstances that fall

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under each category. These examples and explanations for each of the categories are not an exhaustive list of all COVID-19 related circumstances that may qualify an individual for PUA benefits, however, should other qualifying circumstances be used they must be identified and applied in a manner consistent with the examples below.

a) The individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and is seeking a medical diagnosis. Examples may include:
   - An individual who has to quit his or her job as a direct result of COVID-19 because the individual has tested positive for the coronavirus or has been diagnosed with COVID-19 by a qualified medical professional, and continuing work activities, such as through telework, is not possible by virtue of such diagnosis or condition;
   - An individual who has to quit his or her job due to coming in direct contact with someone who has tested positive for the coronavirus or has been diagnosed by a medical professional as having COVID-19, and, on the advice of a qualified medical health professional is required to resign from his or her position in order to quarantine.

b) A member of the individual's household has been diagnosed with COVID-19. For example:
   - A member of the individual's household has been diagnosed as having COVID-19 by a qualified medical professional or a member of the individual's household has tested positive for COVID-19 and the individual is unable to work as a result.

c) The individual is providing care for a family member or a member of the individual's household who has been diagnosed with COVID-19. For example:
   - An individual is "providing care" for a family member or a member of the individual's household if the provision of care requires such ongoing and constant attention that the individual's ability to perform other work functions is severely limited. An individual who is assisting a family member who is able to adequately care for him or herself is not "providing care" under this category.

d) A child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work. For example:
   - An individual has "primary caregiving responsibility" for a child or other person in the household if he or she is required to remain at home to care for the child or other person.
   - This includes an individual whose job allows for telework, but for whom the provision of care to the child or other person with a closed school or other

facility requires such ongoing and constant attention that it is not possible for the individual to perform work at home.

e) The individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency. For example:
   - An individual who is unable to reach his or her place of employment because doing so would require the violation of a state or municipal order restricting travel that was instituted to combat the spread of COVID-19.

f) The individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19. Examples include:
   - An individual who has been advised by a qualified medical professional that he or she may be infected with the coronavirus and that he or she therefore should self-quarantine. For example, an individual had direct contact with another person who has tested positive for the coronavirus or been diagnosed with COVID-19 by a qualified medical professional, and is advised by a health care provider to self-quarantine to prevent further possible spread of the virus. Such circumstances would render the individual unable to reach his or her place of employment.
   - An individual whose immune system is compromised by virtue of a serious health condition and is therefore advised by a health care provider to self-quarantine in order to avoid the greater-than-average health risks that the individual might face if he or she were to become infected by the coronavirus.

g) The individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency. For example:
   - An individual is unable to reach his or her job because doing so would require the violation of a state or municipal order restricting travel that was instituted to combat the spread of the coronavirus or the employer has closed the place of employment.
   - An individual does not have a job because the employer with whom the individual was scheduled to commence employment has rescinded the job offer as a direct result of the COVID-19 public health emergency.

h) The individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19. For example:
   - An individual whose head of household previously contributed the majority of financial support to the household died as a direct result of COVID-19, and the individual is now the person in the household expected to provide such financial support.

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i) The individual has to quit his or her job as a direct result of COVID-19. For example:

- An individual was diagnosed with COVID-19 by a qualified medical professional, and although the individual no longer has COVID-19, the illness caused health complications that render the individual objectively unable to perform his or her essential job functions, with or without a reasonable accommodation.

j) The individual's place of employment is closed as a direct result of the COVID-19 public health emergency. For example:

- If a business is shut down due to an emergency declaration or due to necessary social distancing protocols, the unemployment of individuals who worked in the business would be considered a direct result of COVID-19.

k) The individual meets any additional criteria established by the Secretary for unemployment assistance under this section.

- The Secretary has determined that, in addition to individuals who qualify for benefits under the other criteria described above, an individual who works as an independent contractor with reportable income may also qualify for PUA benefits if he or she is unemployed, partially employed, or unable or unavailable to work because the COVID-19 public health emergency has severely limited his or her ability to continue performing his or her customary work activities, and has thereby forced the individual to suspend such activities. For example, a driver for a ridesharing service who receives an IRS Form 1099 from the ride sharing service may not be eligible for PUA benefits under the other criteria outlined above, because such an individual does not have a "place of employment," and thus cannot claim that he or she is unable to work because his or her place of employment has closed. However, under the additional eligibility criterion established by the Secretary here, the driver may still qualify for PUA benefits if he or she has been forced to suspend operations as a direct result of the COVID-19 public health emergency, such as if an emergency state or municipal order restricting movement makes continued operations unsustainable.

States are required to do the following to ensure the efficacy and integrity of the self-certification process:

- Include information on the self-certification form (either paper or on-line), that the claimant completes, including:
    - Separate from the actual certification, an acknowledgement that the claimant understands that making the certification is under penalty of perjury; and
    - Information that advises the claimant that intentional misrepresentation in self-certifying that he or she falls in one or more of these categories is fraud.
- Provide clear messaging on-line that claimants may be subject to criminal prosecution if they are found to have committed fraud.

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States are also required to take reasonable and customary precautions to deter and detect fraud, such as, for example, a random audit of a sample of claims to detect fraud.

States should bear in mind that many of the qualifying circumstances described in section 2102(a)(3)(A)(ii)(I) are likely to be of short term duration. For example, an individual who has been advised to self-quarantine by a health care provider because of the individual's exposure to a person who has tested positive for the coronavirus, and is therefore unable to reach his or her place of employment for purposes of 2102(a)(3)(A)(ii)(I)(ff), may be able to return to his or her place of employment within two weeks of the exposure if he or she has not exhibited symptoms of COVID-19 or tested positive for the coronavirus. Similarly, a school is not closed as a direct result of the COVID-19 public health emergency, for purposes of 2102(a)(3)(A)(ii)(I)(dd), after the date the school year was originally scheduled to end. As such, the expectation is that states will continue to apply their able, available, and actively seeking work standards as outlined in state law.

States should also note that, for purposes of section 2102(a)(3)(A)(ii)(I)(ii), an individual does not have to quit his or her job as a direct result of COVID-19 if paid sick leave or other paid leave benefits are available to the individual. Generally, an employee "has to quit" within the meaning of this section only when ceasing employment is an involuntary decision compelled by the circumstances identified in the section.

In general, a determination about whether actions are a "direct result", as explained above, should be made based on 20 C.F.R. 625.5(c). When making a determination under the regulation, states should take into account specific circumstances unique to the COVID-19 public emergency. For example, if a business is shut down due to an emergency declaration or due to necessary social distancing protocols, the unemployment of individuals who worked in the business would be considered a direct result of COVID-19.

Individuals who meet the following criteria are not eligible for PUA:

a. Individuals who have the ability to telework with pay. When addressing issues about the availability of paid telework, the state must determine whether the claimant has been offered the option of continuing to work for pay by teleworking. If so, and claimants were offered to continue to work the same number of hours, claimants are not eligible for PUA.
b. Individuals receiving paid sick leave or other paid leave benefits. If claimants receive such leave for their customary work hours, they are not eligible for PUA. The state must treat any paid sick leave or paid leave received by a claimant in accordance with the income restrictions set out in DUA at 20 C.F.R. 625.13.

If the state has further questions in determining whether an individual's qualifying circumstances are a direct result of the COVID-19 public health emergency (as distinguished from circumstances that are a direct result of COVID-19 under the terms of section 2102), the state should refer to 20 C.F.R. 625.5(c).

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2. Determining Exhaustees. A PUA claimant ceases to be regular UC, PEUC, and EB exhaustee when he or she can establish a valid new benefit year. If an individual is no longer a regular UC, EB, or PEUC exhaustee, the individual will not meet the definition of a covered individual and may not receive PUA benefits. Therefore, at each quarter change, the state must check to determine if an individual meets the state's requirements to establish a new benefit year. If individuals can establish a new benefit year, they are no longer eligible for PUA. In these cases, the claimants should be advised that they are no longer eligible for PUA and that they may file a regular UC, PEUC or EB claim.

3. Beginning and Ending Dates of the PUA Program. Under Section 2102 of the Act, states may begin making PUA payments after their agreement with the Secretary is signed.

   Once the agreement is signed, PUA must be paid starting with weeks of unemployment beginning on or after January 27, 2020, if the individual meets PUA's eligibility requirements. In states where the week of unemployment ends on Saturday, the first week for which PUA may be paid is the week ending February 8, 2020. In states where the week of unemployment ends on Sunday, the first week for which PUA may be paid is the week ending February 9, 2020.

   Thus, PUA claims may be backdated to February 2, 2020, the first week of the Pandemic Assistance Period (PAP), if the individual otherwise meets the eligibility requirements to receive PUA as of that date, including the requirement that the individual's unemployment was due to the COVID-19 related reasons listed in section C.1.

   States may not make PUA payments with respect to weeks of unemployment ending after December 31, 2020. Thus, in states where weeks of unemployment end on a Saturday, the last compensable week for the PUA program is the week ending December 26, 2020. In states where the week of unemployment ends on Sunday, the last compensable week for the PUA program is the week ending December 27, 2020.

4. State PUA Agreements with the Department. The PUA program is administered through voluntary agreements between states and the Department. The program is available in all 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau, provided the state/territory signs an agreement with the Department.

5. Termination of PUA Agreement. Either party, upon thirty days written notice, may terminate the PUA Agreement. The Department reserves the right to terminate this Agreement if it determines that the State does not have an adequate system for administering such assistance, including because the State is not adequately ensuring that individuals receiving benefits under the PUA Program are eligible for such benefits. In the case of termination, the PUA period will end 30 days after the date one of the parties to the agreement notifies the other party of its election to terminate the PUA agreement. No PUA payments may be made with respect to weeks which begin after the date the

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termination of the agreement is effective. However, PUA is payable for weeks of unemployment ending on or before such termination date.

6. Agreements between States. One state that has entered into an agreement with the Department to operate a PUA program may choose to enter into an agreement with another state that has an agreement with the Department to operate the program on behalf of the other state.

7. Processing PUA Claims.

   a. Applicability of State Law Provisions. Under Section 2102(h) of the Act, 20 C.F.R. Part 625 applies to the administration of this program except as otherwise provided in Section 2102. Consistent with 20 C.F.R 625.11, the terms and conditions of the state law of the applicable state for an individual which apply to claims for, and the payment of, regular compensation apply to the payment of PUA to individuals. The provisions of the applicable state law that apply to claims for PUA include, but are not limited to:

      - Claim Filing and Reporting;
      - Information and Due Process to individuals;
      - Notices to individuals and employers, as appropriate, including notice to each individual of each determination and redetermination of eligibility for or entitlement to PEUC;
      - Determinations, redeterminations, appeals, and hearings;
      - Disqualification, including disqualifying income provisions;
      - Ability to work and availability for work, absent a COVID-19 related circumstance listed above;
      - The Interstate Benefit Payment Plan; and
      - The Interstate Arrangement for Combining Employment and Wages.

   b. Claims for PUA. In processing claims for PUA, states must verify that individuals have no regular UI entitlement. If the individual is not eligible for regular UI because there are insufficient covered wages or the individual has an active UI claim with a definite or indefinite disqualification, then a state does not need to require the individual to file a regular UI initial claim. However, the state must have an established process whereby the individual's ineligibility for regular UI is documented on the application.

   c. If the individual's eligibility for regular UI is questionable (for example, there are wages in the base period but no claim is filed, or a job separation that has not been adjudicated), then the state must first require the individual to file a regular UI initial claim. If the individual is subsequently disqualified, then the state may consider the individual for PUA eligibility.

8. Establishment of the Effective Date of PUA claims. The Pandemic Assistance Period (PAP) begins February 2, 2020 (the first week following the beginning date provided

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by the CARES Act) and ends on December 26, 2020 (the last week provided by the CARES Act, in states where weeks of unemployment end on a Saturday) or December 27, 2020 (the last week provided by the CARES Act, in states where weeks of unemployment end on a Sunday).

PUA claims are effective the week filed. However, they must be backdated to the first week during the PAP in which the individual meets the definition of a covered individual.

9. Establishment of PUA Weekly Benefit Amount. Section 2102(d) of the Act requires the state to pay individuals the WBA under the UC law of the state where the covered individual was employed plus the $600 FPUC payment. The minimum WBA may not be less than the minimum WBA in 20 C.F.R. 625.6 before the amount of FPUC under Section 2104 of the Act is added.

   If an individual is self-employed or would not otherwise qualify for UC under a state's law, the individual's PUA WBA is calculated as provided in 20 C.F.R. 625.6 and is increased by the $600 FPUC payment. If a self-employed individual or an individual who is "lacking sufficient work history" had earnings for the prior tax year that would result in a lower WBA than the minimum DUA WBA that is outlined in the quarterly UIPL for the Minimum DUA benefit, the individual's WBA must be the minimum amount listed in the quarterly UIPL. Since the PAP began on February 2, 2020, the state's minimum PUA WBA for the period February 2, 2020, through March 31, 2020, will be calculated based on UIPL No. 3-20. If an individual lives in a territory that does not provide unemployment compensation under its law, the individual's PUA WBA is calculated as provided in 20 C.F.R. 625.6.

10. Establishment of PUA Maximum Entitlement (Number of weeks of PUA). The total number of weeks in which a covered individual may receive PUA may not exceed 39 weeks and such total must include any week for which a covered individual received regular compensation or extended benefits under any state or federal law.

    Section 2102 of the Act provides that if extended benefits duration is extended after March 27, 2020, the 39-week period shall be extended by the number of weeks that is equal to the number of weeks by which the extended benefits were extended. Thus, if a state enters a "high unemployment period," as provided in section 202(b)(3)(B) of the Federal-State Extended Unemployment Compensation Act of 1970 (26 U.S.C. 3304 note), up to an additional 7 weeks of benefits for a total of 46 weeks of PUA benefits would be available to eligible individuals. However, note that PUA entitlement must be reduced by the amount of regular compensation and extended benefits the individual received.

11. Other PUA Operational Instructions.

    a. Total Unemployment. The WBA payable to an individual for a week of total unemployment is equal to the individual's most recent WBA (including any dependents' allowances) for the applicable PAP.

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b. Partial and Part-Total Unemployment. To determine the amount payable for a week of partial or part-total unemployment, the state will calculate the payment amount in accordance with the state law applicable to such a week of unemployment.

c. The terms and conditions of the state law which apply to claims for regular compensation and extended benefits and the payment thereof shall apply to claims for PUA and the payment thereof except as provided in these operating instructions and any additional guidance issued regarding the PUA program.

12. Secretary's Standard. The procedures for reporting and filing claims for PUA must be consistent with these instructions and the Secretary's "Standard for Claim Filing, Claimant Reporting, Job Finding and Employment Services" (Employment Security Manual, Part V, sections 5000 et. seq.).

13. Determination of Entitlement: Notices to Individuals.

a. Determination of Initial Claim. When an individual files an initial claim for PUA the state agency must determine promptly the eligibility of the individual and, if eligible, the weekly and maximum amounts of PUA payable. If denied PUA, the individual must be issued an appealable determination.

b. Determination of Weekly Claims. The state agency must promptly, upon the filing of a claim for a payment of PUA for a week of unemployment, determine whether the individual is entitled to a payment of PUA for such week, and, if entitled, the amount of PUA to which the individual is entitled to and issue a prompt payment.

c. Redetermination. An individual filing a PUA initial claim or weekly certification has the same rights to request a reconsideration of a determination as are provided for in the applicable state law for regular compensation.

d. Notices to Individual. The state agency must give written notice to the individual of any determination or redetermination of an initial claim and all weekly claims. Each notice must include such information regarding rights to reconsideration or appeal, or both, using the same process that is used for redeterminations of regular compensation.

e. Promptness. Full payment of PUA when due must be made as soon as administratively feasible.

f. Secretary's Determination Standard. The procedures for making determinations and redeterminations and furnishing written notices of determinations, redeterminations, and rights of appeal to individuals claiming PUA must be consistent with the Secretary's "Standard for Claim Determinations—Separation

Information" (Employment Security Manual (ESM), Part V, sections 6010 et seq.). In processing claims, states must comply with section 6013 of the ESM about conducting an investigation and section 6014 of the ESM concerning gathering separation information from employers when the claim involves separation from an employer.

g. Appeal and Hearing.

- Applicable State Law. To ensure that appeals and hearings are held promptly, the applicable state law provisions concerning the right of appeal and fair hearing from a determination or redetermination of entitlement to regular compensation shall apply to determinations and redeterminations of eligibility for or entitlement to PUA.

- Rights of Appeal and Fair Hearing. The right of appeal and opportunity for a fair hearing to claims for PUA must be consistent with these instructions and with sections 303(a)(1) and 303(a)(3) of the Social Security Act (SSA) (42 U.S.C. 503(a)(1) and 503(a)(3)).

- Promptness of Appeals Decisions.

  - Decisions on appeals under the PUA Program must accord with the "Standard for Appeals Promptness—Unemployment compensation" in 20 C.F.R. Part 650.

  - Any applicable state law provision allowing the advancement or priority of unemployment compensation cases on judicial calendars, or otherwise intended to provide for the prompt payment of unemployment compensation when due, must apply to proceedings involving entitlement to PUA.

h. Fraud and Overpayment. The requirements of 20 C.F.R. 625.14 shall apply with respect to PUA overpayments and fraud to the same extent and in the same manner as in the case of DUA.

i. A state may also use other federal UC to recover PUA overpayments made in that state, regardless of whether the state has an agreement under Section 303(g)(2) of the Social Security Act (SSA) (42 U.S.C. §503(g)(2)). This includes FPUC and PEUC.

j. Further, if a state has an Interstate Reciprocal Overpayment Recovery Arrangement in effect with the National Association of State Workforce Agencies, PUA may only be used to offset PUA overpayments for another state. However, a state may use state or other federal UC paid in that state to recover PUA overpayments for other states.

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14. Effect of Other UI-Related Programs on Eligibility for PUA.

    a. Trade Readjustment Allowances (TRA). Individuals are not eligible for TRA until PUA entitlement is exhausted. The provisions of Section 233(d) of the Trade Act of 1974, as amended, (relating to reduction of EB entitlement because of the receipt of TRA in the most recent benefit year) are not applicable to determinations of entitlement to PUA.

    b. Disaster Unemployment Assistance (DUA). If an individual is eligible for DUA with respect to a week of unemployment under Section 410 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, (42 U.S.C. 5177) the individual is not eligible to receive PUA for that week.

15. Effect of State Additional Compensation (AC). Section 2102 of the Act and, by reference, DUA regulations at 20 C.F.R. Part 625 require that an individual have no rights to regular compensation, extended benefits, or additional compensation in order to meet the eligibility requirements for PUA.

16. Effect of Federal Pandemic Unemployment Compensation (FPUC). Section 2102 of the Act provides that the $600 FPUC payments provided under section 2104 of the Act be added to the PUA WBA. Note that the FPUC payment may be made separately from the PUA payment or combined with that payment, and that FPUC payments may only be made with respect to weeks of unemployment ending on or before July 31, 2020.

17. Coordination Rule. Section 2102 of the CARES Act requires, as a condition of PUA eligibility, that an individual not be eligible for regular compensation or extended benefits under state or federal law or pandemic emergency unemployment compensation under Section 2107, or to have exhausted all rights to regular unemployment or extended benefits under state or federal law or pandemic emergency unemployment compensation under Section 2107.

18. Record Maintenance and Disposal of Records. The state must maintain PUA payment data as required by the Department.

    a. Record Maintenance. Each state will maintain records on the administration of the PUA program and will make all such records available for inspection, examination, and audit by such federal officials, employees as the Department may designate, or as may be required by the law. Reference ET Handbook No. 401, *UI Report Handbook* for details.

    b. Disposal of Records. The electronic/paper records created in the administration of the PUA program must be maintained by the state for three years after final action (including appeals or court action) on the payments, or for less than the three-year period if copied by micro photocopy or by an electronic imaging method. At the end of the three-year period, the PUA records shall be transferred to state accountability under the conditions for the disposal of records that apply to UCFE and UCX records, as explained in Chapter X of ET Handbook No. 391 (1994

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Edition) (OMB No. 1205-0179) and Chapter I of ET Handbook No. 384 (1994 Edition) (OMB No. 1205-0176).

19. Disclosure of Information. Information in records made and maintained by the state agency in administering the PUA program must be kept confidential, and information in such records may be disclosed only in the same manner and to the same extent as information with respect to regular compensation, and the entitlement of individuals thereto, may be disclosed under provisions of the applicable state law meeting the requirements of 20 C.F.R. Part 603. As provided under 20 C.F.R. 603.4(b), the confidentiality requirements do not apply when such information is being provided in the aggregate, provided it cannot be combined with other publicly available information to reveal any such identifying particulars about an individual or the individual's past or present employer.

20. Inviolate Rights to PUA. The rights of individuals to PUA must be protected in the same manner and to the same extent as the rights of persons to regular UC are protected under the applicable state law. Such measures must include protection of individuals from waiver, release, assignment, pledge, encumbrance, levy, execution, attachment, and garnishment of their rights to PUA. In the same manner and to the same extent, individuals must be protected from discrimination and obstruction in regard to seeking, applying for, and receiving PUA.

21. Notifications.

    a. *Identification and Notification of Potentially Eligible Claimants*. The state must identify individuals who are potentially eligible for PUA and provide them with appropriate written notification of their potential entitlement to PUA, including filing instructions. This includes notifying claimants who were found ineligible for UC as far back as January 27, 2020.

    b. *Interstate Claims*. PUA is payable to individuals filing under the Interstate Benefit Payment Plan in the same manner and to the same extent that benefits are payable to intrastate claimants. The liable state is responsible for identifying and notifying all potentially eligible interstate claimants of their potential eligibility, including filing instructions.

    c. *Notification of Media*. To assure public knowledge of the status of the PUA program, the state must notify all appropriate news media having coverage throughout the state of the beginning of the PUA program.

D. Financial Information and Instructions:

1. Payment to States. Requesting PUA Benefit Funds—Under Section 2102(f)(2) of the CARES Act, each state that has entered into an agreement with the Secretary to pay PUA, will be paid an amount equal to 100% of the amount of PUA paid to eligible individuals by the state under the agreement and in full accordance with the CARES Act and these instructions. States will request funds from the Extended Unemployment Compensation Account (EUCA) through the Automated Standard Application for Payments (ASAP)

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system. Drawdown requests must adhere to the funding mechanism stipulated in the Treasury-State Agreement executed under the Cash Management Improvement Act of 1990. Requests will be funded in the same manner as all ASAP transactions elected by the states (FEDWIRE or ACH to the state benefit payment account).

There will be one new line in the ASAP for making drawdowns to pay PUA benefits, refer to #3 below for drawdown instructions. The line will be clearly labeled PANDEMIC UNEMPLOYMENT ASSISTANCE (PUA).

Section 2102(f)(2)(B) authorizes the Secretary to determine the amounts to be paid to states for processing PUA workloads. Such costs will be based on workload counts reported on the ETA902P report, and will incorporate minute per unit factors and salary rates identical to those used in the computation of the regular UC program above base administrative costs.

Administrative costs will be computed on the ETA 902P report, line 301, column 17. *See* Attachment VI for additional detail. The supplemental budget request process will be used for states to request funds for implementation.

2. PUA Accounting Obligational Authority. The Grant Officer will assign a separate line on the UI program notices of obligational authority for PUA administrative grant funds, and a separate sub-account for PUA will be set up in the Payment Management System for states to draw down PUA administrative funds.

   Administrative Fund Accounting—Because of the separate appropriation for PUA administrative funds and the availability of these funds until expended, states must track and report PUA administrative expenditures and obligations separately from the regular UI program. Therefore, states must establish a separate fund ledger and must submit a separate ETA 9130 for the PUA program. States must include any PUA administrative expenditures and obligations incurred in March 2020 in their June 30, 2020, PUA ETA 9130 report.

3. Time Distribution. To ensure that PUA costs are tracked separately, states must charge time used for all PUA activities to the appropriate UI functional activity codes as outlined in Appendix E to ET Handbook No. 410 under the separate PUA fund ledger; however, states must combine regular and PUA staff year usage data in Section A of the UI-3 worksheet.

4. Accounting for PUA Payments (Benefits). PUA advances to the states' UTF accounts and disbursements for PUA benefit payments will be reported on the monthly ETA 2112. Do not use a separate form for this report. (*See* Reporting Instructions.) Accurate reporting of advances, reimbursements and payments is important due to the monthly reconciliation of balances with Department of Labor records.

5. Processing Refunds. There are two scenarios for returning funds to the program line for PUA.

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a. The most likely scenario will be when the state has funds in its state benefit payment account and needs to return those funds to the EUCA. This should be completed as a negative amount posted to the appropriate line in ASAP. To accomplish this, the total draw for the day in ASAP must be greater than the negative balance posted to the appropriate line.

b. The second scenario is when a state actually has the funds in its Federal UI account that are required to be returned to the appropriate program line. This should be accomplished by the state processing a book transfer transaction that accomplishes a transfer from its UI account to the appropriate program under the EUCA account.

E. Reporting Instructions

1. ETA 2112. PUA benefit payment activity must be reported in the aggregate on the regular ETA 2112 report.

    a. Line 23c. Pandemic Unemployment Assistance. Report in columns C and E the amount of Federal funds received as advances or reimbursement for PUA.
    b. Line 42c. PUA Activity. Enter in columns C and F the net amount for which the Federal government is liable for PUA.

2. ETA 538. Total PUA initial claims processed during the report period and total PUA continued claims reflecting unemployment for the previous week will be reported in the comments section and labeled as "PUA IC" and "PUA CC" followed by the number. For example: "PUA IC =239" "PUA CC =15,135". Regular initial claims and continued claims should not include PUA claims.

3. ETA 539. Total PUA initial claims processed during the report period and total PUA continued claims reflecting unemployment for the previous week will be reported in the comments section and labeled as "PUA IC" and "PUA CC" followed by the number. For example: "PUA IC =239" "PUA CC =15,135". Regular initial claims and continued claims should not include PUA claims.

4. ETA 902. See Attachment VI for detailed instructions about this reporting.

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General Provisions for Administering the Pandemic Unemployment Assistance (PUA) Program

CERTIFICATIONS AND ASSURANCES

1. **Compliance with Federal Requirements**. States must comply with the provisions contained in the states' Agreements with the Department to administer PUA and all applicable PUA funding instruments. States must perform such duties and functions in accordance with Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards at 2 C.F.R. Part 200 and 2 C.F.R. Part 2900 applicable to all grants and cooperative agreements. Additionally, the Department's administrative requirements for grants and cooperative agreements at 29 C.F.R. Parts 31, 32, 38, 96, and 98 apply to grant funds provided for these activities.

2. **Prohibition on Subsidization of Forced or Indentured Child Labor.** States, consistent with section 103 of the Further Consolidated Appropriations Act, 2020, Pub. L. 116- 94 and in accordance with Executive Order No. 13126, must not obligate or expend funds made available to administer PUA for the procurement of goods, mined, produced, manufactured, or harvested or services rendered, whole or in part, by forced or indentured child labor in industries and host countries already identified by the U.S. Department of Labor prior to enactment of the Department's 2008 appropriation.

3. **Salary and Bonus Pay Limitations.** States, in compliance with section 101 of the Further Consolidated Appropriations Act, 2020, PUB. L. 116- 94, must not use funds provided for PUA administration to pay the salary and bonuses of an individual, either as direct costs or indirect costs, at a rate in excess of Executive Level II, except as provided for under section 101 of Public Law 109-149. This limitation shall not apply to vendors providing goods and services as defined in OMB Circular No. A-133. Where states are recipients of such funds, states may establish a lower limit for salaries and bonuses of those receiving salaries and bonuses from sub-recipients of such funds, taking into account PUA, including the relative cost-of-living in the state, the compensation levels for comparable state or local government employees, and the size of the organizations that administer Federal programs involved including Employment and Training Administration programs. *See* TEGL No. 5-06 for further clarification. The incurrence of costs and the receipt of reimbursement for these costs under this award certifies that the Grantee has read the above condition and is in compliance.

4. **Veterans' Priority Provisions.** This program, funded by the U.S. Department of Labor, is subject to the provisions of the "Jobs for Veterans Act" (JVA), Public L. 107-288 (38 U.S.C. §4215). The JVA provides priority of service to veterans and spouses of certain veterans for the receipt of employment, training, and placement services. The veterans' priority is implemented by 20 C.F.R. Part 1010 (73 Fed. Reg. 78132, Sept. 19, 2008). Please note that to obtain priority service a veteran must meet the program's eligibility requirements. Training and Employment Guidance Letter (TEGL) No. 10-09 (November 10, 2009) provided general guidance on the scope of the veterans' priority statute and its effect on current employment and training programs. In addition to TEGL 10-09, a series of questions

and answers related to priority of service is posted at: https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=2816 for fifteen (15) programs administered by ETA.

The Workforce Innovation and Opportunity Act (WIOA) State Plan requires states to describe the policies and strategies in place to ensure, pursuant to the JVA, that priority of service is provided to veterans (and certain spouses) who otherwise meet the eligibility requirements for all employment and training programs funded by the U.S. Department of Labor and administered by ETA. *See Required Elements for Submission of the Unified or Combined State Plan and Plan Modifications under the Workforce Innovation and Opportunity Act*, OMB Control No. 1205-0522. In addition, the states are required to provide assurances that they will comply with the Veterans' Priority Provisions established by the JVA. States must adhere to JVA requirements, as interpreted by the Department, in administering PUA.

5. **Certifications and Assurances.** In administering PUA, states must fully comply with the State Quality Service Plan (SQSP) assurances. These SQSP assurances are detailed in Chapter 1, Part VIII of the "Unemployment Insurance State Quality Service Plan (SQSP) Assurances," ET Handbook No. 336 (18th Edition, Change 4).

   A. Assurance of Equal Opportunity (EO).
   B. Assurance of Administrative Requirements and Allowable Cost Standards.
   C. Assurance of Management Systems, Reporting, and Recordkeeping.
   D. Assurance of Program Quality.
   E. Assurance on Use of Unobligated Funds.
   F. Assurance of Prohibition of Lobbying Costs.
   G. Drug-Free Workplace.
   H. Assurance of Contingency Planning.
   I. Assurance of Conformity and Compliance.
   J. Assurance of Automated Information Systems Security.
   K. Assurance of Confidentiality.

   The Office of Management and Budget (OMB), SF 424 B *Assurances-Non- Construction Programs,* signed and submitted by each state with its State Quality Service Plan annual submission, also apply.

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Statutory Language of Title II, Subtitle A, Section 2102 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020

SEC. 2102. PANDEMIC UNEMPLOYMENT ASSISTANCE.

(a) Definitions.--In this section:

(1) COVID-19.--The term ``COVID-19'' means the 2019 Novel Coronavirus or 2019-nCoV.

(2) COVID-19 public health emergency.--The term ``COVID-19 public health emergency'' means the public health emergency declared by the Secretary of Health and Human Services on January 27, 2020, with respect to the 2019 Novel Coronavirus.

(3) Covered individual.--The term ``covered individual''--

(A) means an individual who--

(i) is not eligible for regular compensation or extended benefits under State or Federal law or pandemic emergency unemployment compensation under section 2107, including an individual who has exhausted all rights to regular unemployment or extended benefits under State or Federal law or pandemic emergency unemployment compensation under section 2107; and

(ii) provides self-certification that the individual--

(I) is otherwise able to work and available for work within the meaning of applicable State law, except the individual is unemployed, partially unemployed, or unable or unavailable to work because--

(aa) the individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and seeking a medical diagnosis;

(bb) a member of the individual's household has been diagnosed with COVID-19;

(cc) the individual is providing care for a family member or a member of the individual's household who has been diagnosed with COVID-19;

(dd) a child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work;

(ee) the individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency;

(ff) the individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;

(gg) the individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency;

(hh) the individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19;

(ii) the individual has to quit his or her job as a direct result of COVID-19;

(jj) the individual's place of employment is closed as a direct result of the COVID-19 public health emergency; or

(kk) the individual meets any additional criteria established by the Secretary for unemployment assistance under this section; or

(II) is self-employed, is seeking part-time employment, does not have sufficient work history, or otherwise would not qualify for regular unemployment or extended benefits

under State or Federal law or pandemic emergency unemployment compensation under section 2107 and meets the requirements of subclause (I); and

(B) does not include--

(i) an individual who has the ability to telework with pay; or

(ii) an individual who is receiving paid sick leave or other paid leave benefits, regardless of whether the individual meets a qualification described in items (aa) through (kk) of subparagraph (A)(i)(I).

(4) Secretary.--The term "Secretary" means the Secretary of Labor.

(5) State.--The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau.

(b) Assistance for Unemployment as a Result of COVID-19.--Subject to subsection (c), the Secretary shall provide to any covered individual unemployment benefit assistance while such individual is unemployed, partially unemployed, or unable to work for the weeks of such unemployment with respect to which the individual is not entitled to any other unemployment compensation (as that term is defined in section 85(b) of title 26, United States Code) or waiting period credit.

(c) Applicability.--

(1) In general.--Except as provided in paragraph (2), the assistance authorized under subsection (b) shall be available to a covered individual--

(A) for weeks of unemployment, partial unemployment, or inability to work caused by COVID-19--

(i) beginning on or after January 27, 2020; and

(ii) ending on or before December 31, 2020; and

(B) subject to subparagraph (A)(ii), as long as the covered individual's unemployment, partial unemployment, or inability to work caused by COVID-19 continues.

(2) Limitation on duration of assistance.--The total number of weeks for which a covered individual may receive assistance under this section shall not exceed 39 weeks and such total shall include any week for which the covered individual received regular compensation or extended benefits under any Federal or State law, except that if after the date of enactment of this Act, the duration of extended benefits is extended, the 39-week period described in this paragraph shall be extended by the number of weeks that is equal to the number of weeks by which the extended benefits were extended.

(3) Assistance for unemployment before date of enactment.--The Secretary shall establish a process for making assistance under this section available for weeks beginning on or after January 27, 2020, and before the date of enactment of this Act.

(d) Amount of Assistance.--

(1) In general.--The assistance authorized under subsection (b) for a week of unemployment, partial unemployment, or inability to work shall be--

(A)(i) the weekly benefit amount authorized under the unemployment compensation law of the State where the covered individual was employed, except that the amount may not be less than the minimum weekly benefit amount described in section 625.6 of title 20, Code of Federal Regulations, or any successor thereto; and

(ii) the amount of Federal Pandemic Unemployment Compensation under section 2104; and

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(B) in the case of an increase of the weekly benefit amount after the date of enactment of this Act, increased in an amount equal to such increase.

(2) Calculations of amounts for certain covered individuals.-- In the case of a covered individual who is self-employed, who lives in a territory described in subsection (c) or (d) of section 625.6 of title 20, Code of Federal Regulations, or who would not otherwise qualify for unemployment compensation under State law, the assistance authorized under subsection (b) for a week of unemployment shall be calculated in accordance with section 625.6 of title 20, Code of Federal Regulations, or any successor thereto, and shall be increased by the amount of Federal Pandemic Unemployment Compensation under section 2104.

(3) Allowable methods of payment.--Any assistance provided for in accordance with paragraph (1)(A)(ii) shall be payable either--

(A) as an amount which is paid at the same time and in the same manner as the assistance provided for in paragraph

(1)(A)(i) is payable for the week involved; or

(B) at the option of the State, by payments which are made separately from, but on the same weekly basis as, any assistance provided for in paragraph (1)(A)(i).

(e) Waiver of State Requirement.--Notwithstanding State law, for purposes of assistance authorized under this section, compensation under this Act shall be made to an individual otherwise eligible for such compensation without any waiting period.

(f) Agreements With States.--

(1) In general.--The Secretary shall provide the assistance authorized under subsection (b) through agreements with States which, in the judgment of the Secretary, have an adequate system for administering such assistance through existing State agencies.

(2) Payments to states.--There shall be paid to each State which has entered into an agreement under this subsection an amount equal to 100 percent of--

(A) the total amount of assistance provided by the State pursuant to such agreement; and

(B) any additional administrative expenses incurred by the State by reason of such agreement (as determined by the Secretary), including any administrative expenses necessary to facilitate processing of applications for assistance under this section online or by telephone rather than in-person.

(3) Terms of payments.--Sums payable to any State by reason of such State's having an agreement under this subsection shall be payable, either in advance or by way of reimbursement (as determined by the Secretary), in such amounts as the Secretary estimates the State will be entitled to receive under this subsection for each calendar month, reduced or increased, as the case may be, by any amount by which the Secretary finds that his the amounts which should have been paid to the State. Such estimates may be made on the basis of such statistical, sampling, or other method as may be agreed upon by the Secretary and the State agency of the State involved.

(g) Funding.--

(1) Assistance.--

(A) In general.--Funds in the extended unemployment compensation account (as established by section 905(a) of the Social Security Act (42 U.S.C. 1105(a)) of the Unemployment Trust Fund (as established by section 904(a) of such Act (42 U.S.C. 1104(a)) shall be used to make payments to States pursuant to subsection (f)(2)(A).

(B) Transfer of funds.--Notwithstanding any other provision of law, the Secretary of the Treasury shall transfer from the general fund of the Treasury (from funds not otherwise appropriated) to the extended unemployment compensation account such sums as the Secretary of Labor estimates to be necessary to make payments described in subparagraph (A). There are

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appropriated from the general fund of the Treasury, without fiscal year limitation, the sums referred to in the preceding sentence and such sums shall not be required to be repaid.

(2) Administrative expenses.--

(A) In general.--Funds in the employment security administration account (as established by section 901(a) of the Social Security Act (42 U.S.C. 1105(a)) of the Unemployment Trust Fund (as established by section 904(a) of such Act (42 U.S.C. 1104(a)) shall be used to make payments to States pursuant to subsection (f)(2)(B).

(B) Transfer of funds.--Notwithstanding any other provision of law, the Secretary of the Treasury shall transfer from the general fund of the Treasury (from funds not otherwise appropriated) to the employment security administration account such sums as the Secretary of Labor estimates to be necessary to make payments described in subparagraph (A). There are appropriated from the general fund of the Treasury, without fiscal year limitation, the sums referred to in the preceding sentence and such sums shall not be required to be repaid.

(3) Certifications.--The Secretary of Labor shall from time to time certify to the Secretary of the Treasury for payment to each State the sums payable to such State under paragraphs (1) and (2).

(h) Relationship Between Pandemic Unemployment Assistance and Disaster Unemployment Assistance.--Except as otherwise provided in this section or to the extent there is a conflict between this section and section 625 of title 20, Code of Federal Regulations, such section 625 shall apply to this section as if--

(1) the term ``COVID-19 public health emergency'' were substituted for the term ``major disaster'' each place it appears in such section 625; and

(2) the term ``pandemic'' were substituted for the term ``disaster'' each place it appears in such section 625.

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Attachment IV to UIPL No. 16-20

Supplemental Budget Request (SBR) Application

Instructions: States must complete the application using the suggested format and instructions below for the projects/activities for which the state is seeking funding. This application is to be combined with a completed SF-424 and an SF-424A covering all projects/activities.

Unemployment Insurance Supplemental Budget Request Abstract		
State Name:		
Total Funds Requested for All Projects:		
Name, Title, and Address of Grant Notification Contact *(Typically the State Workforce Agency Administrator)* **Name:** **Title:** **Address:**		
Name, E-Mail Address, and Phone Number of SBR Project or Fiscal Manager **Name:** **E-Mail Address:** **Telephone Number:**		
Provide the following information for each project *(add additional rows as needed)*:		
Project Name	**Total Cost of Project**	**Proposed Completion Date**

Project Description
Project Timeline

Description of Costs			
State Agency Staff Costs:			
Type of Position	**Total Hours**	**Cost Per Hour**	**Total**
Contract Staff Costs:			
Type of Position	**Total Hours**	**Cost Per Hour**	**Total**
Hardware, Software and Telecommunications Equipment:			
Item Description	**Cost Per Item**	**Quantity**	**Total**
Other Costs:			
Item	**Cost**	**Explanation**	

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SECTION INSTRUCTIONS

Name of Project: Provide the name of the proposed project.

Amount of Funding Request for this Project: Provide the total amount of funds requested in this individual project.

State Contact: Provide name, telephone number, and e-mail address of the individual who can answer any questions relating to the proposal.

Project Description: Provide a brief description of the projects/activities for which the state seeking funding.

Project Timeline: Provide a list of the dates and the milestones for this project.

Description of Costs: Provide an explanation of all costs included in the project.

- **State Agency Staff Costs:** Use the table format provided in this attachment to request state staff to support project implementation.
- **Contract Staff Costs:** Use the table format provided in this attachment to request contract staff to support project implementation.
- **Hardware, Software, and Telecommunications Equipment:** Provide an itemized list of hardware, software, and telecommunications equipment including the cost per item and the number of each item requested. A description of each item must provide any information needed to identify the specific item and a description of the size and capacity of each item if applicable.
- **Other:** Identify each item of cost not covered elsewhere and provide the expected cost per item. The need for each item must be explained.

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Attachment V to UIPL No. 16-20

Instructions Completing the SF-424 and SF-424A

I. Application for Federal Assistance (SF-424)

Use the current version of the form for submission. Expired forms will not be accepted. SF-424, Expiration Date 12/31/2022, Office of Management and Budget (OMB) Control No. 4040-0004 (Grants.gov). http://www.grants.gov/web/grants/forms/sf-424-family.html

Section # 8, APPLICANT INFORMATION:

- Legal Name: The legal name must match the name submitted with the System for Award Management (SAM). Please refer to instructions at https://www.sam.gov
- Employer/Tax Identification Number (EIN/TIN) : Input your correct 9-digit EIN and ensure that it is recorded within SAM
- Organizational DUNS: All applicants for Federal grant and funding opportunities are required to have a 9-digit Data Universal Numbering System (D-U-N-S®) number, and must supply their D-U-N-S® number on the SF-424. Please ensure that your state is registered with the SAM. Instructions for registering with SAM can be found at https://www.sam.gov . Additionally, the state must maintain an active SAM registration with current information at all times during which it has an active Federal award or an application under consideration. To remain registered in the SAM database after the initial registration, there is a requirement to review and update the registration at least every 12 months from the date of initial registration or subsequently update the information in the SAM database to ensure it is current, accurate, and complete. Failure to register with SAM and maintain an active account will result in a rejection of your submission.
- Address: Input your complete address including Zipcode+4; Example: 20110-831. For lookup, use link at https://tools.usps.com/go/ZipLookupAction!input.action
- Organizational Unit: Input appropriate Department Name and Division Name, if applicable
- Name and contact information of person to be contacted on matters involving this application. Provide complete and accurate contact information including telephone number and email address for the point of contact

Section # 9, Type of Applicant 1: Select Applicant Type: Input "State Government"

Section # 10, Name of the Federal Agency: Input "Employment and Training Administration"

Section # 11, Catalog of Federal Domestic Assistance Number: Input "17.225"; CFDA Title: Input "Unemployment Insurance"

Section # 12, Funding Opportunity Number and Title: Input "UIPL No. 16-20, Pandemic Unemployment Assistance Implementation Grants"

Section # 13, Competition Identification Number: Leave Blank

Section # 14, Areas Affected by Project: Input the place of performance for the project implementation; Example "NY" for New York

Section # 15, Descriptive Title of Applicant's Project: Input "Pandemic Unemployment Assistance Implementation Grants"

Section # 16, Congressional Districts of:

- Applicant: Input the Congressional District of your home office. For lookup, use link at www.house.gov with Zipcode + 4
- Program/Project: Input the Congressional District where the project work is performed. If it's the same place as your home office, input the congressional district for your home office. For lookup, use link at www.house.gov with Zipcode+4

Section # 17, Proposed Project

- Start Date: Input a valid start date for the project (earliest start date will be March 27, 2020)
- End Date: Input a valid end date for the project

Section # 18, Estimated Funding ($): Input the estimated funding requested. Ensure that the funding requested matches the TOTALS in Section B – Budget Categories of the SF424A

Section #s 19 – 20: Complete as per instructions for Form SF-424

Section # 21, Authorized Representative: Please select the "I AGREE" check box and provide complete information for your authorized signatory including contact information such as telephone number and email address. If your Authorized Representative has changed from your previous application submission for this program, please include a letter from a higher level leadership authorizing the new signatory for the application submission

Remember to get the SF-424 signed and dated by the Authorized representative

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II. Budget Information -Non-Construction Programs (SF-424A)

Use the current version of the form for the submission. Expired forms will not be accepted. SF 424A, Expiration Date 02/28/2022, OMB Control No. 4040-0006 https://apply07.grants.gov/apply/forms/readonly/SF424A-V1.0.pdf

Section B – Budget Categories: Ensure that TOTALS in Section 6, Object Class Categories matches the Estimated Funding requested in the SF-424.

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Attachment VI to UIPL No. 16-20

Handbook 401 Instructions for ETA 902 Pandemic Unemployment Assistance

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ETA 902P – PANDEMIC UNEMPLOYMENT ASSISTANCE ACTIVITIES

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A. Facsimile of Form

ETA 902P – PANDEMIC UNEMPLOYMENT ASSISTANCE ACTIVITIES

STATE:		REGION:			REPORT FOR PERIOD		
SECTION A. APPLICATION AND PAYMENT ACTIVITIES							
CATEGORY	**LINE NO.**	**INITIAL APPS.**	**NO. DETERM. ELIG.**	**FIRST PAYMTS.**	**WKS. CLAIMED**	**WKS. COMP**	**AMOUNT COMP.**
		1	2	3	4	5	6
Total	**101**						
Self-Employed	**102**						

SECTION B. DENIAL AND APPEALS ACTIVITY								
CATEGORY	**LINE NO.**	**WKS.OF PUA DENIED**	**APPEALS FILED**		**APPEALS DISPOSED**		**FAVOR OF APPELLANT**	
			STATE	**H A**	**STATE**	**H A**	**STATE**	**R A**
		7	8	9	10	11	12	13
Total	**201**							
Self - Employed	**202**							

SECTION C. OVERPAYMENT ACTIVITY AND ADMINISTRATION					
CATEGORY	**LINE NO.**	**OVERPAYMENTS**			**ADMINISTRATIVE COSTS**
		CASES	**WEEKS**	**AMOUNT**	**PERSONNEL**
		14	15	16	17
Total	**301**				
Fraud	**302**				
Signature				Title	

Comments:

OMB No.: NA **OMB Expiration Date**: NA **OMB Burden Minutes**: NA

OMB Burden Statement: Section 2116(a), Division B, Title II of the CARES Act states that "Chapter 35 of Title 44, United States Code, (commonly referred to as the "Paperwork Reduction Act of 1995") shall not apply to the amendments made by this subtitle." Therefore these reporting instructions do not require additional OMB approval and the submission of this information is required to obtain or retain benefits under the SSA 303(a)(6).

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B. Purpose

The ETA 902P report contains monthly data on Pandemic Unemployment Assistance (PUA) activities provided by the CARES Act, enacted on March 27, 2020. PUA is a temporary Federal program to provide relief for workers affected by the coronavirus who do not qualify for other Federal benefits such as regular unemployment insurance or extended benefits.

C. Scope and Duration of the Report

1. The first report shall be sent in the month following the date the state agreement to participate in the PUA program, and later reports shall be sent each month that PUA activity continues to occur, such as for payments made for weeks in the pandemic assistance period (PAP) issued as a result of appeals.
2. Reports should be submitted monthly through the end of the Pandemic Assistance Period and until all payment and appeals activity is complete.

D. Due Date and Transmittal

Reports shall be submitted electronically each month providing PUA activities performed during the preceding calendar month. Reports are due in the National Office on the 30th of the month following the month to which data relate. South Pacific Island jurisdictions must submit hardcopy reports, as there is no electronic submittal method available to them at this time.

For South Pacific Island jurisdictions, one copy should be sent to the National Office addressed as follows:

U.S. Department of Labor, ETA
Attn: Office of Unemployment Insurance
Frances Perkins Building
200 Constitution Avenue, N.W.
Washington, D.C. 20210
Attention: Pandemic Unemployment Assistance Coordinator/Program Specialist
Division of Unemployment Insurance Operations

One copy should also be sent to the San Francisco ETA Regional Office.

E. General Reporting Instructions

1. In all instructions, reference to State UI (UC) claims will include UCFE, UCX, TRA, RRA (Railroad), EB, and any other program included and/or defined under 20 C.F.R. 625.2(d).

2. Self-employed applicants are those who have filed an initial request for PUA and for whom it was determined that their primary reliance for income is on their performance of services in their own business or farm.

3. Payments of UI made to replace erroneously paid PUA should not be reported on the ETA 902P, but should be reported on the appropriate UI reports, i.e., ETA 5159.

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F. Definitions

1. Effective Date of an Initial Application. The effective day is the first day of the first week of unemployment provided that week of unemployment is in the pandemic assistance period (PAP). PUA claims may be backdated to the beginning of the PAP, February 2, 2020.

2. Eligible. Meets qualifications for receiving Pandemic Unemployment Assistance, as specified in Section 2102 of the CARES Act. If an individual is eligible for UC, such individual is not eligible for PUA and should not be counted in any PUA Activities report.

G. Item by Item Instructions

1. Report Period Ended. Enter the month, last day of the month, and four digit year to which the data relate; e.g., 01/31/2020.

2. State. Enter the two-letter Federal Information Processing Standards (FIPS) State Alpha Code (identical to the two-letter U.S. Postal Service abbreviation) of the state or South Pacific Island jurisdiction as it appears in FIPS Publication 5-2. The National Institute of Standards and Technology issued the FIPS publication on May 28, 1987.

3. Section A. Application and Payment Activities.

a. Column 1, Initial Applications. Enter the number of initial applications for PUA taken during the report period. This will equal the number of initial applications that were completed and/or number of applications entered into an automated system through an electronic/telephone claims taking system during the report period. Do not include individuals eligible for UC where it may have been necessary, due to the filing environment, to accept initial claims for both programs.

b. Column 2, Number Determined Eligible. Enter the number of individuals determined eligible for PUA during the report period. Do not include individuals eligible for UC where it may have been necessary, due to the filing environment, to accept initial claims for both programs.

c. Column 3, First Payments. Enter the number of payments which represent, for any individual, the first week for which assistance is paid in the pandemic assistance period.

d. Column 4, Weeks Claimed. Enter the total number of weeks for which PUA is claimed during the report period whether or not PUA is actually paid. If claims are filed weekly, the number of weeks will equal the number of weekly received during the report period. If claims are filed other than weekly claims, the number of weeks will equal the number of weeks during the report period.

e. Column 5, Weeks Compensated. Enter the number of weeks of unemployment for which PUA was paid during the report period. A week of unemployment

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compensated is any week of unemployment for which PUA funds are paid, regardless of amount.

f. Column 6, Amount Compensated. Enter the amount of PUA funds represented by the weeks reported in column 5.

4. Section B. Denial and Appeals Activity.

a. Column 7, Weeks of PUA Denied. Enter the number of weeks of unemployment where a PUA payment was denied for which an individual, except for the reason of the denial, would have been eligible to receive a PUA payment.

NOTE: For columns 8 through 13, the entries refer to the number of cases received or disposed of during the report period by authority (i.e., first level state appeals authority and the second level state higher authority). All cases, including cases disposed of before reaching the appeals authority, should be included. Definitions of case, authority, disposal, etc., are those developed for the PUA program where found or, when these do not exist, are those used in the state UI program.

b. Columns 8 and 9, Appeals Filed. In columns 8 and 9, distribute, by type of authority, the appeal cases or requests for review received during the month. In addition, provide a sub-breakout of the Total for self-employed individuals in line 202.

c. Columns 10 and 11, Appeals Disposed. Enter in columns 10 and 11 the total number of cases disposed during the month by authority level. In line 202, provide the number of cases disposed of involving self-employed individuals.

d. Columns 12 and 13, Favor of Appellant. Enter in columns 12 and 13 the number of appeal decisions included in columns 10 and 11, which were in favor of the appellant by authority level. In line 202 enter a breakout of self-employed individuals who appealed and had the decision in their favor.

5. Section C. Overpayment Activity.

a. Columns 14, 15, and 16, Overpayments. In column 14, Cases, line 301, enter the number of cases, including willful misrepresentation (fraud) determined during the report period as an overpayment, regardless of when it occurred. In line 302 provide a sub-breakout of the number of cases determined as fraud cases. In column 15, Weeks, enter in line 301 the number of weeks of PUA overpaid in connection with the cases reported in column 14; enter the number of weeks of fraud overpayments included in line 301. In column 16, Amount, enter in line 301, the amount overpaid represented by cases reported in column 14. Provide a sub-breakout of the amount involving fraud in line 302.

b. Columns 17, Administrative Costs. This data cell will self-populate and reflect computed administrative costs based on workload items reported in Section A. and Section B. above. Minute per unit factors reflected in the annual UIPL advisory communicating target allocations for base administrative grants and staff year usage

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information from the UI-1 report will be used to compute staffing levels needed to process the initial claims (line 101 column 1), weeks claimed (line 101 column 4) and appeals disposed (line 201 column 10) workload. Staff salary rates will reflect the rates used for quarterly above base computations. Staffing costs will be increased by the applicable factor to account for leave, and resulting costs will be increased by 19% to account for overhead.

Time factors and staff salary rates necessary for the computations of administrative costs described above for Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau will be communicated to each territory separately.

H. Checking the Report

1. General Checks. Entries should be made for all required items. If the item is inapplicable, or if applicable but no activity corresponding to the items occurred during the report period, a zero should be entered. A report containing missing data cannot be sent to the National Office, but can be stored on the state's system.

2. Arithmetic Checks.

   a. For columns 1, 2, and 8 through 13, the entries in line 102 and 202 respectively, should be equal to or less than the entries in line 101 or 201.

   b. For columns 14 through 16, the entries in line 302 should be equal to or less than line 301.

Signature. Signature is only required if reports are sent manually to the National Office.

PLAINTIFF'S EXHIBIT C

EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210	CLASSIFICATION UI
	CORRESPONDENCE SYMBOL OUI/DUIO
	DATE April 10, 2020

ADVISORY: **UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 17-20**

TO: STATE WORKFORCE AGENCIES

FROM: JOHN PALLASCH
Assistant Secretary

SUBJECT: Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020—Pandemic Emergency Unemployment Compensation (PEUC) Program Operating, Financial, and Reporting Instructions

1. **Purpose**. To provide states with operating, financial, and reporting instructions for the PEUC program authorized by Section 2107 of the CARES Act of 2020, Public Law (Pub. L.) 116-136.

2. **Action Requested**. The U.S. Department of Labor's (Department) Employment and Training Administration (ETA) requests that State Workforce Administrators provide the information in this Unemployment Insurance Program Letter (UIPL) and all attachments to appropriate program and other staff in state workforce systems as they implement the Unemployment Insurance (UI)-related provisions in the CARES Act that respond to the economic effects of the Coronavirus Disease 2019 (COVID-19).

3. **Summary and Background**.

   a. Summary. On March 27, 2020, the President signed into law the CARES Act, which includes the Relief for Workers Affected by Coronavirus Act set out in Title II, Subtitle A. Section 2107 of the CARES Act creates a new temporary federal program called Pandemic Emergency Unemployment Compensation (PEUC) that provides up to 13 additional weeks of benefits to individuals who have exhausted their regular unemployment compensation (UC) entitlement and also provides funding to states to administer the program.

   b. Background. The CARES Act was designed to mitigate the economic effects of the COVID-19 pandemic in a variety of ways. The CARES Act includes a provision that provides temporary benefits for individuals who have exhausted their entitlement to regular UC and coverage for individuals who are not eligible for regular UC, such as individuals who are self-employed or have limited recent work history. These

RESCISSIONS	EXPIRATION DATE
None	Continuing

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individuals may include certain gig economy workers, clergy and those working for religious organizations not covered by regular UC, and other workers who may not be covered by the regular UC program under their respective state laws.

This UIPL focuses on Section 2107 of the CARES Act, which authorizes the temporary PEUC program. In short, this program provides eligible individuals with up to 13 additional weeks of benefits to individuals who have exhausted their regular unemployment compensation (UC) entitlement.

Importance of Program Integrity. The programs and provisions within the CARES Act operate in tandem with the fundamental eligibility requirements of the Federal-State UI program, which remain in place and must be adhered to. In addition, some of the CARES Act programs include new eligibility requirements which states will need to apply. These requirements include that individuals are only entitled to benefits if they are no longer working through no fault of their own and that individuals must be able and available to work.

States play a fundamental role in ensuring the integrity of the UI program. While states have been provided some flexibilities as a result of COVID-19, those flexibilities are generally limited to dealing with the effects of COVID-19, as discussed in UIPL Nos. 10-20, 13-20, 14-20, 15-20, and 16-20. States must ensure that individuals only receive benefits in accordance with these statutory provisions.

Further, quitting work without good cause to obtain UI benefits is fraud. Section 2107(e) expressly provides that if an individual has obtained these benefits through fraud, the individual is ineligible for any additional benefit payments, must pay back the benefits, and is subject to criminal prosecution under 18 U.S.C. §1001 and other Federal laws. States are expected to enforce these statutory provisions.

The Department is actively working with states receiving funding under the CARES Act to provide UI benefits only to individuals who are entitled to such benefits. The Department will also be actively engaged with its Office of the Inspector General (OIG) to ensure program integrity. The CARES Act includes an appropriation of $26 million to the Department's OIG to carry out audits, investigations, and other oversight activities related to states' adherence to existing UI laws and policies, as well as the provisions of the CARES Act.

4. **Guidance.** Key information about the PEUC program is provided below, including an overview of the PEUC program, important program dates, funding of PEUC benefits and administration, and reporting and other instructions.

   a. **Program overview.**

   PEUC is a temporary program that provides up to 13 weeks of 100% Federally-funded benefits to individuals who:

- have exhausted all rights to regular compensation under state law or Federal law with respect to a benefit year that ended on or after July 1, 2019;
- have no rights to regular compensation with respect to a week under any other state UC law or Federal UC law, or to compensation under any other Federal law;
- are not receiving compensation with respect to a week under the UC law of Canada; and
- are able to work, available to work, and actively seeking work, while recognizing that states must provide flexibility in meeting the "actively seeking work" requirement if individuals are unable to search for work because of COVID-19, including because of illness, quarantine, or movement restriction.

For purposes of PEUC eligibility, an individual is deemed to have exhausted benefits when:

- no payments of regular UC may be made under state law because such individual has received all available regular UC based on employment or wages during such individual's base period; or
- the individual's right to such regular UC has been terminated by reason of the expiration of the benefit year with respect to which such rights existed (excluding any benefit year that ended before July 1, 2019).

The payment of Extended Benefits (EB) for which an individual is otherwise eligible must be deferred until after the payment of any PEUC for which the individual is concurrently eligible. Refer to UIPL No. 14-20 for additional information on the coordination of programs.

b. **Important program dates.** PEUC is payable in a state beginning the week following the week in which an agreement is signed with the Secretary (see definition of "Agreement" in Attachment I, section B). In states where the week of unemployment ends on Saturday, the first possible week for which PEUC may be paid is the week ending April 4, 2020. In states where the week of unemployment ends on Sunday, the first possible week for which PEUC may be paid is the week ending April 5, 2020.

PEUC is not payable for any week of unemployment ending after December 31, 2020. Accordingly, in states where the week of unemployment ends on a Saturday, the last week that PEUC benefits may be paid is the week ending December 26, 2020. For states where the week of unemployment ends on a Sunday, the last week that PEUC is payable is the week ending December 27, 2020.

c. **Program administration funding for PEUC program.** The PEUC program is available in the 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, provided the state/territory signs an agreement with the Department (See definition of "Agreement" in Attachment I, section B).

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The cost of PEUC benefits is 100% federally funded. States may not charge employers for any PEUC benefits paid. Implementation costs and ongoing administrative costs are also 100% federally funded.

If a state wishes to have the administrative costs for implementation of this program federally funded, the state must submit a Supplemental Budget Request (SBR) detailing such costs. SBRs are limited to one-time costs that are attributable to implementation of PEUC.

Permissible implementation costs include:

- Computer programming and other technology costs;
- Implementation of necessary business processes required to create the program implementation;
- Training and travel;
- Notices to beneficiaries; and
- Overhead related only to the above.

The basis for these estimated costs must be included in the SBR application. Calculations for costs for state staff and contractors should be shown in accordance with the SBR instructions in ET Handbook No. 336, *Unemployment Insurance State Quality Service Plan Planning and Reporting Guidelines, 18th Edition.* ETA encourages states to submit these forms by **April 30, 2020**, by electronic submission to the National Office at covid-19@dol.gov, with a copy to the appropriate Regional Office. For application submission instructions, refer to SBR application template in **Attachment IV**, SBR Application Template, and **Attachment V**, Instructions for Completing the SF-424 and SF-424A.

State agencies will be able to request on-going administrative costs for PEUC via the quarterly UI-3 report. More specific information is included in **Attachment I**, Section G "Reporting Instructions."

d. **Additional Guidance and Instructions**. Additional guidance and instructions on implementing and operating the PEUC program are provided in the attachments to this UIPL. **Attachment I** of this UIPL provides states with the implementation and operating instructions, including definitions, administrative requirements, financial information, and reporting information. **Attachment II** provides the general provisions concerning certifications and assurances for PEUC. **Attachment III** provides the statutory language in Section 2107 of the CARES Act creating PEUC. **Attachment IV** provides a template for the SBR Application template. **Attachment V** provides Instructions for completing the Standard Form (SF) 424 and SF 424A.

5. **Inquiries**. States should direct inquiries to the covid-19@dol.gov and copy the appropriate Regional Office.

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6. **References**.

- Coronavirus Aid, Relief, and Economic Security (CARES) Act, 2020, Pub. L. 116-136, including Title II Subtitle A Relief for Workers Affected by Coronavirus Act;
- Section 303 of the Social Security Act, codified at 42 U.S.C. §503;
- Federal-State Extended Unemployment Compensation Act of 1970, 26 U.S.C. §3304 note;
- Sections 231 and 233 of the Trade Act of 1974, as amended, 19 U.S.C. §§2291 and 2293;
- Section 410 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 USC 5177;
- 20 C.F.R. Parts 603, 604, 615, 616, 617, and 650;
- ET Handbook No. 384, *Unemployment Compensation for Ex-Servicemembers, 2nd Edition*;
- ET Handbook No. 391, *UCFE Handbook for State Agencies*;
- ET Handbook No. 401, *UI Report Handbook, 5th Edition*;
- ET Handbook No. 336, *Unemployment Insurance State Quality Service Plan Planning and Reporting Guidelines, 18th Edition*;
- UIPL No. 15-20, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 Federal Pandemic Unemployment Compensation (FPUC) Program Operating, Financial, and Reporting Instructions*, issued April 4, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=9297;
- UIPL No. 14-20, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 – Summary of Key Unemployment Insurance (UI) Provisions Regarding Temporary Emergency State Staffing Flexibility*, issued April 2, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3390;
- UIPL No. 13-20, *Families First Coronavirus Response Act, Division D Emergency Unemployment Insurance Stabilization and Access Act of 2020*, issued March 22, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=8634;
- UIPL No. 10-20, *Unemployment Compensation (UC) for Individuals Affected by the Coronavirus Disease 2019 (COVID-19)*, issued March 12, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=8893; and
- UIP No. 5-13, *Work Search and Overpayment Offset Provisions Added to Permanent Federal Unemployment Compensation Law by Title II, Subtitle A of the Middle Class Tax Relief and Job Creation Act of 2012*, issued January 10, 2013, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3698.

7. **Attachment(s)**.

- Attachment I: Implementing and Operating Instructions for the Pandemic Emergency Unemployment Compensation (PEUC) Program;
- Attachment II: General Provisions for Administering the Pandemic Emergency Unemployment Compensation (PEUC) Program;
- Attachment III: Statutory Language of Title II, Subtitle A, Section 2107 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020;

- Attachment IV: Supplemental Budget Request (SBR) Application; and
- Attachment V: Instructions for Completing the SF-424 and SF-424A.

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Implementing and Operating Instructions for the Pandemic Emergency Unemployment Compensation (PEUC) Program

A. Introduction.

On March 27, 2020, the President signed Public Law (Pub. L.) 116-136, the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020. Section 2107 creates a new Federal program called Pandemic Emergency Unemployment Compensation (PEUC) and provides funding to states to administer the program.

The PEUC program allows states to enter into an agreement with the Secretary of Labor (Secretary) to pay up to 13 weeks of benefits to individuals who:

- have exhausted all rights to regular unemployment compensation (UC) under state or Federal law;
- have no rights to regular UC under any other state or Federal law;
- are not receiving compensation under the UC laws of Canada; and
- are able to work, available for work, and actively seeking work, while recognizing that states must provide flexibility in meeting the "actively seeking work" requirement if individuals are unable to search for work because of COVID-19, including because of illness, quarantine, or movement restriction.

For purposes of PEUC eligibility, an individual is deemed to have exhausted benefits when:

- no payments of regular UC can be made under state law because such individual has received all available regular UC based on employment or wages during such individual's base period; or
- the individual's right to such regular UC has been terminated by reason of the expiration of the benefit year with respect to which such rights existed (excluding any benefit year that ended before July 1, 2019).

Both the costs of the new Federal benefit and the costs of program administration are 100% federally funded. This guidance explains the eligibility requirements and the administrative functions associated with the program.

B. Definitions.

This section contains the definitions of terms used throughout this document.

1. "Act" means the CARES Act, including Title II Subtitle A, The Relief for Workers Affected by Coronavirus Act.
2. "Additional compensation" means compensation fully financed by a state and payable under a state law by reason of conditions of high unemployment or by reason of other special factors, and when so payable, includes compensation payable pursuant to 5

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U.S.C. chapter 85.

3. "Agreement" means the agreement between a state and the Secretary under which the state agency makes payments, as the Secretary's agent, of PEUC in accordance with Section 2107 of the CARES Act as interpreted by the Secretary as set forth in these instructions or any other instructions issued by the Secretary.
4. a. "Benefit Year" means the benefit year as defined in applicable state law.
   b. "Applicable Benefit Year" means, with respect to an individual, the current benefit year if, at the time an initial claim for PEUC is filed, the individual has an unexpired benefit year, ending on or after July 1, 2019, (this means, in general, that an individual's benefit year must have ended on July 6, 2019, or later) only in the state in which such claim is filed; or, where the individual has more than one unexpired benefit year in one or more states, the individual's most recent benefit year ending on or after July 1, 2019. For this purpose, the most recent benefit year, for an individual who has unexpired benefit years in more than one state when an initial claim for PEUC is filed, is the benefit year with the latest ending date, or, if such benefit years have the same ending date, the benefit year in which the latest continued claim for regular compensation was filed.
5. "Applicable State" means the state where the individual is an exhaustee for PEUC purposes, and, in the case of a combined wage claim for regular compensation, the term means the "paying state" for such claim as defined in 20 C.F.R. 616.6(e).
6. "Applicable State Law" means the state law of the applicable state for an individual.
7. "Base Period" means the base period as determined under the applicable state law for the individual's applicable benefit year.
8. "Compensation" means cash benefits (including dependents' allowances) payable to individuals with respect to their unemployment. "Compensation" is also referred to as "Unemployment Compensation" or "UC."
9. "Extended compensation" means compensation payable to an individual for weeks of unemployment beginning in an extended benefit period, under those provisions of the state law which satisfy the requirements of the Federal-State Extended Unemployment Compensation Act of 1970 (Pub. L. 91-373), and when so payable includes additional compensation and compensation payable pursuant to 5 U.S.C. chapter 85. Extended compensation is referred to as Extended Benefits or EB.
10. "Pandemic Emergency Unemployment Compensation" means the compensation payable under Section 2107 of the CARES Act, and which is referred to as PEUC.
11. "Regular compensation" means compensation payable to an individual under any state law, and, when so payable, includes compensation payable under 5 U.S.C. chapter 85, but does not include extended compensation and additional compensation.
12. "Secretary" means the U.S. Secretary of Labor.
13. "State" means the states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands.
14. "State Agency" means the unemployment compensation agency of the state administering the state law.
15. "State Law" means the unemployment compensation law of a state approved by the Secretary under Section 3304(a) of the Internal Revenue Code of 1986 (26 U.S.C. §3304(a)).
16. "Week" means a week as defined in the applicable State's UC law.
17. "Week of Unemployment" means a week of total, part-total, or partial unemployment as

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defined in the applicable state law, which must be applied to claims filed under the requirements of the PEUC program in the same manner and to the same extent as if the individual filing a claim for PEUC were filing a claim for regular compensation.

C. Operating Instructions.

1. Eligibility for PEUC.

   a. Basic Eligibility Requirements. To be eligible for a week of PEUC, in addition to meeting the applicable state law provisions, an individual must:

      - have exhausted all rights to regular compensation under the applicable state or Federal law with respect to the applicable benefit year;
      - have no rights to regular compensation with respect to a week under such law or any other state or Federal UC law;
      - certify that he or she is not receiving compensation with respect to such week under the UC law of Canada; and
      - be able to work, available to work, and actively seeking work. However, States must provide flexibility in meeting the "actively seeking work" requirement if individuals are unable to search for work because of COVID-19, including because of illness, quarantine, or movement restriction.

   b. Determining Exhaustees. An individual is deemed to have exhausted his or her right to regular compensation under a State law when:

      - no payments of regular compensation can be made under such law because such individual has received all regular compensation available to such individual based on employment or wages during such individual's base period; or
      - such individual's rights to such compensation have been terminated by reason of the expiration of the benefit year with respect to which such rights existed

   Exhaustees cease to be exhaustees when they can establish a valid new benefit year. Therefore, at each quarter change, a State must check to see if an individual has earned enough wages to:

   - establish a new benefit year in the State;
   - establish a new benefit year in any other State; or
   - establish a new benefit year if wages from one or more states are combined (a combined wage claim (CWC)).

   If the individual can establish a new benefit year in the filing State or in any other state, the individual may not continue to collect PEUC. In these cases, the individual

should be advised that he or she no longer qualifies for the PEUC claim because of eligibility for a regular or CWC claim and should be instructed: (1) to file a claim for regular UC, or (2) to contact the other state to file a regular UC claim, or CWC claim as appropriate.

Once the claimant qualifies for a new claim (regular or a CWC), payments on the PEUC claim must cease, even if the Weekly Benefit Amount (WBA) for the new UC claim is lower than what the claimant was receiving on the PEUC claim.

If the individual remains unemployed and otherwise eligible, the claimant may resume collection of the original PEUC after exhaustion of the second regular UC claim, as long as the claimant has not already received 13 weeks of PEUC on the first claim.

If a redetermination or an appeal decision results in a determination that an individual is entitled to more or less regular compensation, the individual's status as an exhaustee must be redetermined, as appropriate.

2. Beginning and Ending of the PEUC Program in a State. Under Section 2107 of the CARES Act, PEUC is payable in a State beginning the first week after the date on which the State enters into an agreement with the Department. In States where the week of unemployment ends on Saturday, the first week for which PEUC may be paid is the week ending April 4, 2020, provided an agreement is in place no later than March 28, 2020. In a State where the week of unemployment ends on a Sunday, the first week for which PEUC may be paid is the week ending April 5, 2020.

   PEUC is only payable for weeks of unemployment ending on or before December 31, 2020. Accordingly, in States where the week of unemployment ends on a Saturday, the last week that PEUC is payable is the week ending December 26, 2020. For States where the week of unemployment ends on a Sunday, the last week that PEUC is payable is the week ending December 27, 2020.

3. Termination of PEUC Agreement. Either party, upon thirty (30) days written notice, may terminate the PEUC Agreement. The Department reserves the right to terminate this Agreement if it determines that the state does not have an adequate system for administering such assistance, including because the state is not adequately ensuring that individuals receiving benefits under the PEUC Program are eligible for such benefits. In the case of termination, the PEUC period will end thirty (30) days from the date the notice of termination is given. PEUC will only be payable for weeks which end before the date the termination of the agreement is effective.

4. PEUC Eligibility and Relation to Other Types of Benefit Payments.

   a. Federal Pandemic Unemployment Compensation (FPUC) is available to individuals receiving PEUC for weeks of unemployment ending on or before July 31, 2020, as discussed in UIPL No. 15-20.

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b. Extended Benefits (EB). Section 2107(a)(5) of the CARES Act requires that the payment of extended compensation for which an individual is otherwise eligible must be deferred until after the payment of any PEUC for which the individual is concurrently eligible. In this case, EB entitlement is deferred, not reduced. Therefore, if the State is in an EB period when a PEUC claim is exhausted, individuals may receive any remaining EB entitlement, as long as the EB eligibility provisions are met.

c. Trade Readjustment Allowances (TRA). The maximum amount of PEUC payable to an individual, who is also entitled to TRA, must not be reduced by reason of TRA entitlement.

d. Disaster Unemployment Assistance (DUA). An individual is not eligible for DUA with respect to a week of unemployment under Section 410 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, (42 U.S.C. §5177) if the individual is eligible to receive PEUC compensation for that week.

5. PEUC Weekly Benefit Amount (WBA).

a. Total Unemployment.

- The WBA payable to an individual for a week of total unemployment is equal to the amount of regular compensation (including dependents' allowances) payable to such individual during the applicable benefit year for a week of total unemployment under the applicable state law,

and

- The weekly amount of FPUC under section 2104 of the CARES Act, which is payable for weeks of unemployment ending on or before July 31, 2020. See UIPL 15-20.

b. Partial and Part-Total Unemployment.

- The WBA payable to an individual for a week of partial or part-total unemployment is equal to the amount of regular compensation (including dependents' allowances) payable to such individual during the applicable benefit year for a week of partial or part-total unemployment under the applicable state law,

and

- The weekly amount of FPUC under section 2104 of the CARES Act, which is payable for weeks of unemployment ending on or before July 31, 2020. See UIPL 15-20.

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6. Establishment of PEUC Account. Section 2107(b) of the CARES Act requires States to establish, for each eligible individual who files an application for PEUC, a PEUC account with respect to the individual's applicable benefit year. The amount established in the PEUC account must be equal to 13 times the individual's average weekly benefit amount (including dependent's allowances), which includes the amount of FPUC under Section 2104.

   States have flexibility in how they operationalize the payment of benefits in relationship to the PEUC account.

7. Nonreduction Rule. An agreement with a state under section 2107 of the CARES Act will cease to apply, if the method governing the computation of regular compensation under the state's law has been modified in a manner such that the number of weeks (the maximum benefit entitlement), or the average weekly benefit amount, of regular compensation which will be payable during the period of the agreement will be less than the number of weeks, or the average weekly benefit amount, of the average weekly benefit amount of regular UC which would otherwise have been payable during such period under the state law, as was in effect on January 1, 2020. "Maximum benefit entitlement" means the amount of regular UC payable to an individual with respect to the individual's benefit year.

8. Record Maintenance and Disposal of Records.

   a. Record Maintenance. Each State must maintain records on the administration of the PEUC program and will make all such records available for inspection, examination, and audit by such Federal officials, employees as the Department may designate, or as otherwise required by the law. Reference ET Handbook No. 401, *UI Report Handbook, 5th Edition*, for details.

   b. Disposal of Records. The electronic/paper records created in the administration of the PEUC program must be maintained by the State for three years after final action (including appeals or court action) on the payments, or for less than the three-year period if copied by micro photocopy or by an electronic imaging method. At the end of the three-year period, the PEUC records must be transferred to state accountability under the conditions for the disposal of records that apply to UCFE and UCX records, as explained in Chapter X of ET Handbook No. 391 (1994 Edition) (OMB No. 1205-0179) and Chapter I of ET Handbook No. 384 (1994 Edition) (OMB No. 1205-0176).

9. Disclosure of Information. Information in records made and maintained by the State agency while administering the PEUC program must be kept confidential, and information in such records may be disclosed only in the same manner and to the same extent as information is disclosed with respect to regular UC. This information may be disclosed under provisions of the applicable state law meeting the requirements of 20 C.F.R. Part 603. As provided under 20 C.F.R. Part 603.4(b), the confidentiality

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requirements do not apply when such information is being provided in the aggregate, provided it cannot be combined with other publicly-available information to reveal any such identifying particulars about an individual or the individual's past or present employer.

10. Inviolate Rights to PEUC. The individual's rights to PEUC must be protected in the same manner and to the same extent as individual's rights to regular UC are protected under the applicable State law. Such measures must include protection of individuals from waiver, release, assignment, pledge, encumbrance, levy, execution, attachment, and garnishment of their rights to PEUC. In the same manner and to the same extent, individuals must be protected from discrimination and obstruction in regards to seeking, applying for, and receiving PFUC.

D. Processing claims for PEUC.

1. Notifications.

   a. *Identification and Notification of Potentially Eligible Claimants.* The State must identify individuals who are potentially eligible for PEUC and provide them with appropriate written notification of their potential entitlement to PEUC, including filing instructions. This includes notifying individuals who have established a claim with a benefit year ending after July 1, 2019 and who have either exhausted their entitlement or whose benefit year has expired.

   Note that PEUC is only payable in States that have an agreement with the Secretary and that start with weeks of unemployment ending on or after April 4, 2020 (or April 5, 2020 if the state's week of unemployment ends on a Sunday), provided the individual is otherwise eligible.

   b. *Interstate Claims.* PEUC is payable to individuals filing under the Interstate Benefit Payment Plan in the same manner and to the same extent that benefits are payable to intrastate claimants. The paying state is responsible for identifying and notifying all potentially eligible interstate claimants of their potential eligibility, including filing instructions. Refer to Handbook 392, *Handbook for Interstate Claimstaking, ET Handbook No. 392, Appendix A, 2nd Edition* for definitions and more information on the Interstate Benefit Payment Plan

   c. *Notification of Media.* To assure public knowledge of the status of the PEUC program, the state must notify all news media with statewide coverage of the beginning of the PEUC program.

2. Applicability of State Law Provisions. Under Section 2107 of the CARES Act, except where inconsistent with the CARES Act or with the operating instructions promulgated to carry out the CARES Act, all terms and conditions of the state UC law applicable to claims for and payment of regular UC apply to claims for and payment of PEUC. States are reminded that they may have certain flexibilities in applying their requirements in

light of the efforts to mitigate COVID-19, in addition to the specific flexibilities for "actively seeking work" in Section 2107(a)(7). See UIPL No. 10-20.

The provisions of the applicable state law that apply to claims for PEUC include but are not limited to:

a. Claim Filing and Reporting;
b. Information and Due Process to individuals, as appropriate;
c. Notices to individuals and employers, as appropriate, including notice to each individual of each determination and redetermination of eligibility for or entitlement to PEUC;
d. Determinations, redeterminations, appeals, and hearings;
e. Disqualification, including disqualifying income provisions;
   Note: An individual is not entitled to receive PEUC for a week if the individual is ineligible for benefits for the week due to a disqualification under the applicable state law.
f. Ability to work and availability for work;
g. Actively seeking work;
h. The Interstate Benefit Payment Plan; and
i. The Interstate Arrangement for Combining Employment and Wages.

Compliance with the requirement to actively seek work for PEUC purposes means an individual:

a. is registered with employment services as required under state provisions;
b. is engaged in an active search for employment that is appropriate in light of the employment available in the labor market, the individual's skills and capabilities, and includes a number of employer contacts that is consistent with the standards communicated to the individual by the state;
c. is maintaining a record of work search activities, including employers contacted, method of contact, and date contacted, and when requested, is able to provide such information to the state according to state provisions.

Any temporary emergency flexibility measures that states have adopted for regular UC as described in UIPL Nos. 10-20 and 13-20 are applicable to the administration of PEUC. Additionally, section 2107(a)(7)(B) of the CARES Act requires that states provide flexibility with respect to the "actively seeking work" requirements for PEUC "in case of individuals unable to search for work because of COVID-19, including because of illness, quarantine, or movement restriction."

3. Claims for PEUC. In processing claims for PEUC, states must verify that claimants have no entitlement to regular UC before processing the application for PEUC. If the applicant meets the requirements in Section C1, the state should process the PEUC application. In situations where an individual may be eligible for PEUC in another state, assessing whether an individual is eligible for regular UC in that state before establishing a PEUC claim can be complex. When coordinating with other states to assess an individual's

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eligibility, states should access the State Identification (SID) inquiry screen and/or the Interstate Benefits Inquiry (IBIQ) screen in the Interstate Connection Network (ICON) to check for claims and wages in other states. All states have access to ICON's user guides for more detailed instructions (www.ui-icon.org).

a. Intrastate Initial Claims. An initial claim for PEUC will be filed by an individual according to the applicable state's manual, remote, or electronic filing procedures.

b. Interstate Initial Claims. Interstate PEUC claims will be filed on the same forms and in the same manner as all other interstate initial claims against the paying state. Before accepting an initial PEUC claim, the state that is taking the claim must review the individual's work history, examine potential entitlement and advise the individual of all filing options. If the individual has sufficient employment and wages to establish a new benefit year under any state or federal program, including the combined wage arrangement, there is no eligibility under the PEUC program. Refer to Handbook 392, *Handbook for Interstate Claimstaking, ET Handbook No. 392, Appendix A, 2nd Edition.*

c. Intrastate and Interstate Weeks Claimed. Claims for payments of PEUC for weeks of unemployment must be filed at the same times and in the same manner as claims for regular compensation are filed under the applicable state law, and on forms or electronic filing procedures as furnished to the individual by the state agency.

d. Administrative, entitlement, and eligibility requirements provided in these instructions also apply to claims filed under the CWC program, except where inconsistent with combined wage (and interstate, when applicable) procedures, policies and rules. Refer to Handbook 399, *Interstate Arrangement for Combining Employment and Wages.*

When a PEUC determination or redetermination is issued on a CWC claim, no Report of Determination of Combined-Wage Claim, TC-IB5, will be issued to the transferring state. The paying state will not bill any state that transfers in wages earned in its state (i.e., the transferring state) for PEUC. The paying state will charge all PEUC compensation paid on CWC claims directly to the Extended Unemployment Compensation Account (EUCA) in accordance with the fiscal instructions provided in these operating instructions.

4. Secretary's Standard. The procedures for reporting and filing claims for PEUC must be consistent with these instructions and the Secretary's "Standard for Claim Filing, Claimant Reporting, Job Finding and Employment Services"" (Employment Security Manual, Part V, sections 5000 et. seq.).

5. Determination of Entitlement and Notices to Individuals.

a. Determination of Initial Claim. When an individual files an initial claim for PEUC, the State agency must determine promptly the eligibility of the individual and, if

eligible, the weekly and maximum benefit amounts of PEUC payable. If denied PEUC, the individual must be issued a determination that is appealable. For additional information about the coordination of benefits with other UI programs, refer to UIPL 14-20.

b. Determination of Weekly Claims. The state agency must promptly, upon the filing of a claim for a payment of PEUC for a week of unemployment, determine whether the individual is entitled to a payment of PEUC for such week, and, if entitled, the amount of PEUC to which the individual is entitled to and issue a prompt payment.

c. Redetermination. An individual filing a PEUC initial claim or weekly certification has the same right to request a reconsideration of a determinations or as are provided for in the applicable state law for regular compensation.

d. Notices to Individual. The state agency must give written notice to the individual of any determination or redetermination of an initial claim and all weekly claims. Each notice must include such information regarding rights to reconsideration or appeal, or both, using the same process that is used for determinations or redeterminations of regular compensation.

e. Promptness. Full payment of PEUC when due must be made with the greatest promptness that is administratively feasible.

f. Secretary's Determination Standard. The procedures for making determinations and redeterminations and furnishing written notices of determinations, redeterminations, and rights of appeal to individuals claiming PEUC must be consistent with the Secretary's "Standard for Claim Determinations—Separation Information" (Employment Security Manual, Part V, sections 6010 et seq.)

6. Appeal and Hearing

a. Applicable State Law. The applicable state law provisions concerning the right of appeal and fair hearing from a determination or redetermination of entitlement to regular compensation shall apply to determinations and redeterminations of eligibility for or entitlement to PEUC.

b. Rights of Appeal and Fair Hearing. The right of appeal and opportunity for a fair hearing to claims for PEUC must be consistent with these instructions and with sections 303(a)(1) and 303(a)(3) of the Social Security Act (SSA) (42 U.S.C. §§503(a)(1) and 503(a)(3)).

c. Promptness of Appeals Decisions.

- Decisions on appeals under the PEUC program must comply with the "Standard for Appeals Promptness—Unemployment compensation" in 20 C.F.R. Part 650.

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- Any applicable state law provision allowing the advancement or priority of unemployment compensation cases on judicial calendars, or otherwise intended to provide for the prompt payment of unemployment compensation when due, must apply to proceedings involving entitlement to PEUC.

7. Non-Charging Employers. The cost of PEUC benefits to eligible individuals is 100% federally funded. States may not charge employers for any PEUC benefits paid.

E. Fraud and Overpayments.

1. Fraud. Under Section 2107(e) of the CARES Act, an individual commits fraud if he or she knowingly has made or caused to be made by another, a false statement or representation of a material fact, or knowingly has failed, or caused another to fail, to disclose a material fact, and as a result of such false statement or representation or of such nondisclosure such individual has received an amount of PEUC to which such individual was not entitled.

   Section 2107(e) only provides for an individual being ineligible for future PEUC benefits in accordance with the applicable provisions of state UC law. It does not permit the establishment of a penalty on PEUC that was fraudulently obtained. Therefore, States may not impose fraud penalty provisions on PEUC payments. Any individuals committing fraud under this program is subject to prosecution under 18 U.S.C §1001 and other Federal laws.

2. Overpayments. A PEUC overpayment occurs when an individual has received a PEUC payment to which he or she is not entitled.

3. Opportunity for a Hearing. Under 2107(e)(3)(B) of the CARES Act, a State may not require repayment of a PEUC overpayment until it determines that the payment was an overpayment, the individual was provided notice of the determination, the individual had an opportunity for a fair hearing, and the determination is final.

4. Waiver of Overpayments. The State has authority to waive repayments of PEUC if the payment was without fault on the part of the individual and such repayment would be contrary to equity and good conscience.

5. Recovery Provisions. If the overpayment amount is not subject to waiver, the State agency must recover the amount of PEUC to which an individual was not entitled in accordance with the same procedures as apply to recovery of overpayments of regular UC paid by the State.

   PEUC benefits may only be offset from other State and Federal UC for three years after the date such individual received the PEUC payment to which he or she was not entitled. After three years, a State may continue to recover PEUC overpayments through means other than benefit offsets, according to State law.

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6. Benefit Offsets. Consistent with section 2107(e)(3), a state must recover PEUC overpayments from any additional PEUC payments to which the individual is entitled and from any other UC payable under state or Federal law administered by the state agency (including FPUC and PUA from the CARES Act, and any other assistance or allowance payable with respect to a week of unemployment under any other state or Federal law).

   Additionally, PEUC payments must be reduced to recover overpayments from any other state and Federal unemployment benefit programs, if the state has a cross-program offset agreement in place under Section 303(g)(2), SSA (42 U.S.C. §503(g)(2)).

   A state may not offset more than 50% from the PEUC payment to recover overpayments from any state or Federal unemployment benefit program.

   A state has significant flexibility in the way it implements the offset requirement. While a state must attempt to recover the full amount of the overpayment, a state may limit the amount that will be deducted from each payment as noted on page 4 of UIPL No. 05-13, *Work Search and Overpayment Offset Provisions Added to Permanent Federal Unemployment Compensation Law by Title II, Subtitle A of the Middle Class Tax Relief and Job Creation Act of 2012.*

F. Financial Information and Instructions:

1. Payment to States. Requesting PEUC Benefit Funds—Under Section 2107(c) of the CARES Act, each state that has entered into an agreement with the Secretary to pay PEUC will be paid an amount equal to 100% of the amount of PEUC paid to individuals by the state under the agreement and in full accordance with the CARES Act and these instructions. Pursuant to section 2107(d)(1), states will request funds from the Extended Unemployment Compensation Account (EUCA) to pay all PEUC benefits. All requests will go through the Automated Standard Application for Payments (ASAP) system. Drawdown requests must adhere to the funding mechanism stipulated in the Treasury–State Agreement executed under the Cash Management Improvement Act of 1990. Requests will be funded in the same manner as all ASAP transactions elected by the states (FEDWIRE or ACH to the state benefit payment account).

   There will be a new line in the ASAP for making drawdowns to pay PEUC benefits. The line will be clearly labeled PANDEMIC EMERGENCY UC (PEUC).

   PEUC benefits paid to former employees of state and local governments, former Federal employees and former service members, "501(c)(3)" nonprofit organizations and Federally-recognized Indian tribes are funded from U.S. Treasury general revenues through the EUCA. This does not affect the process for requesting funds, but does affect the reporting of those benefits on the ETA 2112. States are to report all PEUC payments, including reimbursable, UCFE/X on line 40, column C and column F. (Note that it does not matter whether these employers have elected reimbursement status.) See Reporting Instructions, Paragraph 2.f for details.

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PEUC Administrative Funds. Section 2107(d)(2) of the Act appropriates funds from the Employment Security Administration Account (ESAA) in the UTF, to pay costs related to the administration of the PEUC agreement.

States will receive PEUC administrative funds through the contingency entitlement process. See Reporting Instructions, Paragraph 2.h. The supplemental budget request process will be used for states to request funds for implementation.

2. PEUC Accounting

   a. Obligational Authority. The Grant Officer will assign a separate line on the UI program notices of obligational authority for PEUC administrative grant funds, and a separate sub-account for PEUC will be set up in the Payment Management System for states to draw down PEUC administrative funds.

   b. Administrative Fund Accounting. Because of the separate appropriation for PEUC administrative funds and the availability of these funds until expended, states must track and report PEUC administrative expenditures and obligations separately from the regular UI program. Therefore, States must establish a separate fund ledger and must submit a separate ETA 9130 for the PEUC program. States are to include any PEUC administrative expenditures and obligations incurred in March 2020 in their June 30, 2020, PEUC ETA 9130 report.

   c. Time Distribution. To ensure that regular UI and PEUC costs are tracked separately, states need to charge time used for all PEUC activities to the appropriate UI functional activity codes as outlined in Appendix E to ET Handbook No. 401 5th Edition under the separate PEUC fund ledger; however, States should combine regular and PEUC staff year usage data in Section A of the UI-3 worksheet.

   d. Accounting for PEUC Payments (Benefits).

      - PEUC advances to the States' UTF accounts and disbursements for PEUC benefit payments will be reported on the monthly ETA 2112. Do not use a separate form for this report. (See Reporting Instructions.) Accurate reporting of advances, reimbursements and payments is important due to the monthly reconciliation of balances with Department of Labor records.

      - Since PEUC paid to UCFE and UCX claimants will be funded out of General Revenues, the Federal Employees Compensation Account (FECA) will not be used to pay PEUC benefits. Therefore, federal agencies will not be required to reimburse the Unemployment Trust Fund for PEUC paid to ex-federal civilian and military employees. The ETA 191 report and UCFE/UCX detailed claimant data provided by states to federal agencies must exclude PEUC.

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3. Processing Refunds. There are two scenarios for returning funds to the program line for PEUC:

   a. The most likely scenario will be when the State has funds in its State benefit payment account and needs to return those funds to the EUCA. This should be completed as a negative amount posted to the appropriate line in ASAP. To accomplish this, the total draw for the day in ASAP must be greater than the negative balance posted to the appropriate line.

   b. The second scenario is when a State actually has the funds in its Federal UI account that are required to be returned to the appropriate program line. This should be accomplished by the State processing a book transfer transaction that accomplishes a transfer from its UI account to the appropriate program under the EUCA account.

G. Reporting Instructions

1. General. The PEUC program reports, ETA 207, ETA 218, ETA 227, ETA 5130 and ETA 5159 must be submitted electronically by using separate PEUC entry screens that are available through the UI Required Reports electronic reporting system. PEUC activity should also be reported on the ETA 2112, ETA 539 and UI-3 as specified below in section 2. Unless otherwise noted, definitions of items will follow definitions in the regular program as specified in ETA Handbook 401, 5th Edition. Due dates will be the same as the regular versions of reports.

   Reporting will begin with the first reporting period in which the effective date of the PEUC program falls. Reporting for all reports will continue as long as there is activity. However, only reports with non-zero data need to be submitted.

2. Data Items to be Reported.

   a. ETA 207. Report column 1, Total Determinations and Redeterminations, for lines 101 through 106. Report also lines 201 and 202, columns 7 through 10; and lines 301 and 302, columns 11, 12, 14, and 17.

   b. ETA 218. Report line 100, columns 1 through 3.

   c. ETA 227. Report Section A, Overpayments Established - Causes, lines 101 and 103 through 110 for columns 2 through 5 and line 102 for columns 1 through 5. Report all of section B, Overpayments Established – Methods of Detection, excluding line 210. Report all of Section C, Recovery/Reconciliation, excluding lines 314, and columns 22 and 23. Report all of Section D, Criminal/Civil Actions excluding lines 407 and 408, and column 24, and all of Section E, Aging of Benefit Overpayment Accounts, excluding column 25.

   d. ETA 5130. Report all data elements.

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e. ETA 5159. For Section A, Claims Activities, report initial claims information for columns 2 through 5 and column 7 for lines 101 through 103. Report eligibility reviews and continued weeks claimed activity for columns 8 through 12 for lines 201 through 203. The claims information needed for column 11 for lines 201 through 203 will be identified as entitlement type "code 2" (Federal Benefit Extension) in field number 28 on the Interstate Liable-Agent Data Transactions (LADT). For Section B, Payment Activities, report columns 14, 15, 17, 18, and 19 for lines 301 and 302, columns 21 and columns 24 through 28 for line 303.

- First Payments. Report the first payment under the PEUC program.
- Final Payments. A final payment is to be reported when a payment is issued that exhausts the benefit entitlement in the individual's PEUC account.

f. ETA 2112. PEUC benefit payment activity must be reported in the aggregate on the regular ETA 2112 report. Line 16. Intra-Account Transfer. Include in column F the amount of PEUC funds transferred from the UTF to the state benefit payment account. Line 16 column F must equal Line 47 column E.

- Line 16. Intra-Account Transfer. Include in column C and column F the amount of PEUC funds transferred from the UTF to the State benefit payment account. Line 16 column F must equal Line 47 column E.
- Line 23. Federal Extended Compensation. Enter in columns C and E the amount of Federal funds received as advances or reimbursement for PEUC.
- Lines 33, 34, 35. Enter total benefits paid, attributable to state and local governments, section 501(c)(3) nonprofit organizations, and federally recognized Indian tribes, as appropriate, on the appropriate line for the type of employer, excluding PEUC benefits.
- Line 36. UCX Net Payments. Enter in columns C and F the net Federal portion of unemployment compensation paid to former members of the armed services, excluding PEUC. The total payments should be adjusted for refunds deposited during the month, credits and recharges, and cancellations and reissuances.
- Line 40. PEUC Activity. Enter in columns C and F the net amount for which the Federal government is liable for PEUC, including for UCFE and UCX claimants.
- Line 42. Federal Emergency Compensation. Enter in columns C and F the net Federal Emergency Compensation paid for past programs, which the Federal government is liable. Exclude PEUC (line 40), Pandemic Unemployment Compensation Assistance (line 42c), Federal Pandemic Unemployment

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Compensation (line 42b), Emergency Unemployment Compensation of 2008 (line 39), and the Temporary Extended Unemployment Compensation Act of 2002 (line 41), as each of these programs have dedicated lines on the ETA 2112. Examples of past emergency or supplemental benefits programs authorized and financed entirely by the Federal government during periods of high unemployment are SUA—Special Unemployment Assistance, FSB—Federal Supplemental Benefits, or FSC–Federal Supplemental Compensation and the Emergency Unemployment Compensation of 1991 programs. Identify the payment by program and amount in the "comments" section. Report all benefits paid, including the amounts transferred to the IRS for federal income tax withholding, regardless of whether paid from the state account in the UTF or the state benefit payment account.

- Line 46. UCFE Net Payments. Enter in columns C and F the net Federal portion of unemployment compensation paid to former federal civilian (including postal) employees, excluding PEUC. The total payments should be adjusted for refunds deposited during the month, credits and recharges, and cancellations and reissuances.

- Line 50. Withholding. States are to report gross benefits in column F regardless of whether amounts of withholding transferred to the IRS go through the state benefit payment account. See ETA Handbook 401, 5th Edition, for specific instructions.

g. ETA 539. Total weeks claimed for regular UC, UCFE, and UCX under the PEUC program for the report period will be reported in the comments section and labeled as "PEUC" followed by the number. For example: "PEUC=239". (The agent weeks claimed information needed for this report will be obtained from the LADT identified in field 28 as "code 2", Federal Benefit Extension.)

h. UI-3 Worksheet. Report PEUC claims activity/workload activity electronically on the lines for third tier programs on the regular UI-3 report.

3. Benefit Accuracy Measurement (BAM). All paid and denied PEUC claims will be excluded from the BAM Paid Claims Accuracy (PCA) and Denied Claims Accuracy (DCA) sampling frames. This is consistent with the policy for previous temporary programs.

If a PEUC claim is selected for any PCA or DCA sample because it was not properly coded in the State UI Transactions File, it must be coded "8" in PCA data element c1 (Program Code) or DCA data element 22 (Program Code). These cases will not be investigated by BAM, and the BAM supervisor will not sign-off on these cases.

Denied State UI, UCFE, or UCX claims filed for the sole purpose of establishing eligibility for PEUC should be considered "pro-forma" claims. These cases will be deleted from the sample and will be coded "9" in PCA data element c1 (Program Code)

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or DCA data element 22 (Program Code) using the Delete Cases application in the BAM Supervisor Case Management menu. These cases will not be investigated by BAM, and the BAM supervisor will not sign-off on these cases.

If PEUC and pro-forma UI, UCFE, and UCX cases are excluded from the BAM PCA and DCA samples, BAM must sample additional cases in subsequent batches to compensate for the number of excluded PCA and DCA PEUC and pro-forma cases.

4. OMB Approval. Division A, Title II, Section 2116(a) of the CARES Act states that "Chapter 35 of Title 44, United States Code, (commonly referred to as the 'Paperwork Reduction Act of 1995'), shall not apply to the provisions of, and the amendments made by, this subtitle." As the OMB approval process is waived for these reporting instructions, these instructions should be considered final.

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General Provisions for Administering the Pandemic Emergency Unemployment Compensation (PEUC) Program

CERTIFICATIONS AND ASSURANCES

1. **Compliance with Federal Requirements.** States must comply with the provisions contained in the states' Agreements with the Department to administer PEUC and all applicable PEUC funding instruments. States must perform such duties and functions in accordance with Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards at 2 C.F.R. Part 200 and 2 C.F.R. Part 2900 applicable to all grants and cooperative agreements. Additionally, the Department's administrative requirements for grants and cooperative agreements at 29 C.F.R. Parts 31, 32, 38, 96, and 98 apply to grant funds provided for these activities.

2. **Prohibition on Subsidization of Forced or Indentured Child Labor.** Consistent with section 103 of the Further Consolidated Appropriations Act, 2020, Pub. L. 116- 94 and in accordance with Executive Order No. 13126, States must not obligate or expend funds made available to administer PEUC for the procurement of goods, mined, produced, manufactured, or harvested or services rendered, whole or in part, by forced or indentured child labor in industries and host countries already identified by the Department prior to enactment of the Department's 2008 appropriation.

3. **Salary and Bonus Pay Limitations.** States, in compliance with section 101 of the Further Consolidated Appropriations Act, 2020, PUB. L. 116- 94, must not use funds provided for PEUC administration to pay the salary and bonuses of an individual, either as direct costs or indirect costs, at a rate in excess of Executive Level II, except as provided for under section 101 of Public Law 109-149. This limitation shall not apply to vendors providing goods and services as defined in 2 CFR 200, Subpart F – Audit Requirements. Where States are recipients of such funds, States may establish a lower limit for salaries and bonuses of those receiving salaries and bonuses from sub-recipients of such funds, taking into account PEUC, including the relative cost-of-living in the state, the compensation levels for comparable state or local government employees, and the size of the organizations that administer Federal programs involved including Employment and Training Administration programs. See TEGL No. 5-06 for further clarification. The incurrence of costs and the receipt of reimbursement for these costs under this award certifies that the Grantee has read the above condition and is in compliance.

4. **Veterans' Priority Provisions.** This program, funded by the Department, is subject to the provisions of the "Jobs for Veterans Act" (JVA), Pub. L. 107-288 (38 U.S.C. §4215). The JVA provides priority of service to veterans and spouses of certain veterans for the receipt of employment, training, and placement services. The veterans' priority is implemented by 20 C.F.R. Part 1010 (73 Fed. Reg. 78132, Sept. 19, 2008). Please note that to obtain priority service a veteran must meet the program's eligibility requirements. Training and Employment Guidance Letter (TEGL) No. 10-09 (November 10, 2009) provided general guidance on the scope of the veterans' priority statute and its effect on current employment

and training programs. In addition to TEGL 10-09, a series of questions and answers related to priority of service is posted at: https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=2816 for fifteen (15) programs administered by ETA.

The Workforce Innovation and Opportunity Act (WIOA) State Plan requires States to describe the policies and strategies in place to ensure, pursuant to the JVA, that priority of service is provided to veterans (and certain spouses) who otherwise meet the eligibility requirements for all employment and training programs funded by the Department and administered by ETA. See Required Elements for Submission of the Unified or Combined State Plan and Plan Modifications under the Workforce Innovation and Opportunity Act, OMB Control No. 1205-0522. In addition, the states are required to provide assurances that they will comply with the Veterans' Priority Provisions established by the JVA. States must adhere to JVA requirements, as interpreted by the Department, in administering PEUC.

5. **Certifications and Assurances**. In administering PEUC, states must fully comply with the State Quality Service Plan (SQSP) assurances. These SQSP assurances are detailed in Chapter 1, Part VIII of the "Unemployment Insurance State Quality Service Plan (SQSP) Assurances," ET Handbook No. 336 (18th Edition, Change 4).

   A. Assurance of Equal Opportunity (EO).
   B. Assurance of Administrative Requirements and Allowable Cost Standards.
   C. Assurance of Management Systems, Reporting, and Recordkeeping.
   D. Assurance of Program Quality.
   E. Assurance on Use of Unobligated Funds.
   F. Assurance of Prohibition of Lobbying Costs.
   G. Drug-Free Workplace.
   H. Assurance of Contingency Planning.
   I. Assurance of Conformity and Compliance.
   J. Assurance of Automated Information Systems Security.
   K. Assurance of Confidentiality.

The Office of Management and Budget (OMB), SF 424 B Assurances-Non- Construction Programs, signed and submitted by each state with its State Quality Service Plan annual submission, also apply.

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Statutory Language of Title II, Subtitle A, Section 2107 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020

SEC. 2107. PANDEMIC EMERGENCY UNEMPLOYMENT COMPENSATION.

(a) Federal-State Agreements.--

(1) In general.--Any State which desires to do so may enter into and participate in an agreement under this section with the Secretary of Labor (in this section referred to as the ``Secretary''). Any State which is a party to an agreement under this section may, upon providing 30 days' written notice to the Secretary, terminate such agreement.

(2) Provisions of agreement.--Any agreement under paragraph (1) shall provide that the State agency of the State will make payments of pandemic emergency unemployment compensation to individuals who--

(A) have exhausted all rights to regular compensation under the State law or under Federal law with respect to a benefit year (excluding any benefit year that ended before July1, 2019);

(B) have no rights to regular compensation with respect to a week under such law or any other State unemployment compensation law or to compensation under any other Federal law;

(C) are not receiving compensation with respect to such week under the unemployment compensation law of Canada; and

(D) are able to work, available to work, and actively seeking work.

(3) Exhaustion of benefits.--For purposes of paragraph (2)(A), an individual shall be deemed to have exhausted such individual's rights to regular compensation under a State law when--

(A) no payments of regular compensation can be made under such law because such individual has received all regular compensation available to such individual based on employment or wages during such individual's base period; or

(B) such individual's rights to such compensation have been terminated by reason of the expiration of the benefit year with respect to which such rights existed.

(4) Weekly benefit amount, etc.--For purposes of any agreement under this section--

(A) the amount of pandemic emergency unemployment compensation which shall be payable to any individual for any week of total unemployment shall be equal to--

(i) the amount of the regular compensation (including dependents' allowances) payable to such individual during such individual's benefit year under the State law for a week of total unemployment; and

(ii) the amount of Federal Pandemic Unemployment Compensation under section 2104;

(B) the terms and conditions of the State law which apply to claims for regular compensation and to the payment thereof (including terms and conditions relating to availability for work, active search for work, and refusal to accept work) shall apply to claims for pandemic emergency unemployment compensation and the payment thereof, except where otherwise inconsistent with the provisions of this section or with the regulations or operating instructions of the Secretary promulgated to carry out this section;

(C) the maximum amount of pandemic emergency unemployment compensation payable to any individual for whom an pandemic emergency unemployment compensation account is

established under subsection (b) shall not exceed the amount established in such account for such individual; and

(D) the allowable methods of payment under section 2104(b)(2) shall apply to payments of amounts described in subparagraph (A)(ii).

(5) Coordination rule.--An agreement under this section shall apply with respect to a State only upon a determination by the Secretary that, under the State law or other applicable rules of such State, the payment of extended compensation for which an individual is otherwise eligible must be deferred until after the payment of any pandemic emergency unemployment compensation under subsection (b) for which the individual is concurrently eligible.

(6) Nonreduction rule.--

(A) In general.--An agreement under this section shall not apply (or shall cease to apply) with respect to a State upon a determination by the Secretary that the method governing the computation of regular compensation under the State law of that State has been modified in a manner such that the number of weeks (the maximum benefit entitlement), or the average weekly benefit amount, of regular compensation which will be payable during the period of the agreement will be less than the number of weeks, or the average weekly benefit amount, of the average weekly benefit amount of regular compensation which would otherwise have been payable during such period under the State law, as in effect on January 1, 2020.

(B) Maximum benefit entitlement.--In subparagraph (A), the term ``maximum benefit entitlement'' means the amount of regular unemployment compensation payable to an individual with respect to the individual's benefit year.

(7) Actively seeking work.--

(A) In general.--Subject to subparagraph (C), for purposes of paragraph (2)(D), the term ``actively seeking work'' means, with respect to any individual, that such individual--

(i) is registered for employment services in such a manner and to such extent as prescribed by the State agency;

(ii) has engaged in an active search for employment that is appropriate in light of the employment available in the labor market, the individual's skills and capabilities, and includes a number of employer contacts that is consistent with the standards communicated to the individual by the State;

(iii) has maintained a record of such work search, including employers contacted, method of contact, and date contacted; and

(iv) when requested, has provided such work search record to the State agency.

(B) Flexibility.--Notwithstanding the requirements under subparagraph (A) and paragraph (2)(D), a State shall provide flexibility in meeting such requirements in case of individuals unable to search for work because of COVID-19, including because of illness, quarantine, or movement restriction.

(b) Pandemic Emergency Unemployment Compensation Account.--

(1) In general.--Any agreement under this section shall provide that the State will establish, for each eligible individual who files an application for pandemic emergency unemployment compensation, an pandemic emergency unemployment compensation account with respect to such individual's benefit year.

(2) Amount in account.--The amount established in an account under subsection (a) shall be equal to 13 times the individual's average weekly benefit amount, which includes the amount of Federal Pandemic Unemployment Compensation under section 2104, for the benefit year.

(3) Weekly benefit amount.--For purposes of this subsection, an individual's weekly benefit

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amount for any week is the amount of regular compensation (including dependents' allowances) under the State law payable to such individual for such week for total unemployment plus the amount of Federal Pandemic Unemployment Compensation under section 2104.

(c) Payments to States Having Agreements for the Payment of Pandemic Emergency Unemployment Compensation.--

(1) In general.--There shall be paid to each State that has entered into an agreement under this section an amount equal to 100 percent of the pandemic emergency unemployment compensation paid to individuals by the State pursuant to such agreement.

(2) Treatment of reimbursable compensation.--No payment shall be made to any State under this section in respect of any compensation to the extent the State is entitled to reimbursement in respect of such compensation under the provisions of any Federal law other than this section or chapter 85 of title 5, United States Code. A State shall not be entitled to any reimbursement under such chapter 85 in respect of any compensation to the extent the State is entitled to reimbursement under this section in respect of such compensation.

(3) Determination of amount.--Sums payable to any State by reason of such State having an agreement under this section shall be payable, either in advance or by way of reimbursement (as may be determined by the Secretary), in such amounts as the Secretary estimates the State will be entitled to receive under this section for each calendar month, reduced or increased, as the case may be, by any amount by which the Secretary finds that the Secretary's estimates for any prior calendar month were greater or less than the amounts which should have been paid to the State. Such estimates may be made on the basis of such statistical, sampling, or other method as may be agreed upon by the Secretary and the State agency of the State involved.

(d) Financing Provisions.--

(1) Compensation.--

(A) In general.--Funds in the extended unemployment compensation account (as established by section 905(a) of the Social Security Act (42 U.S.C. 1105(a)) of the Unemployment Trust Fund (as established by section 904(a) of such Act (42 U.S.C. 1104(a)) shall be used for the making of payments to States having agreements entered into under this section.

(B) Transfer of funds.--Notwithstanding any other provision of law, the Secretary of the Treasury shall transfer from the general fund of the Treasury (from funds not otherwise appropriated) to the extended unemployment compensation account such sums as the Secretary of Labor estimates to be necessary to make payments described in subparagraph (A). There are appropriated from the general fund of the Treasury, without fiscal year limitation, the sums referred to in the preceding sentence and such sums shall not be required to be repaid.

(2) Administration.--

(A) In general.--There are appropriated out of the employment security administration account (as established by section 901(a) of the Social Security Act (42 U.S.C. 1101(a)) of the Unemployment Trust Fund, without fiscal year limitation, such funds as may be necessary for purposes of assisting States (as provided in title III of the Social Security Act (42 U.S.C. 501 et seq.)) in meeting the costs of administration of agreements under this section.

(B) Transfer of funds.--Notwithstanding any other provision of law, the Secretary of the Treasury shall transfer from the general fund of the Treasury (from funds not otherwise appropriated) to the employment security administration account such sums as the Secretary of Labor estimates to be necessary to make payments described in subparagraph (A). There are appropriated from the general fund of the Treasury, without fiscal year limitation, the sums

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referred to in the preceding sentence and such sums shall not be required to be repaid.

(3) Certification.--The Secretary shall from time to time certify to the Secretary of the Treasury for payment to each State the sums payable to such State under this subsection. The Secretary of the Treasury, prior to audit or settlement by the Government Accountability Office, shall make payments to the State in accordance with such certification, by transfers from the extended unemployment compensation account (as so established) to the account of such State in the Unemployment Trust Fund (as so established).

(e) Fraud and Overpayments.--

(1) In general.--If an individual knowingly has made, or caused to be made by another, a false statement or representation of a material fact, or knowingly has failed, or caused another to fail, to disclose a material fact, and as a result of such false statement or representation or of such nondisclosure such individual has received an amount of pandemic emergency unemployment compensation under this section to which such individual was not entitled, such individual--

(A) shall be ineligible for further pandemic emergency unemployment compensation under this section in accordance with the provisions of the applicable State unemployment compensation law relating to fraud in connection with a claim for unemployment compensation; and

(B) shall be subject to prosecution under section 1001 of title 18, United States Code.

(2) Repayment.--In the case of individuals who have received amounts of pandemic emergency unemployment compensation under this section to which they were not entitled, the State shall require such individuals to repay the amounts of such pandemic unemployment compensation to the State agency, except that the State agency may waive such repayment if it determines that--

(A) the payment of such pandemic emergency unemployment compensation was without fault on the part of any such individual; and

(B) such repayment would be contrary to equity and good conscience.

(3) Recovery by state agency.--

(A) In general.--The State agency shall recover the amount to be repaid, or any part thereof, by deductions from any pandemic emergency unemployment compensation payable to such individual under this section or from any unemployment compensation payable to such individual under any State or Federal unemployment compensation law administered by the State agency or under any other State or Federal law administered by the State agency which provides for the payment of any assistance or allowance with respect to any week of unemployment, during the 3-year period after the date such individuals received the payment of the pandemic emergency unemployment compensation to which they were not entitled, in accordance with the same procedures as apply to the recovery of overpayments of regular unemployment benefits paid by the State.

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

(4) Review.--Any determination by a State agency under this section shall be subject to review in the same manner and to the same extent as determinations under the State unemployment compensation law, and only in that manner and to that extent.

(f) Definitions.--In this section, the terms ``compensation'', ``regular compensation'', ``extended compensation'', ``benefit year'', ``base period'', ``State'', ``State agency'', ``State law'', and ``week'' have the respective meanings given such terms under section 205 of the Federal-

State Extended Unemployment Compensation Act of 1970 (26 U.S.C. 3304 note).

(g) Applicability.--An agreement entered into under this section shall apply to weeks of unemployment--

(1) beginning after the date on which such agreement is entered into; and

(2) ending on or before December 31, 2020.

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Attachment IV to UIPL No.17-20

Supplemental Budget Request (SBR) Application

Instructions: States must complete the application using the suggested format and instructions below for the projects/activities for which the state is seeking funding. This application is to be combined with a completed SF-424 and an SF-424A covering all projects/activities.

Unemployment Insurance Supplemental Budget Request Abstract		
State Name:		
Total Funds Requested for All Projects:		
Name, Title, and Address of Grant Notification Contact *(Typically the State Workforce Agency Administrator)* **Name:** **Title:** **Address:**		
Name, E-Mail Address, and Phone Number of SBR Project or Fiscal Manager **Name:** **E-Mail Address:** **Telephone Number:**		
Provide the following information for each project *(add additional rows as needed)*:		
Project Name	**Total Cost of Project**	**Proposed Completion Date**

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Project Description
Project Timeline

Description of Costs			
State Agency Staff Costs:			
Type of Position	**Total Hours**	**Cost Per Hour**	**Total**
Contract Staff Costs:			
Type of Position	**Total Hours**	**Cost Per Hour**	**Total**
Hardware, Software and Telecommunications Equipment:			
Item Description	**Cost Per Item**	**Quantity**	**Total**
Other Costs:			
Item	**Cost**	**Explanation**	

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SBR APPLICATION SECTION INSTRUCTIONS

Amount of Funding Request for this Project: Provide the total amount of funds requested for all projects.

State Contact(s): Provide name, telephone number, and e-mail address of the individuals - Grant Notification contact and SBR Project/Fiscal Manager for any questions we may have relating to this proposal.

Project Name: Provide the name of the proposed project.

Project Description: Provide a brief description of the projects/activities for which the state seeking funding.

Project Timeline: Provide a list of the dates and the milestones for this projects/activities.

Description of Costs: Provide an explanation of all costs for the projects/activities.

- **State Agency Staff Costs:** Use the table format provided in this attachment to request state staff to support project implementation.
- **Contract Staff Costs:** Use the table format provided in this attachment to request contract staff to support project implementation.
- **Hardware, Software, and Telecommunications Equipment:** Provide an itemized list of hardware, software, and telecommunications equipment including the cost per item and the number of each item requested. A description of each item must provide any information needed to identify the specific item and a description of the size and capacity of each item if applicable.
- **Other Costs:** Identify each item of cost not covered elsewhere and provide the expected cost per item. The need for each item must be explained.

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Attachment V to UIPL No. 17-20

Instructions Completing the SF-424 and SF-424A

I. Application for Federal Assistance (SF-424)

Use the current version of the form for submission. Expired forms will not be accepted. SF-424, Expiration Date 12/31/2022, Office of Management and Budget (OMB) Control No. 4040-0004 (Grants.gov). https://www.grants.gov/web/grants/forms/sf-424-family.html.

Section # 8, APPLICANT INFORMATION:

- Legal Name: The legal name must match the name submitted with the System for Award Management (SAM). Please refer to instructions at https://www.sam.gov
- Employer/Tax Identification Number (EIN/TIN) : Input your correct 9-digit EIN and ensure that it is recorded within SAM
- Organizational DUNS: All applicants for Federal grant and funding opportunities are required to have a 9-digit Data Universal Numbering System (D-U-N-S®) number, and must supply their D-U-N-S® number on the SF-424. Please ensure that your state is registered with the SAM. Instructions for registering with SAM can be found at https://www.sam.gov. Additionally, the state must maintain an active SAM registration with current information at all times during which it has an active Federal award or an application under consideration. To remain registered in the SAM database after the initial registration, there is a requirement to review and update the registration at least every 12 months from the date of initial registration or subsequently update the information in the SAM database to ensure it is current, accurate, and complete. Failure to register with SAM and maintain an active account will result in a rejection of your submission.
- Address: Input your complete address including Zipcode+4; Example: 20110-831. For lookup, use link at https://tools.usps.com/go/ZipLookupAction!input.action
- Organizational Unit: Input appropriate Department Name and Division Name, if applicable
- Name and contact information of person to be contacted on matters involving this application. Provide complete and accurate contact information including telephone number and email address for the point of contact

Section # 9, Type of Applicant 1: Select Applicant Type: Input "State Government"

Section # 10, Name of the Federal Agency: Input "Employment and Training Administration"

Section # 11, Catalog of Federal Domestic Assistance Number: Input "17.225"; **CFDA Title:** Input "Unemployment Insurance"

Section # 12, Funding Opportunity Number and Title: Input "UIPL No. 17-20, Pandemic Emergency Unemployment Compensation Implementation Grants"

Section # 13, Competition Identification Number: Leave Blank

Section # 14, Areas Affected by Project: Input the place of performance for the project implementation; Example "NY" for New York

Section # 15, Descriptive Title of Applicant's Project: Input "Pandemic Emergency Unemployment Compensation Implementation Grants"

Section # 16, Congressional Districts of:

a. Applicant: Input the Congressional District of your home office. For lookup, use link at www.house.gov with Zipcode + 4

b. Program/Project: Input the Congressional District where the project work is performed. If it's the same place as your home office, input the congressional district for your home office. For lookup, use link at www.house.gov with Zipcode+4

Section # 17, Proposed Project

a. Start Date: Input a valid start date for the project (earliest start date will be March 27, 2020)
b. End Date: Input a valid end date for the project

Section # 18, Estimated Funding ($): Input the estimated funding requested. Ensure that the funding requested matches the TOTALS in Section B – Budget Categories of the SF424A

Section #s 19 – 20: Complete as per instructions for Form SF-424

Section # 21, Authorized Representative: Please select the "I AGREE" check box and provide complete information for your authorized signatory including contact information such as telephone number and email address. If your Authorized Representative has changed from your previous application submission for this program, please include a letter from a higher level leadership authorizing the new signatory for the application submission

Remember to get the SF-424 signed and dated by the Authorized representative

II. Budget Information -Non-Construction Programs (SF-424A)

Use the current version of the form for the submission. Expired forms will not be accepted. SF 424A, Expiration Date 02/28/2022, OMB Control No. 4040-0006 https://apply07.grants.gov/apply/forms/readonly/SF424A-V1.0.pdf

Section B – Budget Categories: Ensure that TOTALS in Section 6, Object Class Categories matches the Estimated Funding requested in the SF-424.

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PLAINTIFF'S EXHIBIT D

P.O. Box 995
1550 Gadsden Street
Columbia, SC 29202
dew.sc.gov

Henry McMaster
Governor

G. Daniel Ellzey
Executive Director

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TO: HENRY MCMASTER, GOVERNOR OF SOUTH CAROLINA

FROM: G. DANIEL ELLZEY, EXECUTIVE DIRECTOR

SUBJECT: OPTING OUT OF "AGREEMENT IMPLEMENTING THE RELIEF FOR WORKERS AFFECTED BY CORONAVIRUS ACT"

DATE: MAY 6, 2021

I. Background

On May 4, 2021, Montana announced it was using federal funds authorized by the American Rescue Plan Act to issue "return-to-work bonuses" to individuals on unemployment who rejoin the labor force and maintain employment for at least one month. At the same time, Montana also announced that it was fully opting out of the federal unemployment programs enacted in response to the COVID-19 pandemic. This "opt-out" is effective June 27, 2021. Montana cited a low unemployment rate (3.8%), a shrinking labor force (-10,000 people), and high number of job postings as the reasons for its decision.

This memorandum explains the implications in the event South Carolina follows a similar course of action.

II. Federal Programs

South Carolina elected to participate in the six unemployment-related programs in connection with the Coronavirus Aid, Relief, and Economic Security Act and Continued Assistance to Unemployed Workers Act of 2020. The agreement South Carolina signed to initiate these programs allows South Carolina or the United States Department of Labor to terminate the programs upon thirty days' written notice to the other party.

1. Pandemic Unemployment Assistance (PUA) – Section 2102

What It Is: benefits to the self-employed, the underemployed, independent contractors, and individuals who have been unable to work as a direct result of COVID-19. This includes individuals diagnosed with COVID-19 or instructed to quarantine.

How It Would Change: Beginning no sooner than 30 days from the date South Carolina provides written notice to USDOL, South Carolina would stop paying PUA benefits to

existing claimants and not process any new PUA claims filed after the expiration of the notice period.

What is the impact: For claim week ending May 1, 2021, 37,284 claimants received PUA benefits for a weekly cost of $6.2 million.

2. **Pandemic Emergency Unemployment Compensation (PEUC) – Section 2107**

What It Is: Extension of unemployment benefits for claimants beyond the traditional 20 weeks by an additional 51 weeks. PEUC allowed claimants to extend their time on unemployment where they normally would have expired.

How It Would Change: Beginning no sooner than 30 days from the date South Carolina provides written notice to USDOL, South Carolina claimants who have exhausted their regular UI benefits would no longer be eligible for payments.

What is the impact: For claim week ending May 1, 2021, 56,318 claimants received PEUC benefits for a weekly cost of $14.6 million; however, approximately 9,300 PEUC would be eligible to move to regular unemployment insurance compensation.

3. **Federal Pandemic Unemployment Compensation (FPUC) – Section 2104**

What It Is: $300 weekly add-on benefit for all types of unemployment assistance.

How It Would Change: Beginning no sooner than 30 days from the date South Carolina provides written notice to USDOL, South Carolina would stop issuing the $300 weekly FPUC benefit payments for weeks after the expiration of the notice period.

What is the impact: For claim week ending May 1, 2021, 108,483 claimants received FPUC benefits for a weekly cost of $37.0 million.

4. **Mixed Earners Unemployment Compensation (MEUC)**

What It Is: $100 weekly add-on benefit for those who are eligible for regular UI benefits, but also earned self-employment income.

How It Would Change: Beginning no sooner than 30 days from the date South Carolina provides written notice to USDOL, South Carolina would stop paying MEUC benefits to existing claimants and stops processing any MEUC claims received after the notice period.

What is the Impact: For claim week ending May 1, 2021, 21 claimants received MEUC benefits for a weekly cost of $34,400.

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5. **Emergency Unemployment Relief for Governmental Entities and Nonprofit Organizations – Section 2103**

What It Is: Funding for 75% of UI benefits paid to employees of governmental entities and non-profits. These entities are known as "reimbursable employers" because they reimburse the UI trust fund dollar-for-dollar for any benefits paid to their employees instead of paying UI taxes. The rationale for the program was to lessen the financial burden of COVID-19 shutdowns because these employers would not benefit from capping tax rates and non-charging like other employers would.

How It Would Change: Beginning no sooner than 30 days from the date South Carolina provides written notice to USDOL, South Carolina would stop receiving funding for this program. Reimbursable employers go back to being charged 100% of the benefits DEW pays out to their employees after the expiration of the notice period.

What is the Impact: The funding of benefits for employees of reimbursable employers returns to normal. Reimbursable employers do not have the benefit of federal funding if they still experience a layoff connected to COVID-19. While this provision provided millions of dollars in relief to the reimbursable employers in 2020, the benefit charges of these entities have declined significantly.

6. **Temporary Federal Funding of the First Week of Compensable Regular Unemployment for States with No Waiting Week – Section 2105**

What It Is: Funding for one week of benefits for states that waive the one-week waiting period claimants must typically serve prior to receiving UI benefits. South Carolina waived its statutory waiting week via Executive Order. In South Carolina, the analysis of whether to waive this statutory provision is not tied to federal funding, but to whether the labor market is such that claimants could pursue other employment during that first week of unemployment.

How It Would Change: The Governor rescinds/amends the Executive Order waiving the waiting week. Then, beginning no sooner than 30 days from the date South Carolina provides written notice to USDOL, South Carolina stops receiving funding for this program. The first week of unemployment for claimants who file after the expiration of the notice period would not be compensable.

What is the Impact: New claimants who (1) file after the expiration of the notice period and (2) do not exhaust all benefits receive one less week of benefits than they currently would. Between May 2020 and the end of March 2021, this provision resulted in approximately $88.7 million in funding. However, as state UI claim levels have declined,

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so too has the benefit of this provision. The state is averaging roughly $400,000 per week in first week waiting reimbursements.

III. Return-to-Work Bonus

In addition to opting out of the federal programs, Montana also decided to pay a return-to-work bonus. Described as an incentive for individuals to reenter the workforce, the bonus is a $1,200 payment to the first 12,500 Montanans with an active unemployment claim as of May 4, 2021, who:

- Discontinue receiving unemployment benefits
- Accept an offer of employment in the state of Montana
- Complete at least four full weeks of paid employment

These equates to a maximum payout of $15 million. Montana plans to use federal stimulus funds authorized by the American Rescue Plan Act to fund this bonus. As we understand it, Montana has reached out to the United States Treasury Department for confirmation that federal funds can be used for this purpose.

IV. Total Financial Impact

Assuming an end to the federal programs as of week ending June 26, 2021, the maximum amount of expected losses in federal funding to the state would be between $600 and $650 million, or around $63 million for each week of lost program time. Most of this would be the result of the end of the FPUC and PEUC programs.

Program	Anticipated 10-Week Funding Loss
PUA	$62.0 million
PEUC	$146.0 million
FPUC	$370.0 million
MEUC	$0.3 million
Reimbursable	$3.0 million
Waiting Week	$4.0 million
Total	**$585.3 million**

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The current estimates are based on individuals currently filing and receiving payments. There may also be additional payments owed to individuals who are in pending status or have a future appeal reversal. Thus, the $600 million is the maximum expected loss from ending the program as of June 26, 2021.

These potential losses will be offset, to some extent, by individuals returning to work. There are currently more than 80,000 open jobs in the state. It is not possible to predict which individuals will go back, how quickly, or at what wage levels. But assuming that between 30 and 50 percent of the current unemployment claimants return to work at an average weekly wage of $500, between $223 and $372 million in wages could be earned over the ten week period between June 27th and September 4th. These earnings do not take into account any additional fringe benefits, which could include health benefits, retirement benefits, etc. Additionally, as the economy continues to recover, it is expected that more job openings will become available and be filled.

V. Other Considerations

1. *Declining claimant numbers:* The number of individuals drawing benefits will be decreasing rapidly regardless of whether South Carolina opts out of federal programs. 28,000 PUA claimants were required to provide documentation and did not. Therefore, they have disqualified themselves from benefits. We are also enforcing the requirement to search for work more aggressively. Lastly, we are engaging in broad reemployment efforts that will have an effect on the number of individuals drawing benefits each week. **See Attachment A.**

2. *Program-specific opt-out:* The agreement does not necessarily require a complete opt out of all federal programs, although that is what Montana did. Conceptually, South Carolina could opt out of one program such as FPUC and elect to remain in other programs. For this reason, we have provided separate analysis for each of the programs.

3. *Notice Period:* The agreement requires 30 days-notice from a state to effect a termination. However, there does not appear to be a limitation on providing more than 30-days notice. For example, Montana provided notice on May 4, 2021, but is continuing in the program for 53 days (through June 26, 2021).

4. *No ability to modify programs:* The agreement only allows for South Carolina to terminate participation in a program, i.e., we do not have authority to limit or modify a program. For example, we could not say to end benefits once a claimant receives a certain number of weeks or dollar amount.

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PLAINTIFF'S EXHIBIT
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HENRY MCMASTER
GOVERNOR

May 6, 2021

Mr. Daniel Ellzey
Director
Department of Employment and Workforce
1550 Gadsden Street
Columbia, SC 29202

Dear Director Ellzey,

South Carolina's businesses have borne the brunt of the financial impact of the COVID-19 pandemic. Those businesses that have survived—both large and small, and including those in the hospitality, tourism, manufacturing, and healthcare sectors—now face an unprecedented labor shortage.

This labor shortage is being created in large part by the supplemental unemployment payments that the federal government provides claimants on top of their state unemployment benefits. In many instances, these payments are greater than the worker's previous pay checks. What was intended to be short-term financial assistance for the vulnerable and displaced during the height of the pandemic has turned into a dangerous federal entitlement, incentivizing and paying workers to stay at home rather than encouraging them to return to the workplace.

These federal entitlements pose a clear and present danger to the health of our State's businesses and to our economy. Since the Biden administration and Congress appear to have little to no comprehension of the damage being done and no appetite to terminate the federal payments, the State of South Carolina must take action.

Accordingly, I hereby direct the Department of Employment and Workforce (DEW) to terminate the State of South Carolina's participation in the Federal Pandemic Unemployment Compensation (FPUC) program, the Pandemic Unemployment Assistance (PUA) program, the Pandemic Emergency Unemployment Compensation (PEUC) program, the Mixed Earner Unemployment Compensation (MEUC) program, the Emergency Unemployment Relief for Governmental Entities and Non-profit Organizations program, and the Temporary Federal Funding of the First Week of Compensable Regular Unemployment for States with No Waiting Week program, effective June 30, 2021.

Following termination of participation in these federal programs, DEW shall return to normal operation of the State's unemployment insurance program, including enforcing the requirement that claimants demonstrate active efforts to seek employment in order to remain eligible for benefits.

Thank you for your continued leadership and attention to these important issues. Please keep me informed of your progress.

Yours very truly,

Henry McMaster

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PLAINTIFF'S EXHIBIT
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EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210	CLASSIFICATION Unemployment Insurance
	CORRESPONDENCE SYMBOL OUI/DL
	DATE July 12, 2021

ADVISORY: **UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 14-21, Change 1**

TO: STATE WORKFORCE AGENCIES

FROM: SUZAN G. LEVINE /s/
Principal Deputy Assistant Secretary

SUBJECT: State Responsibilities After the Temporary Unemployment Benefit Programs under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, as amended, End Due to State Termination of Administration or When the Programs Expire.

1. **Purpose.** To advise states of the operational requirements after the temporary unemployment benefit programs authorized under the CARES Act, as amended, end. These operational requirements apply after the temporary programs expire on September 6, 2021, or earlier if a state chooses to end participation before September 6, 2021.

2. **Action Requested.** The Department of Labor's (Department) Employment and Training Administration (ETA) requests that State Workforce Administrators provide the information contained in this Unemployment Insurance Program Letter (UIPL) to appropriate program and other staff in state workforce systems as they implement the UI-related provisions that respond to the economic effects of the Coronavirus Disease 2019 (COVID-19) pandemic.

3. **Summary and Background.**

   a. Summary – The temporary unemployment benefit programs authorized under the CARES Act, as amended, are set to expire on September 6, 2021. These programs include Pandemic Unemployment Assistance (PUA), Federal Pandemic Unemployment Compensation (FPUC), Pandemic Emergency Unemployment Compensation (PEUC), and Mixed Earners Unemployment Compensation (MEUC). Full federal funding for the first week of compensable regular unemployment for states with no waiting week will also expire on September 6, 2021. Additionally, some states have chosen to end participation in some or all of these programs earlier than September 6, 2021, which is permissible with 30-days written notice, under the state's agreement with the Secretary of Labor (Secretary) to administer such programs.

   The agreement to administer the PUA, FPUC, PEUC, and MEUC programs remains in effect with respect to weeks of unemployment ending on or before the date of termination or expiration (whichever comes first) until all issues relating to those weeks are resolved.

RESCISSIONS	EXPIRATION DATE
None	Continuing

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States: (1) are required to accept all PUA, FPUC, PEUC, and MEUC claims for a certain period of time after the date of termination or expiration (whichever comes first) and determine all eligibility issues associated with such claims in a timely manner, including establishing overpayments as appropriate and processing appeals; (2) must individually notify individuals of the termination or expiration; and (3) must continue to comply with the return to work reporting requirements described in Section 4.c. of UIPL No. 09-21 during any period for which the agreement remains in effect. States are also advised of the effect that termination or expiration will have on the transfer of federal funds to provide emergency unemployment relief to governmental entities and certain nonprofit organizations, as well as the first week of compensable regular unemployment for states with no waiting week. After terminating participation, states may choose to reinstitute participation prior to the September 6, 2021 end date of the programs.

Additionally, states are strongly encouraged to identify procedures and resources across available workforce partners to ensure individuals are provided access to reemployment services.

b. Background – The CARES Act (Public Law (Pub. L.) 116-136), enacted on March 27, 2020, allows, among other things, states to enter into an agreement with the Secretary to administer the PUA, FPUC, and PEUC programs. States without a waiting week may also enter into an agreement with the Secretary to receive full federal funding of the first week of compensable regular unemployment. *See* UIPL No. 14-20. The Continued Assistance for Unemployed Workers Act of 2020 (Continued Assistance Act), set forth at Division N, Title II, Subtitle A of the Consolidated Appropriations Act, 2021 (Pub. L. 116-260), extended the dates for states to administer these programs and allowed states to also enter into an agreement with the Secretary to administer the MEUC program. *See* UIPL No. 09-21. The American Rescue Plan Act of 2021 (ARPA) (Pub. L. 117-2) further extended the dates for states to administer the PUA, FPUC, PEUC, and MEUC programs through September 6, 2021. *See* UIPL No. 14-21.

4. **Guidance**. All states signed an "Agreement Implementing the Relief for Workers Affected by Coronavirus Act" (Agreement) with the Secretary in March 2020 to administer the PUA, FPUC, and PEUC programs. States without a waiting week also signed an addendum to receive full federal funding for the first week of compensable regular unemployment. Additionally, nearly all states signed an addendum to the Agreement in January 2021 to also administer the MEUC program. The Agreement incorporates amendments to the CARES Act made by the Continued Assistance Act and ARPA. As provided in paragraph I. of the Agreement:

> The [insert state name] State Workforce Agency, hereinafter referred to as the "Agency," will make payments of benefits in accordance with the provisions of the Act identified in paragraph XIV [the CARES Act], and any future amendments thereto (which are incorporated herein by reference), and will cooperate with the U.S. Department of Labor (Department of Labor), and with other state agencies in making such payments.

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Under the Agreement, each state is required to operate the programs as required by any statutory amendments and the Department's guidance.

While all states must prepare for the expiration of temporary unemployment benefit programs authorized under the CARES Act, as amended, which is currently on September 6, 2021, some states have chosen to end participation in some or all of these programs earlier than the current September 6, 2021 expiration date. As set forth in Section XI of the Agreement, a state may terminate specific provisions within the agreement listed in Section XIV or terminate the agreement itself with thirty days' written notice if it chooses to discontinue administration of such provisions. Although Section 261(c) of the Continued Assistance Act permits a state to administer the FPUC program without administering MEUC, states do not have authority to administer MEUC and not FPUC. As such, states may not continue to administer the MEUC program after terminating the agreement to administer the FPUC program.

a. **Processing PUA, FPUC, PEUC, and MEUC claims after the date of termination or expiration.** The state must process and pay benefits to eligible individuals under the PUA, FPUC, PEUC, and MEUC programs for all weeks of unemployment ending on or before the date of termination or expiration (whichever comes first). The state must also comply with all responsibilities with respect to claims filed under these programs for those weeks, including, without limitation, the requirements under the Agreement and in guidance. Accordingly, the Agreement remains in effect with respect to the PUA, FPUC, PEUC, and MEUC programs for weeks of unemployment ending on or before the date of termination or expiration (whichever comes first) until all issues relating to those weeks are resolved.

   In all states, under current federal law, no PUA, FPUC, PEUC, and MEUC payments may be made with respect to weeks of unemployment ending after September 6, 2021. In states where the week of unemployment ends on a Saturday, the last payable week for these programs is the week ending September 4, 2021. In states where the week of unemployment ends on a Sunday, the last payable week for these programs is the week ending September 5, 2021.

   For states that terminate the Agreement to operate some or all of these programs before September 6, 2021, no payments for the terminated programs may be made with respect to weeks of unemployment ending after the date the state terminates participation in the Agreement.

      i. **PUA claims.**

         A. *Taking new applications after the date of termination or expiration.* The state must continue to take new applications for PUA for 30 days after the date of termination or expiration (whichever comes first). The state must backdate such claims, as appropriate, to the first week during the Pandemic Assistance Period in which the individual was unemployed, partially unemployed, or unable or unavailable to work

because of an approved COVID-19 related reason, subject to the limitation described in Section C.15. of Attachment I to UIPL No. 16-20, Change 4.

B. *Continued compliance with responsibilities under the Agreement and in guidance.* A state that chooses to terminate the PUA program prior to September 6, 2021 must comply with all responsibilities under the Agreement and in guidance with respect to claims filed under the PUA program for weeks of unemployment ending on or before the date of termination. This includes the processing of claims using the expanded list of COVID-19 related reasons described in Section 4.b. of UIPL No. 16-20, Change 5.

C. *Accepting submission of income documentation for purposes of calculating a higher PUA weekly benefit amount (WBA).* As described in Question 2 of Attachment I to UIPL No. 16-20, Change 2, states must accept documentation of income to determine an individual's eligibility for a higher PUA WBA at any time during the Pandemic Assistance Period. For the purpose of submitting proof of wages to calculate the PUA WBA, the Pandemic Assistance Period does not change. States terminating participation in the Agreement before September 6, 2021, must continue to allow for submission of such proof through September 6, 2021.

Note that the requirement to provide documentation substantiating employment or self-employment is separate from providing documentation to support the calculation of a higher WBA and has its own deadline, as described in Section C.2. of Attachment I to UIPL No. 16-20, Change 4.

ii. **FPUC claims**. Individuals do not submit an application to receive the supplementary FPUC payment. Insofar as an individual is eligible to receive payment under one of the qualifying programs described in Section 4.a. of UIPL No. 15-20, the state must pay FPUC with respect to weeks of unemployment ending on or before the date of termination or expiration (whichever comes first). States are reminded that FPUC is not payable with respect to any week of unemployment ending after July 31, 2020, through weeks of unemployment ending on or before December 26, 2020. *See* Section 4.b.iii. of UIPL No. 09-21.

iii. **PEUC claims**.

A. *Taking new applications after the date of termination or expiration.* Insofar as state UC law provides for claims to be backdated, the state must continue to take new applications for PEUC as provided in their

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state law for late filing of claims after the date of termination or expiration (whichever comes first).

B. *Addressing state options for determining eligibility for PEUC or regular UC payments for states terminating PEUC early.* Generally, to be eligible for PEUC, an individual must have exhausted all rights to regular UC. However, as described in Section 4.e.iii. of UIPL No. 17-20, Change 2, certain individuals that are eligible for a new regular UC claim may be eligible to continue receipt of PEUC. States must choose one of four options for administering this provision, as described in Section 4.e.ii. of that same UIPL. As such, certain individuals receiving PEUC in states that are terminating the PEUC program before September 6, 2021, may be eligible for a new regular UC claim upon termination of the PEUC program.

iv. **MEUC claims.**

A. *Taking new applications after the date of termination or expiration.* Insofar as state UC law provides for claims to be backdated, the state must continue to take new applications for MEUC as provided in their state law for late filing of claims after the date of termination or expiration (whichever comes first).

B. *States that signed the MEUC addendum and have not yet implemented the MEUC program.* Nearly all states signed an addendum to the Agreement in January 2021 to administer the MEUC program, though some states have not yet implemented the MEUC program. Upon signing the Agreement to administer MEUC, the state agreed to operate the MEUC program through the date of termination or expiration (whichever comes first). Therefore, states must pay MEUC for weeks of unemployment beginning after they signed the agreement through the date of termination or expiration (whichever comes first).

b. **Required notifications.** The state must individually notify individuals of the termination or expiration (whichever comes first) of these programs. This includes all individuals who: (1) are currently receiving PUA, PEUC, FPUC, or MEUC; and (2) anyone for whom a PUA or PEUC claim was previously established (*i.e.*, individuals with remaining PUA or PEUC balances who stopped filing such claims).

States that are not terminating the Agreement early and that included notification of the September 6, 2021 expiration date at the time of notifying individuals of the changes related to the enactment of ARPA (as described in Section 4.d. of UIPL No. 14-21), do not need to provide additional individual notification to individuals.

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i. **Content of notification.** The individual notification must include the specific date on which the temporary unemployment benefit program(s) end.

Generally, receipt of benefits under the temporary unemployment benefit programs indicates that an individual is not eligible for regular UC. However, if the individual is receiving PEUC at the time a state terminates the PEUC program and the individual is eligible for a regular UC claim as described in Section 4.a.iii.B. of this UIPL, the state must include instructions for reopening or filing the new regular UC claim.

States are also encouraged to provide information about reemployment services, as described further in Section 4.f. of this UIPL.

ii. **Distribution method for notification.** The distribution method for these notifications must be consistent with other correspondence provided to the individuals receiving these benefits by the state, which may include notification by mail, email, or through the individual's online web portal.

Additionally, the state may also post general information about the date of termination or expiration on their websites and on social media.

c. **"Return to Work" reporting requirement.** The state must continue to comply with the Return to Work Reporting Requirement, described in Section 4.c. of UIPL No. 09-21, during any period in which an Agreement for any of the UI-related provisions under the CARES Act, as amended, remains in effect. This includes PUA, FPUC, full federal funding of the first week of compensable regular unemployment for states with no waiting week, PEUC, MEUC, and/or 100 percent reimbursement of STC benefit costs paid under state law.

As described in Section 4.a. of this UIPL, the Agreement remains in effect with respect to PUA, FPUC, PEUC, MEUC, and the first week of compensable regular unemployment for states with no waiting week for weeks of unemployment ending on or before the date of termination or expiration (whichever comes first) until all issues relating to those weeks are resolved.

This reporting requirement includes: (1) having a procedure for how work refusals are received, evaluated/adjudicated, and resolved; (2) providing a reporting method for employers to notify the State agency when an individual refuses an offer of employment; and (3) providing a plain-language notice to claimants containing specific provisions described in Section 4.c. of UIPL No. 09-21 at the time an adjudication issue for refusing work is created.

d. **Emergency unemployment relief for governmental entities and certain nonprofit organizations.** Some states have provided written notice to terminate participation in the Emergency Unemployment Relief for Governmental Entities and Nonprofit Organizations provision under Section 2103 of the CARES Act, as amended. The

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Department interprets this to mean that the state does not intend to use the fund transfers under Section 2103 of the CARES Act, as amended, for the authorized purpose specified in Section 903(i)(1)(C) of the Social Security Act (SSA). *See* UIPL No. 18-20, Change 2. As such, unless notified otherwise by the state, the Department will discontinue transferring funds to those states for weeks of unemployment beginning on or after the date of termination. States will receive funds for weeks of unemployment that occurred prior to the termination date. If a state wishes to resume receiving the transfers of funds and reducing the reimbursement amounts owed by governmental entities and certain nonprofit organizations, it must notify the Department immediately.

e. **Full federal funding of the first week of compensable regular unemployment for states with no waiting week.** The State must comply with all responsibilities with respect to all waiting week payments for weeks of unemployment ending on or before the date of termination or expiration (whichever comes first) and comply with all responsibilities with respect to claims filed under these programs for those weeks, including, without limitation, the requirements under the Agreement. *See* UIPL No. 20-20. Accordingly, the Agreement remains in effect with respect to the first compensable week for weeks of unemployment ending on or before the date of termination or expiration (whichever comes first) until all issues relating to those weeks are resolved.

   In addition, the state must reconcile any drawdowns consistent with the guidance provided in UIPL No. 20-20 to ensure that any funds that are drawn pursuant to the line labeled, "WD For 2105 Temporary Comp," in the Automated Standard Application for Payments system are drawn down only for the reason attributable to Section 2105 of the CARES Act, as amended, and are no longer drawn for any weeks of unemployment beginning on or after the date of termination or expiration (whichever comes first).

f. **Reinstituting participation in the pandemic UI programs.** Any state that has provided notice to the Department of its intent to terminate any of the pandemic UI programs prior to the September 6, 2021 end date may reinstitute participation in any or all programs it previously indicated it would be terminating. If the state's date of termination has not become effective, the state simply needs to provide the Department with written notice that it is rescinding or modifying the effective date of its prior notice of termination for the particular program(s) and the state will then be able to continue making payments under the program(s).

   If the date of termination has occurred and the state has terminated participation, the state may need to enter into a new agreement with the Department to reinstitute operations. By entering into a new agreement, the state may experience a lapse in time period for which the state may pay benefits under the FPUC, MEUC, and PEUC programs as the new agreement becomes effective the week of unemployment beginning after a new agreement is signed. The state will not experience a lapse in time period for which the state may pay benefits under the PUA program and the state must provide an opportunity for individuals receiving PUA to certify for the missing weeks.

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If a state enters into a new agreement or rescinds, rather than modifies, the previous notice of termination, the state would need to provide 30-day notice of any future termination of participation in the pandemic UI programs.

States interested in reinstituting previously terminated programs should contact ETA for further assistance in doing so.

g. **Importance of assisting individuals in utilizing available reemployment resources.** The Department strongly encourages states to identify procedures and resources across available workforce partners to ensure individuals affected by the termination or expiration of these temporary unemployment benefit programs are provided access to services through the workforce system. Refer to the resources in Training and Employment Notice (TEN) No. 08-20. Additionally, states may inform individuals of the wide array of activities that support reemployment in today's labor market, including receiving services through American Job Centers. *See* the sample list of activities for an individual to be "actively seeking work" provided in Attachment I to TEN 17-19.

5. **Inquiries.** Please direct inquiries to covid-19@dol.gov with a copy to the appropriate ETA Regional Office.

6. **References.**

- American Rescue Plan Act of 2021 (ARPA), including Title IX, Subtitle A, Crisis Support for Unemployed Workers (Pub. L. 117-2);
- Consolidated Appropriations Act, 2021, including Division N, Title II, Subtitle A, the Continued Assistance for Unemployed Workers Act of 2020 (Continued Assistance Act) (Pub. L. 116-260);
- Coronavirus Aid, Relief, and Economic Security (CARES) Act, including Title II, Subtitle A, Relief for Workers Affected by Coronavirus Act (Pub. L. 116-136);
- UIPL No. 20-21, *State Instructions for Assessing Fraud Penalties and Processing Overpayment Waivers under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, as Amended*, issued May 5, 2021, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=6830;
- UIPL No. 14-21, *American Rescue Plan Act of 2021 (ARPA) – Key Unemployment Insurance (UI) Provisions*, issued March 15, 2021, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=5669;
- UIPL No. 09-21, *Continued Assistance for Unemployed Workers Act of 2020 (Continued Assistance Act) - Summary of Key Unemployment Insurance (UI) Provisions*, issued December 30, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3831;
- UIPL No. 20-20, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 - Operating, Financial, and Reporting Instructions for Section 2105: Temporary Full Federal Funding of the First Week of Compensable Regular Unemployment for States with No Waiting Week*, issued April 30, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=6324;
- UIPL No. 18-20, Change 2, *American Rescue Plan Act of 2021 (ARPA) – Amendments to the Emergency Unemployment Relief for State and Local Governmental Entities, Certain*

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Nonprofit Organizations, and Federally-Recognized Indian Tribes, issued March 26, 2021, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=7171;

- UIPL No. 17-20, Change 2, *Continued Assistance for Unemployed Workers Act of 2020 – Pandemic Emergency Unemployment Compensation (PEUC) Program: Extension, Transition Rule, Increase in Total Benefits, and Coordination Rules*, issued December 31, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?docn=9291;
- UIPL No. 16-20, Change 5, *Expanded Eligibility Provisions for the Pandemic Unemployment Assistance (PUA) Program*, issued February 25, 2021, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3202;
- UIPL No. 16-20, Change 4, *Continued Assistance to Unemployed Workers Act of 2020 – Pandemic Unemployment Assistance (PUA) Program: Updated Operating Instructions and Reporting Changes*, issued January 8, 2021, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=6973; and
- UIPL No. 16-20, Change 2, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 – Pandemic Unemployment Assistance (PUA) Additional Questions and Answers*, issued July 21, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=5479;
- UIPL No. 16-20, Change 1, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 – Pandemic Unemployment Assistance (PUA) Program Reporting Instructions and Questions and Answers*, issued April 27, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=5899;
- UIPL No. 15-20, Change 3, *Continued Assistance for Unemployed Workers (Continued Assistance) Act of 2020 – Federal Pandemic Unemployment Compensation (FPUC) Program Reauthorization and Modification and Mixed Earners Unemployment Compensation (MEUC) Program Operating, Reporting, and Financial Instructions*, issued January 5, 2021, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=6122;
- UIPL No. 15-20, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 – Federal Pandemic Unemployment Compensation (FPUC) Program Operating, Financial, and Reporting Instructions*, issued April 4, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=9297;
- UIPL No. 14-20, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 – Summary of Key Unemployment Insurance (UI) Provisions and Guidance Regarding Temporary Emergency State Staffing Flexibility*, issued April 2, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3390;
- TEN No. 08-20, *Public Workforce System Role in Reopening State and Local Economies*, issued December 10, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=5171; and
- TEN No. 17-19, *Model Unemployment Insurance State Work Search Legislation*, issued February 10, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=4227.

7. **Attachment(s).** None.

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND S.B., S.S., T.S., and B.B. Plaintiffs vs. Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina, and G. Daniel Ellzey, in his official capacity as Director of the South Carolina Department of Employment and Workforce; Defendants	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT **PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** **Emergency Hearing Requested**

TO: ALL DEFENDANTS

NOTICE IS HEREBY GIVEN THAT Plaintiffs, by and through their undersigned counsel, will move before the presiding judge for a preliminary injunction requiring Defendants to immediately reinstate South Carolina's participation in the Federal Pandemic Unemployment Compensation ("FPUC"), Pandemic Emergency Unemployment Compensation ("PEUC"), and Pandemic Unemployment Assistance ("PUA") programs as soon as counsel may be heard. This motion is made upon the grounds stated in Plaintiffs Complaint, the memorandum of law filed concurrently herewith, and such additional evidence, testimony, and argument as may be properly submitted to the court.

The undersigned hereby certifies that, at the time of this filing and to my knowledge, the opposing party is a pro se litigant.

July 28, 2021

SOUTH CAROLINA APPLESEED
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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND S.B., S.S., T.S., and B.B. Plaintiffs vs. Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina, and G. Daniel Ellzey, in his official capacity as Director of the South Carolina Department of Employment and Workforce; Defendants	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

Recognizing the severe economic hardship visited on millions of Americans by the COVID-19 pandemic, Congress passed the Coronavirus Aid, Relief, and Economic Security ("CARES") Act which included, among its many relief programs, enhancements to existing unemployment benefits programs. These programs have provided billions in unemployment benefits to South Carolinians affected by the pandemic and are currently scheduled to continue through September 6, 2021. These benefits, including the costs of their administration, are 100% federally funded.

Effective June 27, 2021, Defendants, Governor McMaster and Director Ellzey, prematurely ended South Carolina's participation in these enhanced unemployment benefits. In doing so, they would forfeit more than half a billion dollars in benefits that would otherwise go to Plaintiffs and tens of thousands of other workers and their families for their benefit and the benefit of the South Carolina economy. In the first week following Defendants' action, there was a more than 82% decrease in the number of South Carolinians receiving any kind of unemployment benefit. That week alone, South Carolina saw a reduction of more than $39 million in the amount of unemployment benefits paid to South Carolina families.

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South Carolina law requires the South Carolina Department of Employment and Workforce ("DEW") to act as necessary to secure all benefits available under the Social Security Act, like the enhanced unemployment benefits at issue in this case, for the benefit of the State of South Carolina and her citizens. Defendants' actions are plainly contrary to this statutory obligation. They have caused, and will continue to cause, Plaintiffs and tens of thousands of other South Carolinians severe and irreparable harm.

Plaintiffs bring this action seeking relief that would require Defendants to renew South Carolina's participation in these enhanced unemployment benefits programs and enjoin Defendants from terminating South Carolina's participation in those programs prior to their expiration.

FACTS

The COVID-19 pandemic visited severe economic hardship on South Carolinians and disproportionately affected those least able to afford it. From June 2019 to June 2020, South Carolina's economy lost 126,100 seasonally adjusted, nonfarm jobs, an outcome largely driven by COVID-19.[1] By far, the hardest hit industry has been leisure and hospitality with 62,500 jobs lost over that period in an industry whose workers earn the lowest average wage of workers in any industry group - $373.00 per week.[2]

While economic recovery is underway, it is incomplete. Many thousands of South Carolina families are still struggling to recover financially. The number of unemployed South Carolinians in May 2021 is approximately 78% higher than it was in January 2020.[3] The U.S. Census Bureau estimates that 176,832 South Carolina households are behind on rent and collectively owe $481,923,073 in back rent.[4]

I. Congress Provides Pandemic Unemployment Benefits to Alleviate the Economic Hardship Caused by COVID-19.

[1] S.C. Department of Employment and Workforce, *Labor Market Trends,* Vol. 1: Issue 5, June 2020.
[2] *Id.*
[3] U.S. Bureau of Labor Statistics, Local Area Unemployment Statistics, available at https://data.bls.gov/pdq/SurveyOutputServlet (accessed July 14, 2021)
[4] https://nationalequityatlas.org/rent-debt (accessed July 14, 2021)

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In order to alleviate some of the economic hardship that the COVID-19 pandemic caused, Congress enacted the Coronavirus Aid, Relief, and Economic Security ("CARES") Act. Signed into law on March 27, 2020, the CARES Act provides for a variety of pandemic relief programs including several types of enhanced unemployment benefits (collectively "Pandemic Unemployment Benefits"). 15 U.S.C. § 9001 *et seq*.

Pandemic Unemployment Assistance ("PUA") is one type of Pandemic Unemployment Benefit and is available to workers who would not otherwise be eligible for regular Unemployment Insurance ("UI") benefits including the self-employed, underemployed, independent contractors, and others whose unavailability or inability to work was caused by COVID-19. 15 U.S.C. § 9021. Pandemic Emergency Unemployment Compensation ("PEUC") is a second type of Pandemic Unemployment Benefit and provides additional weeks of benefits for workers who had exhausted their regular UI benefits. 15 U.S.C. § 9025. Federal Pandemic Unemployment Compensation ("FPUC") is a third type of Pandemic Unemployment Benefit which increased the amount of regular UI benefits by $600 per week from March 27, 2020, through July 31, 2020. 15 U.S.C. § 9023. From December 27, 2020, through September 6, 2021, FPUC increases regular UI benefits by $300 per week. Continued Assistance for Unemployed Workers Act of 2020 ("CAUWA"). Pub. L. No. 116-260, § 200–01, 206; American Rescue Plan Act of 2021 ("ARPA"). Pub. L. No. 117-2, § 9013 (March 11, 2021). Workers receiving PUA and PEUC also receive an additional $300 per week included in their benefit payments although this technically is not an FPUC payment.

Funds have been appropriated by congress for Pandemic Unemployment Benefits and are available in the Unemployment Trust Fund to be distributed to eligible South Carolinians through September 6, 2021. ARPA §§ 9011, 9013, and 9016.[5] The costs of the Pandemic Unemployment Benefits themselves and the costs to states of administering these programs, including startup costs and ongoing administration costs, are 100% federally funded. 15 U.S.C. §§ 9021(f)(2), 9023(d)(1)(A), 9025(d)(2)(A).[6] Pandemic Unemployment Benefits and

[5] The CARES Act provided for three additional types of enhanced unemployment benefits which are not at issue in this case.

[6] See also Unemployment Insurance Program Letter ("UIPL") 15-20, p. 3 (FPUC); 16-20, p. 5 (PUA), 17-20, p. 3-4 (FPUC) (Exhibits A, B, and C to Plaintiffs Complaint).

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administration costs are funded through Sections 901, 904, and 905 of the Social Security Act, 42 U.S.C. § §§ 1101(a), 1104(a), and 1105(a). 15 U.S.C. §§ 9021(g), 9025(d).[7]

Shortly after the CARES Act was enacted, DEW entered into an agreement with the United States Department of Labor ("DOL") to administer Pandemic Unemployment Benefits on behalf of the State of South Carolina. As of July 12, 2021, DEW had distributed the following amounts under these programs:

Pandemic Unemployment Benefit	**Amount Distributed as of July 12, 2021**[8,9]
FPUC	$3,699,971,279.20
PEUC	$681,879,826.25
PUA	$543,498,066.88
Total	**$4,925,349,172.33**

Many tens of thousands of South Carolinians, including Plaintiffs, have been receiving Pandemic Unemployment Benefits since DEW began administering these programs.

II. Defendants Prematurely Terminate Pandemic Unemployment Benefits for Tens of Thousands of South Carolinians

On May 6, 2021, Director Ellzey issued a memorandum to Governor McMaster purporting to assess the impact should South Carolina decide to "opt-out" of Pandemic

[7] PUA benefits, including FPUC and administration costs, are funded by 42 U.S.C. §§ 1104(a) and 1105(a). 15 U.S.C. § 9021(g). PEUC benefits, including FPUC, are funded by 42 U.S.C. §§ 1104(a) and 1105(a), while PEUC administration costs are funded by 42 U.S.C. § 1101(a). 15 U.S.C. § 9025(d).
[8] https://www.dew.sc.gov/data-and-statistics/data-dashboard (accessed July 14, 2021)
[9] Three Pandemic UI Benefit programs not at issue in this case are omitted from these totals.

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Unemployment Benefits effective June 27, 2021, rather than participate through the currently scheduled end of those programs in early September 2021.[10] In his memorandum, Director Ellzey estimated that such action would result in the loss of the following amounts of federal funding between June 27, 2021, and September 4, 2021:

Program	**Anticipated 10-Week Funding Loss (June 27, 2021 – September 4, 2021)**
FPUC	$370.0 million
PEUC	$146.0 million
PUA	$62.0 million
Total	**$578 million**[11]

The same day Director Ellzey issued his memorandum, Governor McMaster directed DEW to terminate South Carolina's participation in the Pandemic Unemployment Benefits effective June 30, 2021.[12]

The effects of Defendants' actions on vulnerable South Carolinians were swift and dramatic. In the first week after Defendants opted out of Pandemic Unemployment Benefits, the number of South Carolinians receiving unemployment benefits of any kind fell by more than 82% (71,604).[13]

[10] Exhibit D to Plaintiffs Complaint
[11] DEW estimates that an additional $7.3 million in benefits will be lost during this time under the three Pandemic UI Programs that are not at issue in this case.
[12] Exhibit E to Plaintiffs Complaint
[13] https://www.dew.sc.gov/data-and-statistics/data-dashboard (accessed July 14, 2021, for June 27-July 3 data and accessed July 15, 2021, for July 4-July 10 data)

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	June 27 – July 3	**July 4 – July 10**	**Change**
Individuals receiving Unemployment Benefits of any kind	87,018	15,414	(71,604)

South Carolinians received over $39,000,000 less in Pandemic Unemployment Benefits between July 4, 2021, and July 10, 2021, than they did the week before Defendants' decision to opt out of those benefits took effect.[14] This weekly loss will most likely increase as Defendants' decision takes full effect.

	June 27 – July 3	**July 4 – July 10**	**Change**
FPUC Benefits Paid	$29,311,525.00	$3,479,806.00	($25,831,719.00)
PEUC Benefits Paid	$10,583,318.00	$1,062,149.00	($9,521,169.00)
PUA Benefits Paid	$4,276,299.00	$445,028.00	($3,831,271.00)

[14] https://www.dew.sc.gov/data-and-statistics/data-dashboard (accessed July 14, 2021, for June 27-July 3 data and accessed July 15, 2021, for July 4-July 10 data)

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Total	**$44,171,142.00**	**$4,986,983**	**($39,184,159.00)**

While Defendants' decision to opt out of Pandemic Unemployment Benefits has taken effect, that action is not irrevocable. On July 12, 2021, DOL issued guidance to state workforce agencies which clarified that "[a]ny state that has provided notice to [DOL] of its intent to terminate any of the Pandemic Unemployment Benefits prior to the September 6, 2021, end date may reinstitute participation in any or all programs it previously indicated it would be terminating."[15]

DOL's July 12 guidance indicates that if the date on which a state has indicated it will terminate participation in Pandmic Unemployment Benefit programs has passed, as it has in South Carolina, the state may need to enter into a new agreement with DOL to reinstitute operations. Doing so may result in a lapse in FPUC and PEUC benefits because the new agreement would become effective the week of unemployment after that agreement is signed.[16] Thus, every week that passes without an agreement between DEW and DOL to administer Pandemic Unemployment Benefits may result in the permanent loss of tens of millions in federal unemployment benefits for needy South Carolinians, including Plaintiffs. PUA benefits will not lapse if South Carolina enters into a new agreement with DOL because the state would be required to provide individuals receiving PUA an opportunity to certify for the missing weeks.[17]

III. Individual Plaintiffs and the Harms They Have Suffered as a Result of Defendants' Conduct.

Plaintiffs' individual circumstances are explained in more detail in their certifications which are attached hereto as Exhibits G – J. Each plaintiff is currently eligible for one or more of the Pandemic Unemployment Benefit programs at issue in this case and would be receiving those benefits but for Defendants' decision to prematurely opt out of those programs. As their certifications make clear, each plaintiff has suffered and is likely to continue suffering

[15] Unemployment Insurance Program Letter No. 14-21, Change 1 (Exhibit F to Plaintiffs Complaint, available at https://wdr.doleta.gov/directives/corr_doc.cfm?docn=9502)
[16] UIPL 14-21 at 7
[17] UIPL 14-21 at 7

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irreparable harm as a result of Defendants' actions including homelessness, loss of utility service, food insecurity, and lack of needed medical treatment.

ARGUMENT

I. Plaintiffs are Entitled to a Declaratory Judgment.

The Uniform Declaratory Judgements Act, S.C. Code Ann. § 15-53-10 *et seq*., provides that "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed" and such a declaration may be affirmative or negative in form and effect." S.C. Code Ann. § 15-53-20. In order to state a cause of action for a declaratory judgment, all that is required is that the party seeking the judgment demonstrate a justiciable controversy. *Brown v. Wingard*, 285 S.C. 478, 479, 330 S.E.2d 301, 302 (1985). "A justiciable controversy is a real and substantial controversy appropriate for judicial determination, as opposed to a dispute or difference of a contingent, hypothetical or abstract character." *Sloan v. Greenville Cty.*, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003). There is nothing contingent, hypothetical, or abstract about the controversy here. Plaintiffs have suffered, and will continue to suffer, the loss of benefits which Defendants have caused DEW to forfeit in violation of its statutory obligations as explained below. Thus, a real and substantial controversy exists between the parties which a declaratory judgment will resolve.

Plaintiffs are entitled to a declaration that Defendants actions in causing DEW to forfeit more than half a billion dollars in benefits that would otherwise be available to needy South Carolina families was in violation of DEW's statutory obligation. As a result, those actions were void and *ultra vires*. South Carolina law provides that:

> In the administration of Chapters 27 through 41 of this title, **the department must cooperate with the United States Secretary of Labor to the fullest extent consistent with the provisions of these chapters, and act**, through the promulgation of appropriate rules, regulations, administrative methods and standards, **as necessary to secure to this State and its citizens all advantages available under the provisions of the Social Security Act that relate to unemployment compensation**, the Federal Unemployment Tax Act, the Wagner-Peyser Act, and the Federal-State Extended Unemployment Compensation Act of 1970.

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S.C. Code Ann. § 41-29-230(1) (emphasis added). As social legislation, Section 41-29-230(1) should be construed to provide protection to as many employees as possible. *C.f. Stone Manufacturing Co. v. South Carolina Employment Security Commission*, 219 S.C. 239, 64 S.E. (2d) 644 (1951) (referring to the Employment Security Law, the predecessor of the statutory scheme at issue in this case). This section unambiguously requires DEW to secure all unemployment compensation made available under the provisions of the Social Security Act ("SSA") for the benefit of the State of South Carolina and its citizens.

The Pandemic Unemployment Benefits at issue in this case are advantages available under the provisions of the SSA that relate to unemployment compensation and, as a result, DEW has a statutory obligation to maximize the amount of these benefits that are available to eligible South Carolinians. The SSA establishes various funds and accounts to hold money for the states to pay unemployment compensation and to cover the administrative costs of running unemployment compensation programs. The Pandemic Unemployment Benefits at issue are temporary enhancements to UI benefits which are already provided by Sections 901, 904, and 905 the SSA. Section 901(a) of the SSA, 42 U.S.C. §§ 1101(a), establishes an unemployment security administration account within the Unemployment Trust Fund through which PEUC administration costs are funded. 15 U.S.C. § 9021(g). Sections 904(a) and 905(a) of the SSA, 42 U.S.C. §§ 1104(a) and 1105(a), establish the Unemployment Trust Fund and extended unemployment compensation account, respectively. PUA and FPUC, including administration costs of both, are funded through the extended unemployment compensation account of the Unemployment Trust Fund. 15 U.S.C. § 9025(d).

In summary, PUA, PEUC, and FPUC do not create new benefits. Rather, they authorize states to draw from benefits already conferred under the SSA in a greater amount and through a specified process for a particular purpose. As a result, these benefits are "advantages available under the provisions of the [SSA]" within the meaning of Section 41-29-230(1) and DEW has an obligation to secure them. DEW's premature withdrawal from these benefit programs was in violation of its statutory obligations and must be considered void and *ultra vires*.

Plaintiffs are individuals who were eligible for and receiving Pandemic Unemployment Benefits at the time DEW withdrew from these programs. Plaintiffs continue to be eligible for

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these benefits and would currently be receiving them but for Defendants' actions causing DEW to prematurely withdraw from these programs. As a result, a justiciable controversy exists between the parties and Plaintiffs have stated a claim for a declaratory judgment.

For the reasons stated above, Plaintiffs are entitled to a declaration that (1) Section 41-29-230(1) requires DEW to secure Pandemic Unemployment Benefits for the benefit of South Carolina and her citizens; (2) Governor McMaster's May 6, 2021 directive to Director Ellzey demanding that DEW terminate its participation in Pandemic Unemployment Benefits was unlawful and ultra vires; and (3) Director Ellzey's termination of DEW's participation in Pandemic Unemployment Benefits was unlawful and *ultra vires*.

II. Plaintiffs are Entitled to a Preliminary Injunction.

In order to obtain a preliminary injunction, the moving party must show that (1) they will suffer immediate, irreparable harm without the injunction; (2) they have a likelihood of success on the merits; and (3) they have no adequate remedy at law. *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011). "To obtain an injunction, the plaintiff must allege facts sufficient to constitute a cause of action for injunction and demonstrate the injunction is reasonably necessary to protect the legal rights pending in the litigation." *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 454, 626 S.E.2d 34, 36 (Ct. App. 2005) (overruled on other grounds, *Poynter Invs. v. Century Builders of Piedmont*, 387 S.C. 583, 694 S.E.2d 15 (2010)). Whether to grant a preliminary injunction is left to the sound discretion of the trial court and will not be overturned unless it is clearly erroneous. *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011). Plaintiffs are entitled to the injunction they seek for the reasons that follow.

A. Plaintiffs have suffered and will continue to suffer irreparable harm without injunctive relief.

Irreparable harm "does not necessarily mean that the injury is beyond the possibility of compensation in damages". *Bethel Methodist Episcopal Church v. Greenville*, 211 S.C. 442, 451, 45 S.E.2d 841, 845 (1947). Instead, "where the mischief is such, from its continuous and permanent character, that it must occasion constantly recurring grievances, which cannot be

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otherwise prevented, a court of equity ought to interfere by injunction to stay the wrong and protect the complainants' property and personal rights from hurt or destruction." *Carter v. Lake City Baseball Club, Inc.*, 218 S.C. 255, 271–72, 65 S.E.2d 470, 477 (1950).

Here, Plaintiffs have all faced the hardships of poverty either created, or exacerbated, by Defendants' premature withdrawal from Pandemic Unemployment Benefits programs. They also face the real and imminent likelihood of other hardships such as homelessness, loss of utility service, food insecurity, and lack of needed medical treatment. South Carolina courts have routinely held less severe hardships to be irreparable harm sufficient to merit injunctive relief. For example, in *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 674 S.E.2d 505 (Ct. App. 2009), the Court of Appeals held that activity which interfered with a property owner's right to use and enjoyment of their property was sufficient to warrant injunctive relief. Similarly, in *Richland Cty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 811 S.E.2d 758 (2018), the Supreme Court held that taxpayers would be irreparably harmed if a county were permitted to use taxpayer funds unlawfully. *See also Peek*, 367 S.C. 450 (holding that the complete loss of a professional practice can be an irreparable harm); *Mack v. Edens*, 306 S.C. 433, 437, 412 S.E.2d 431, 434 (Ct. App. 1991) ("Injunction is a proper remedy for a continuous trespass to land. Because of the permanent and recurring nature of the injury, which cannot otherwise be prevented, the courts should enjoin the continuous trespasser to protect the landowner's property rights from hurt or destruction.").

In addition, should this Court deny injunctive relief and then later determine that Defendants acted unlawfully in prematurely withdrawing from the Pandemic Unemployment Benefits programs, it is very likely that all or a substantial portion of the benefits that Plaintiffs were entitled to would be unrecoverable. As the DOL has noted, there may be a lapse in FPUC and PEUC benefits for any weeks during which there is no agreement between DOL and a state to administer these benefits.[18] In this scenario, those eligible for PUA benefits may be allowed to re-certify and later receive benefits for the missing weeks.[19] However, PUA benefits account for less than 10% of the Pandemic Unemployment Benefits paid to South Carolinians during the

[18] See UIPL 14-21, p. 7 (Exhibit F to Plaintiffs' Complaint)
[19] *Id*.

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week of June 27 – July 3.[20] And those eligible for PUA benefits will still be denied the additional FPUC benefits that they would otherwise be eligible for. The likelihood plaintiffs would be permanently deprived of all or a substantial portion of the benefits that they are eligible for constitutes an additional irreparable harm that injunctive relief could prevent.

Plaintiffs have suffered, and will continue to suffer, these hardships because of Defendants' actions. The proper remedy to prevent the continuation of these irreparable harms is injunctive relief.

B. Plaintiffs are likely to succeed on the merits of their claim for declaratory relief.

In order to be entitled to a preliminary injunction, Plaintiffs do not need to prove an absolute legal right to the relief request. Instead, the plaintiffs need only to present "a fair question to raise as to the existence of such a right." *Peek*, 367 S.C. at 456 (quoting *Williams v. Jones*, 92 S.C. 342, 347, 75 S.E. 705, 710 (1912)). The court is to examine the merits of the case only to the extent necessary to determine whether Plaintiffs have established a prima facie case on the merits. *Helsel v. N. Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992). For the reasons stated in Section I above, Plaintiffs are likely to succeed on the merits of their claim for declaratory relief.

Further, Plaintiffs' likelihood of success is supported by the fact that courts in two states have recently granted injunctive relief in cases substantially similar to the instant case. To date, these are the only two courts to rule on challenges to a state's decision to prematurely end Pandemic Unemployment Benefits.

On June 14, 2021, several Indiana residents receiving Pandemic Unemployment Benefits filed suit against the Governor of Indiana and the Commissioner of the Indiana Department of Workforce Development after they prematurely ended that state's participation in Pandemic Unemployment Benefits programs. *T.L. v. Holcomb*, Marion Superior Court, Cause No.: 49D11-2106-PL-020140. Plaintiffs argued that the defendants' decision to opt out of Pandemic

[20] https://www.dew.sc.gov/data-and-statistics/data-dashboard (accessed July 14, 2021, for June 27-July 3 data and accessed July 15, 2021, for July 4-July 10 data)

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Unemployment Benefits violated their obligations under Indiana law which required the state to secure "all the rights and benefits which are conferred" under the provisions of certain federal statutes including Sections 901, 904, and 905 of the Social Security Act, 42 U.S.C. § §§ 1101(a), 1104(a), and 1105(a).

On June 25, the court issued a decision granting plaintiffs request for a preliminary injunction finding that Indiana law "requires the State to accept these benefits" and ordering the state to immediately notify the DOL of its continued participation in Pandemic Unemployment Benefits. *T.L. v. Holcomb*, Mem. Op. (June 25, 2021), at 9-11.[21]

The Indiana statute at issue in *T.L.* is nearly identical to S.C. Code Ann. § 41-29-230(1) in its requirement that the state secure benefits available under the specified provisions of the Social Security Act. In fact, the South Carolina statute's scope is broader than the Indiana statute. While Indiana's statute only requires the state to secure benefits available under Sections 901, 904, and 905 of the Social Security Act, Section 41-29-230(1) requires DEW to secure all advantages under any part of the Social Security Act that relates to unemployment compensation. Thus, the Indiana court's reasoning is persuasive in this case.

Similarly, on June 30, 2021, several residents of Maryland filed suit against the Governor and Secretary of Labor challenging the state's decision to prematurely withdraw from Pandemic Unemployment Benefits. *D.A. v. Hogan*, Baltimore City Circuit Court, Case No. 24-C-21-002988. The Maryland law at issue in *D.L.* states that the Secretary of Labor "shall cooperate with the United States Secretary of Labor to the fullest extent that this title allows." Md. Code, Lab. & Empl. § 8-310(a)(1). In determining what this statute required of the state, the court looked to the remainder of the statutory scheme which set up the state's unemployment insurance system. That scheme included a statement of the state's public policy which identified "economic insecurity due to unemployment" as a "serious menace." The court then held that Section 8-310(a)(1), when read in the context of the statutory scheme, required executive officials to seek and obtain all federally funded benefits at are available to the state and granted

[21] Attached hereto as Exhibit K

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plaintiffs' motion for preliminary injunction on July 13, 2021. *D.L. v. Hogan*, Mem. Op. (July 13, 2021).[22]

Like the Maryland unemployment insurance statutes, South Carolina's unemployment insurance statutes contain a similar declaration of public policy which identifies economic insecurity due to unemployment as a "serious menace to health, morals and welfare of the people of this State" and the "greatest hazard of our economic life." S.C. Code Ann § 41-27-20. This section coupled with the directive contained in Section 41-29-230(1) that DEW "cooperate with the United States Secretary of Labor to the fullest extent consistent with the provisions of these chapters" would be sufficient, according to the reasoning of the Maryland court, to find that Defendants are required to participate in Pandemic Unemployment Benefits. But South Carolina's unemployment insurance law goes quite a bit further. Unlike Maryland's unemployment insurance laws, Section 41-29-230(1) contains an express directive that DEW secure "all advantages available under the provisions of the Social Security Act that relate to unemployment compensation . . . ." Thus, while Defendants would have a statutory obligation to obtain Pandemic Unemployment Benefits for eligible South Carolinians based on the statement of public policy and mandate that DEW "cooperate . . . to the fullest extent" alone, the directive to secure all advantages makes patently clear that Defendants' premature withdrawal from these programs is contrary to these statutory obligations.

C. Plaintiffs have no adequate remedy at law.

In order to be entitled to a preliminary injunction, Plaintiffs must establish that they do not have an adequate remedy at law. "An 'adequate' remedy at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity." *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). Whether a remedy at law is adequate depends upon the practicality of that remedy under the circumstances. *See e.g., CBS v. Custom Recording Co.*, 258 S.C. 465, 189 S.E.2d 305 (1972).

[22] Attached hereto as Exhibit L.

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Because Plaintiffs are suffering and will continue to suffer irreparable harm in its absence, injunctive relief is the only practical and efficient remedy to Plaintiffs. Further, the DOL has issued guidance which indicates that there may be a lapse in FPUC and PEUC benefits for any weeks during which there is no agreement between DOL and a state to administer these benefits.[23] In effect, PEUC and FPUC benefits may be permanently lost unless and until the injunctive relief that Plaintiffs request is granted. Finally, damages, if available, would most likely take quite some time to recover, would not be available in time for Plaintiffs to avoid the harms that UI benefits are designed to prevent, and would, at best, compensate only the named plaintiffs for benefits that they were entitled to rather than reinstating the Pandemic Unemployment Benefits programs for all eligible South Carolinians. For these reasons, Plaintiffs have no adequate remedy at law.

D. Plaintiffs should not be required to post bond in order to obtain injunctive relief.

Rule 65(c), SCRCP, provides that "no restraining order or temporary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." However, Plaintiffs should not be required to post bond in this case for two reasons.

First, this Court has discretion to set a bond of zero or to waive the bond requirement entirely. South Carolina's Rule 65 "is substantially the Federal Rule which, in turn, is very much the same as present State practice." Rule 65, SCRCP, Note. Federal Rule 65(c) has long been interpreted to afford courts the discretion to set the bond amount as it sees fit or to waive the security requirement in appropriate cases. *See e.g. Pashby v. Delia*, 709 F.3d 307, 332 (4th Cir. 2013).[24] A number of courts have recognized an exception to the security requirement for public interest litigation. *See e.g. Crowley v. Local No. 82, Furniture & Piano*, 679 F.2d 978 (1st Cir.

[23] See UIPL 14-21, p. 7 (Exhibit F to Plaintiffs' Complaint)

[24] The South Carolina Supreme Court's rejection of a nominal bond in *Atwood Agency v. Black*, 374 S.C. 68, 73, 646 S.E.2d 882, 844 (2007), is not inapposite. *Atwood* involved a trade secret claim and did not address whether bond could be waived in public interest litigation as numerous courts have held. Further, *Atwood* simply held that it was error to require a nominal bond on the assumption that the injunction would be upheld.

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1982), *rev'd on other grounds*, 467 U.S. 526, 81 L. Ed. 2d 457, 104 S. Ct. 2557 (1984); *Temple Univ. v. White*, 941 F.2d 201, 220 (3d Cir. 1991); *Atlanta v. Metro. Atlanta Rapid Transit Auth.*, 636 F.2d 1084 (5th Cir. 1981). Here, Plaintiffs seek to enforce DEW's statutory obligation to secure benefits available under the SSA on behalf of themselves and, by extension, tens of thousands of needy South Carolinians.

Second, granting the injunctive relief that Plaintiffs request will not cause Defendants any monetary harm. Both the Pandemic Unemployment Benefits themselves and any costs that Defendants might incur in administering these programs are 100% federally funded. 15 U.S.C. §§ 9021(f)(2), 9023(d)(1)(A), 9025(d)(2)(A).[25] Numerous courts have held that waiving the security requirement or setting a bond of zero dollars is appropriate in such circumstances. *See e.g. Jackson v. City of Aiken Hous. Auth.*, No. 1:16-cv-02831-JMC, 2016 U.S. Dist. LEXIS 172564 (D.S.C. Dec. 14, 2016); *Int'l Controls Corp. v. Vesco*, 490 F.2d 1334, 1356 (2d Cir. 1974) (In construing Rule 65 "the district court may dispense with security where there has been no proof of likelihood of harm to the party enjoined.") c*ert. denied*, 417 U.S. 932, 41 L. Ed. 2d 236, 94 S. Ct. 2644 (1974); *Cont'l Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780, 782 (10th Cir. 1964) ("Under this rule the trial judge has wide discretion in the matter of requiring security and if there is an absence of proof showing a likelihood of harm, certainly no bond is necessary."); *Urbain v. Knapp Bros. Mfg. Co.*, 217 F.2d 810 (6th Cir. 1954), *cert. denied*, 349 U.S. 930, 99 L. Ed. 1260, 75 S. Ct. 772 (1955).

For these reasons, this Court should waive the Rule 65(c) security requirement or set a bond in the amount of zero dollars, an amount which represents the entirety of the harm that Defendants could face if improperly enjoined.

III. In the Alternative, Plaintiffs are Entitled to a Writ of Mandamus.

"To obtain a writ of mandamus requiring the performance of an act, the petitioner must show: (1) a duty of respondent to perform the act; (2) the ministerial nature of the act; (3) the petitioner's specific legal right for which discharge of the duty is necessary; and (4) a lack of any other legal remedy." *Wilson v. Preston*, 378 S.C. 348, 354, 662 S.E.2d 580, 582-83 (2008). A

[25] See also Unemployment Insurance Program Letter ("UIPL") 15-20, p. 3 (FPUC); 16-20, p. 5 (PUA), 17-20, p. 3-4 (FPUC) (Exhibits A, B, and C to Plaintiffs' Complaint).

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writ of mandamus "'is designed to promote justice, subject to certain well-defined qualifications. Its principal function is to command and execute, and not to inquire and adjudicate.'" *Charleston Cty. Sch. Dist. v. Charleston Cty. Election Comm'n*, 336 S.C. 174, 182, 519 S.E.2d 567, 571-72 (1999) (quoting *Willimon v. City of Greenville*, 243 S.C. 82, 86-87, 132 S.E.2d 169, 170-71 (1963)).

Guidance from DOL makes clear that states which have terminated their participation in Pandemic Unemployment Benefits early may reinstitute participation in these programs, even if the date on which the termination was to take effect has passed. In that case, DEW would need to, at most, enter into a new agreement with DOL to administer these benefits.[26] Section 41-29-230(1) unambiguously obligates DEW to secure all advantages available under the Social Security Act that relate to unemployment compensation. Because Pandemic Unemployment Benefits are such advantages, DEW is under an obligation to secure them by withdrawing the state's termination of its participation in these programs or entering into a new agreement with DOL to administer these benefits.

A duty is ministerial when it is "absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *Wilson v. Preston*, 378 S.C. 348, 354, 662 S.E.2d 580, 583 (2008). South Carolina law does not leave any room for discretion in this case. It plainly states that DEW "**must** cooperate with the United States Secretary of Labor **to the fullest extent consistent with the provisions of these chapters, and act**, through the promulgation of appropriate rules, regulations, administrative methods and standards, **as necessary to secure to this State and its citizens all advantages available under the provisions of the Social Security Act that relate to unemployment compensation**." S.C. Code Ann. § 41-29-230(1) (emphasis added). Here, DOL has specified the act that DEW must perform in order to secure Pandemic Unemployment Benefits – DEW must enter into an agreement with DOL to administer those benefits. DEW has no discretion to refuse to perform that act as long as it is consistent with the provisions of Chapters 27 through 41 of Title 41 of the South Carolina Code. Performance of this act is entirely consistent with these Chapters and DEW has performed this act before. As a result, entering into an agreement with DOL to administer Pandemic

[26] Unemployment Insurance Program Letter No. 14-21, Change 1, p. 7 (Exhibit F to Plaintiffs' Complaint and available at https://wdr.doleta.gov/directives/corr_doc.cfm?docn=9502)

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Unemployment Benefits is both a statutory obligation, and a ministerial act that DEW cannot refuse to perform.

Further, Plaintiffs have a legal right to Pandemic Unemployment Benefits and DEW's discharge of its duty is necessary to secure those rights. This is plainly evidenced by the fact that it was DEW's entry into an agreement with DOL to administer these benefits that made them available to Plaintiffs in the first place. And Plaintiffs are no longer receiving Pandemic Unemployment Benefits because DEW, through Defendants' actions, has withdrawn from these programs.

Finally, should this Court deny declaratory and/or injunctive relief, Plaintiffs will have no other legal remedy than a writ of mandamus to vindicate their rights. An action for damages, assuming that remedy is available, would be costly, time-consuming, and ill-adapted to prevent the harms that Plaintiffs seek to avoid in this action. Further, such an action would not be capable of enforcing Defendants' statutory obligation to secure Pandemic Unemployment Benefits and would, at best, compensate only the named plaintiffs for benefits they should have received. For these reasons, a writ of mandamus is proper and necessary in the event that other relief which would require Defendants to reinstate South Carolina's participation in Pandemic Unemployment Benefits is denied.

CONCLUSION

For the forgoing reasons, Plaintiffs respectfully request that this Court grant them the following relief:

First, a declaration that (i) Section 41-29-230(1) requires DEW to secure Pandemic Unemployment Benefits for the benefit of South Carolina and her citizens; (ii) Governor McMaster's May 6, 2021, directive to Director Ellzey demanding that DEW terminate its participation in Pandemic Unemployment Benefits was unlawful and *ultra vires*; and (iii) Director Ellzey's termination of DEW's participation in Pandemic Unemployment Benefits was unlawful and *ultra vires*.

Second, a preliminary and permanent injunction: (i) Requiring Director Ellzey to immediately enter into a new agreement with DOL to administer Pandemic Unemployment

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Benefits; (ii) Requiring Director Ellzey to provide all South Carolinians who were receiving PUA benefits prior to DEW's withdrawal from that program with notice of PUA reinstatement and an opportunity to certify for any weeks of benefits they did not receive as a result of DEW's withdrawal; (iii) Requiring Director Ellzey to pay prospective and retroactive PEUC and FPUC benefits to all South Carolinians who qualify for them or who would have qualified for them but for DEW's withdrawal from these programs; (iv) Enjoining Defendants, Governor McMaster and Director Ellzey, their officers, employees, agents, and all persons acting in concert or participation with them from taking any action that will prevent or delay the State of South Carolina or any individuals who qualify from receiving any and all Pandemic Unemployment Benefits; and (v) Enjoining Defendants, Governor McMaster and Director Ellzey, their officers, employees, agents, and all persons acting in concert or participation with them, from withdrawing the State of South Carolina from Pandemic Unemployment Benefits for the duration of those programs.

Finally, and in the alternative, a writ of mandamus directing the relief requested herein.

Respectfully Submitted,

July 28, 2021

SOUTH CAROLINA APPLESEED
LEGAL JUSTICE CENTER

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STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

CERTIFICATION OF S[redacted]
B[redacted]

PLAINTIFF'S EXHIBIT

G

I, S[redacted] B[redacted], hereby certify[1] that:

1. I am 35 years old and a resident of Spartanburg, South Carolina. I live with my three children ages 15, 11, and 7. My youngest has cerebral palsy, is profoundly disabled, and receives $789.00 per month in SSI benefits.

2. I served for 2 years in the United States Air Force before being honorably discharged due to a disability. I receive approximately $170.00 per month in VA benefits and, aside from my child's SSI, there is no other income coming into my household right now.

3. In June of 2020, I was terminated from my job as a front desk manager at a hotel. I applied for unemployment benefits and I was initially determined to be ineligible because DEW said I was terminated from my job for misconduct.

4. I appealed this initial determination and, in November 2020, DEW reversed its decision and found that I was eligible for unemployment benefits effective June 14, 2020 because I had been terminated without cause connected to my employment.

5. I started receiving unemployment benefits of $299.00 per week in November of 2020.

6. In December of 2020, I started receiving an additional $300.00 per week in Federal Pandemic Unemployment Compensation ("FPUC").

7. In April of 2021, I received a notice that I was eligible for Pandemic Emergency Unemployment Compensation ("PEUC") as of July 5, 2020.

[1] This Certification is being filed in lieu of affidavit pursuant to Paragraph (c)(16) of In Re: Operation of the Trial Courts During the Coronavirus Emergency, Appellate Case No. 2020-000447 (as amended June 15, 2021).

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8. In June of 2021, I received an email from DEW saying that the following week would be the last week that I would be eligible for PEUC, and FPUC. I have not received any unemployment benefits since DEW stopped participating in these programs.

9. I have continued to search for work since I became unemployed. I have applied for approximately 30-40 jobs through DEW's online portal since April of 2021. I was offered one phone interview as a result, but I was not able to take the job because it required 2nd or 3rd shift work and I cannot leave my youngest at home with my other children overnight.

10. I have completed another 60-80 applications since I became unemployed but have not been able to find suitable employment. Until my youngest goes back to school, I would need to make enough to pay for babysitting or daycare, which is particularly expensive for a special needs child.

11. I am approximately 3 months behind on rent and 1.5 months behind on my utility and car payments. The unemployment benefits I was receiving made it possible for me to stay much closer to current on these bills and pay other expenses for myself and my children.

12. I am concerned that if it becomes public knowledge that I was a part of this lawsuit, I could face harassment, retaliation, or the loss of job opportunities.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment by contempt.

Dated: 07 / 20 / 2021

[redacted]

S[redacted] B[redacted]

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STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

CERTIFICATION OF S[redacted]

I, S[redacted] S[redacted], hereby certify[1] that:

1. I am 35 years old and a resident of Easley, South Carolina. I live with my mother who has cancer. I have lived with her since 2012 to be her caregiver. She receives approximately $830.00 per month in SSI survivor's benefits. Currently that is the only income coming into my household.

2. In February 2020, I was let go from my job at a security company that I had held for about 6 months. I applied for unemployment benefits but was found ineligible from March 22, 2020, through July 11, 2020 because DEW said I had been fired for cause. I appealed this decision, but it was upheld.

3. I was preparing to start a new job doing janitorial work at a school in March of 2020 when I got notice that the school would be closing down because of the pandemic.

4. I was found eligible for Pandemic Unemployment Compensation ("PEUC") in June of 2020 and started receiving $214.00 in weekly benefits before tax, $182.00 per week after tax.

5. In November of 2020, I got notice that I was eligible for Pandemic Unemployment Assistance ("PUA") benefits from March 22, 2020, because may place of employment closed as a result of COVID-19. This notice said the pandemic assistance period would end on September 4, 2021

6. In December of 2020, I started receiving an additional $300.00 per week in Federal Pandemic Unemployment Compensation ("FPUC").

[1] This Certification is being filed in lieu of affidavit pursuant to Paragraph (c)(16) of In Re: Operation of the Trial Courts During the Coronavirus Emergency, Appellate Case No. 2020-000447 (as amended June 15, 2021).

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7. In June of 2021, I received notice from DEW that they were not going to be participating in PEUC, PUA, and FPUC after the end of that month. I received my last unemployment benefits check of $47.00 about two weeks ago.

8. I have continued to search for work since I became unemployed in February of 2020 and have applied for hundreds of jobs in that time but have been unable to find suitable employment. I have continued to go to appointments with DEW to help with my job search even though my benefits have ended, and I have been told I don't have to do this anymore.

9. My mother and I struggled to make ends meet before my unemployment benefits were stopped. Since then, we have struggled to put food on the table. We have borrowed money from family for necessities, but I do not know how long those resources will last. My car is more than 20 years old, and I rely on it to get my mother to her frequent surgeries and doctor's appointments. We have remained current on our rent and utilities so far, but I am unsure how long we will be able to do so without the unemployment benefits I was receiving.

10. I am concerned that if it becomes public knowledge that I was a part of this lawsuit, I could face harassment, retaliation, or the loss of job opportunities.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment by contempt.

Dated: 07 / 20 / 2021

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STATE OF SOUTH CAROLINA

COUNTY OF MARION

CERTIFICATION OF T[redacted]
S[redacted]

PLAINTIFF'S EXHIBIT 1

I, T[redacted] S[redacted], hereby certify[1] that:

1. I am 49 years old and a resident of Marion, South Carolina.

2. I lost my job on March 11, 2020, when the company I was working for closed my division and moved its operations to Columbia, South Carolina.

3. I applied for unemployment benefits and was approved for $151.00 per week in regular Unemployment Insurance ("UI"). After exhausting regular UI, I was moved to extended benefits under the Pandemic Unemployment Compensation ("PEUC") program.

4. I started receiving an additional $600.00 per week in Federal Pandemic Unemployment Compensation ("FPUC") in April of 2020. I received this benefit through July of 2020 when it ended.

5. After my FPUC assistance ended, I lost my house, and my car was repossessed. I was able to get my car back, but only by borrowing money from family. I moved in with a friend and our agreement is that I pay half of the utilities.

6. In December 2020, I started receiving an additional $300.00 per week when FPUC was re-started. I received FPUC until DEW stopped participating in the program in June of 2021.

7. I am no longer receiving unemployment benefits of any kind since DEW stopped participating in PEUC and FPUC.

8. I have been required to, and I have continued to, search for work since I became unemployed. I have conducted at least 288 job searches using the DEW online portal and

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have not received even an offer to interview. I have been searching for jobs outside of the DEW online portal and have had four interviews, but no job offers.

9. Since my unemployment benefits ended, I have gotten behind in my utility payments. If I am unable to continue these payments, I will not be able to live where I am anymore and I don't have any place else to go. While I am current on my car payment now, I have no way to keep paying and my car will likely be repossessed again. Because I don't have health insurance right now, I have to pay for prescriptions and copays out of pocket and I am currently in need of treatment for kidney problems.

10. I am concerned that if it becomes public knowledge that I was a part of this lawsuit, I could face harassment, retaliation, or the loss of job opportunities.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment by contempt.

Dated: 07 / 22 / 2021

[redacted]

T[redacted] S[redacted]

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STATE OF SOUTH CAROLINA

COUNTY OF HORRY

CERTIFICATION OF B[redacted]
B[redacted]

PLAINTIFF'S EXHIBIT

J

I, B[redacted] B[redacted], hereby certify[1] that:

1. I am 41 years old and a resident of Myrtle Beach, South Carolina. I live with my nephews ages 10 and 12 who I care for.

2. I started a cake-making business in Myrtle Beach in 2021 and operated it full time until lockdowns began due to the pandemic in March of 2020. I had to close my business because very few events were happening, and few people were ordering cakes.

3. I applied for unemployment benefits in March of 2020 and started receiving Pandemic Unemployment Assistance ("PUA") in June of 2020. I have also received Federal Pandemic Unemployment Compensation ("FPUC") when it was available.

4. I was receiving PUA and FPUC when DEW stopped participating in these programs in June of 2021. Because DEW stopped participating in these programs, I currently have no income.

5. Now that the economy seems to be recovering and people are holding events again, I had planned to use PUA and FPUC benefits to get my business re-started. But I will not be able to do this without income because I will need to buy supplies and pay vendors to do this.

6. I have applied for at least 50-60 jobs since I had to close my business, but I have not received a job offer nor have I been offered an interview.

7. I have applied for PPP and SBA loans to get my business operating again but have always been told that there is no money available.

[1] This Certification is being filed in lieu of affidavit pursuant to Paragraph (c)(16) of In Re: Operation of the Trial Courts During the Coronavirus Emergency, Appellate Case No. 2020-000447 (as amended June 15, 2021).

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8. I am currently behind on my house taxes because of the pandemic, and I am concerned that, unless I can get my business restarted, I will eventually lose my home.

9. I have been able to stay current on most of my bills while I was receiving unemployment benefits. But because these benefits have been stopped, I don't know how I will keep paying for things like food and utilities.

10. I am concerned that if it becomes public knowledge that I was a part of this lawsuit, I could face harassment, retaliation, or the loss of job opportunities.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment by contempt.

Dated: 07 / 26 / 2021

[redacted]

B[redacted] B[redacted]

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PLAINTIFF'S EXHIBIT

K

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STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT
	) SS:	
COUNTY OF MARION	)	CAUSE NO.: 49D11-2106-PL-020140

T.L., J.C., L.C, S.A.S., J.H.S., and CONCERNED CLERGY OF INDIANAPOLIS

Plaintiffs,

v.

ERIC HOLCOMB, in his official capacity as GOVERNOR of the State of Indiana and FREDERICK PAYNE, in his official capacity as COMMISSIONER of the INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT

Defendants,

FILED

JUN 25 2021

Myla A. Eldridge

CLERK OF THE MARION CIRCUIT COURT

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND JUDGMENT

Comes now the Court, and, this matter having come before the Court on Plaintiffs' Complaint for Declaratory Judgment and Injunctive Relief and Plaintiffs' Motion for Preliminary Injunction, which were filed with the Court on June 14, 2021, and on Plaintiffs' Motion for Emergency Hearing which was filed with the Court on June 17, 2021, and the parties, by counsel, having come before the Court on the 23rd day of June, 2021, and having submitted this matter to the Court for decision, now the Court, being duly advised in the premises, pursuant to Trial Rule 52 (A) of the Indiana Rules of Trial Procedure, issues the following:

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FINDINGS OF FACT

(1) The Court has jurisdiction over the parties herein and the subject matter of this action.

(2) Congress passed the Coronavirus Aid, Relief, and Economic Security ("CARES") Act in March 2020, codified as 15 U.S.C. § 9001 *et seq*. The CARES Act, in relevant part, provides for benefits, in the form of cash payments to qualified recipients, extensions of time to receive benefits, and extension of some payments to persons who would be otherwise be ineligible for unemployment benefits.

(3) Through the CARES Act, Congress created three types of unemployment benefits for workers who would typically not be eligible for regular unemployment insurance ("UI") benefits (collectively "CARES Act Benefits"). These benefits offered expanded unemployment insurance coverage to the self-employed, workers without daycare or who needed to supervise children learning from home, and workers experiencing extended weeks of unemployment. 15 U.S.C. §§ 9021, 9025. Congress also recognized that increasing the amount of unemployment benefits for eligible workers would have a stabilizing effect on the economy. 15 U.S.C. § 9023.

(4) One of these benefits, Pandemic Unemployment Assistance ("PUA"), is available for workers who were not eligible for regular unemployment benefits and whose unemployment, partial unemployment, unavailability or inability to work was caused by COVID-19. 15 U.S.C. § 9021.

(5) A second category of benefit, Pandemic Emergency Unemployment Compensation ("PEUC"), added additional weeks of benefits for workers who had exhausted the number of weeks they could draw UI benefits. 15 U.S.C. § 9025.

(6) . Federal Pandemic Unemployment Compensation ("FPUC") increased the amount of UI benefits by $600-per-week from March 27, 2020, through July 31, 2020 and $300-per week from December 27, 2020 to September 6, 2021. 15 U.S.C. § 9023, further amended by the American Rescue Plan Act of 2021 ("ARPA"). Pub. L. No. 117-2, § 9011, 9013, 9016 (March 11, 2021).

(7) PUA, PEUC and FPUC benefits are authorized through September 6, 2021. ARPA § 9011, 9013, 9016. Funds have been appropriated by Congress and are available in the Unemployment Trust Fund to be received by eligible Hoosiers. 15 U.S.C. § 9021(g)(1)(B); 15 U.S.C. § 9023(d)(3); 15 U.S.C. § 9025(d)(1)(B).

(8) The Plaintiffs in this cause of action, who are identified in the caption by their initials, are all receiving benefits in varying amounts which are provided through the CARES Act. (The names of the Plaintiffs and their particular situations are more fully detailed in their sworn statements contained in their individual affidavits which comprise the Appendix of Exhibits in Support of Plaintiffs' Motion for Preliminary Injunction, which was filed with the Court on June 14, 2021.)

(9) Defendant Eric Holcomb is the Governor of Indiana.

(10) Defendant Frederick Payne is the Commissioner of the Indiana Department of Workforce Development

(11) After enactment of the CARES Act, the Indiana Department of Workforce Development entered into an agreement regarding PUA, PEUC, and FPUC with the U.S. Department of Labor on behalf of the State of Indiana

(12) On May 17, 2021, Governor Holcomb announced that Indiana would end its participation in PUA, PEUC, and FPUC, effective June 19, 2021. All parties acknowledge

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that although this action was taken by the Governor, the Plaintiffs are continuing to receive CARES Act Benefits.

(13) On June 14, 2021, the Plaintiffs filed their Complaint for Declaratory Judgment and Injunctive Relief and their Motion for Preliminary Injunction, pursuant to Trial Rule 65(A) of the Indiana Rules of Trial Procedure, with the Court.

(14) In their Affidavits, the Plaintiffs state that the loss of benefits provided to them under the CARES Act will result in an inability to pay rent, utilities, necessary living expenses and medical care, face possible eviction and limit opportunities for necessary and affordable childcare.

(15) On June 17, 2021, the Plaintiffs filed their Motion for Emergency Hearing. The Court set an emergency hearing for June 23, 2021.

(16) On June 21, 2021, the Defendants filed a Motion to Continue the hearing set for June 23, 2021. The Defendants also filed a Motion for Change of Judge on June 21, 2021, pursuant to Trial Rules 76 (B) and 79 of the Indiana Rules of Trial Procedure and LR 49 – TR 79 – 223 of the Marion Circuit and Superior Court Civil Division Rules.

(17) On June 23, 2021, the Court Denied Defendants' Motion to Continue Hearing.

(18) The Court conducted the hearing in this matter on June 23, 2021 on an emergency basis.

CONCLUSIONS OF LAW

(1) Wherever appropriate or necessary herein, the above-stated "Findings of Fact" shall be construed and interpreted as Conclusions of Law.

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(2) Trial Rule 79 (O) of the Indiana Rules of Trial Procedure states: Nothing in this rule shall divest the original court and judge of jurisdiction to hear and determine emergency matters between the time a motion for change of judge is filed and the appointed special judge accepts jurisdiction.

(3) The public policy of the State of Indiana is set out in I.C. 22-4-1-1 which states: As a guide to the interpretation and application of this article, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is declared hereby to be a serious menace to the health, morale, and welfare of the people of this state and to the maintenance of public order within this state. Protection against this great hazard of our economic life can be provided in some measure by the required and systematic accumulation of funds during periods of employment to provide benefits to the unemployed during periods of unemployment and by encouragement of desirable stable employment. The enactment of this article to provide for payment of benefits to persons unemployed through no fault of their own, to encourage stabilization in employment, and to provide for integrated employment and training services in support of state economic development programs, and to provide maximum job training and employment opportunities for the unemployed, underemployed, the economically disadvantaged, dislocated workers, and others with substantial barriers to employment, is, therefore essential to public welfare; and the same is declared to be a proper exercise of the police powers of the state. To further this public policy, the state, though its department of workforce development, will maintain close coordination among all federal, state, and local agencies whose mission affects the employment or employability of the unemployed and underemployed.

(4) Indiana Code § 22-4-37-1 states, in relevant part, that "[i]t is declared to be the

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purpose of this article to secure to the state of Indiana and to employers and employees in Indiana all the rights and benefits which are conferred under the provisions of 42 U.S.C. 501 through 504, 42 U.S.C. 1101 through 1109, 26 U.S.C. 3301 through 3311, and 29 U.S.C. 49 et seq., and the amendments to those statutes." The enumerated US Code sections deal with the establishment and funding of federal and state unemployment benefits schemes.

(5) While an application for preliminary injunction is addressed to the trial court's discretion, the power to issue such an injunction should be used sparingly and should not be granted except in rare circumstances in which the law and facts are clearly in the moving party's favor. Steenhoven v. College Life Insurance Co. of America, Ind. App., 458 N E 2d 661, 667 (1984); Wells v. Auberry, Ind. App. 429 N E. 2d 679, 682 (1982). See also: Sadler v. State Ex. Rel. Sanders, Ind. App. 811 N E 2d 936, 952-53 (2004); Robert's Hair Designers, Inc., v. Pearson, Ind. App. 780 N E 2d 858, 863 (2002).

(6) A trial court's discretion to grant or deny preliminary injunctive relief is measured by several factors: (1) whether the plaintiff's remedies at law are inadequate, thus causing irreparable harm pending the resolution of the substantive action if the injunction does not issue; (2) whether the plaintiff has demonstrated at least a reasonable likelihood of success at trial by establishing a prima facie case; (3) whether the threatened injury to the plaintiff outweighs the threatened harm the grant of the injunction may inflict on the defendant; and (4) whether, by the grant of the preliminary injunction, the public interest would be disserved. In order to grant a preliminary injunction, the moving party has the burden of showing, by a preponderance of the evidence, that the facts and circumstances entitle him to injunctive relief. Apple Glen Crossing v Trademark Retail, 784 NE 2d 484, 487-88 (Ind. 2003); Barlow v. Sipes, Ind. App., 744 NE 2d 1,5 (2001); Reilly v. Daly, Ind. App., 666 NE 2d 439, 443 (1996).

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(7) The function of a preliminary injunction is to preserve the status quo pending the final determination of the case on the merits. Mercho-Roushdi Corp v. Blatchford, Ind. App. 742 NE 2d 519, 524 (2001); City of Fort Wayne v. State ex rel. Hoagland, Ind. App. 342 NE 2d 865, 869 (1976).

(8) Preliminary injunctions are generally used to preserve the status quo as it existed before a controversy, pending a full determination on the merits of the dispute. Stoffel v. Daniels, Ind. App., 908 NE 2d 1260, 1272 (2009); U.S. Land Servs v. U.S. Surveyor, Ind. App. 826 N.E. 2d 49, 67 (2005) (emphasis supplied)

(9) Despite Indiana's attempt to end PUA, PEUC and FPUC benefits, continuing to allow access to these benefits favors the status quo as they have been available in their current form since December 27, 2020, or roughly six months.

(10) A loss of housing or medical care and the inability to provide food, shelter and adequate childcare for a family constitute irreparable harm pending resolution of this cause of action and are not adequately compensable by an award of damages.

(11) To establish a party has a reasonable likelihood of success on the merits, the party must establish a prima facie case. Hannum Wagle & Cline Engineering, Inc. v. Am. Consulting, Inc., 64 N.E.3d 863, 874, Ind.App. (2016) (*citing* Apple Glen Crossing, LLC v. Trademark Retail, Inc., 784 N.E.2d 484, 487 (Ind. 2003)). "The party is not required to show that he is entitled to relief as a matter of law, nor is he required to prove and plead a case, which would entitle him to relief upon the merits." *Hannum Wagle,* 64 N.E.3d at 874 (*quoting* Avemco Ins. Co. v. State ex rel. McCarty, 812 N.E.2d 108, 118, Ind. App. (2004).

(12) There is a likelihood of success on the merits. The burden on this element can be

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shown by establishing a *prima facia* case. Ind. High Sch. Athletic Ass'n, Inc. v. Martin, 731 N.E.2d 1, 7 (Ind.App. 2000), *rehearing denied, transfer denied.* Substantial probative evidence means "more than a scintilla and less than preponderance." *Id.* (quoting Partlow v. Indiana Family and Soc. Servs. Admin., 717 N.E.2d 1212, 1217, Ind.App. (1999)). Plaintiffs who seek preliminary injunctive relief are not required to show that they are entitled to relief as a matter of law, nor required to prove and plead a case would entitle them to relief upon the merits. *Ind. High Sch. Athletic Ass'n, Inc.*, 731 N.E.2d at 7 (quoting Norland v. Faust, 675 N.E.2d 1142, 1149, Ind.App., (1997)). .

(13) Unemployment benefits under the CARES Act are funded by and through the federal unemployment programs established under 42 U.S.C. §§ 1101(a), 1104(a), and 1105(a). See 15 U.S.C. § 9021(g), 15 U.S.C § 9025 (d) and 15 U.S.C. § 9023(d). These are the same statutes enumerated in Ind. Code 22-4-37-1.

(14) Indiana Code § 22-4-37-1 charges the State of Indiana with the responsibility of securing "all the rights and benefits" conferred under certain federal statutes, including 42 U.S.C. §§ 1101, 1104 and 1105. Presently, Congress has authorized an enhanced use of benefits conferred under 42 U.S.C. § 1101, *et seq.* for pandemic relief through September 6, 2021. By rejecting these benefits after June 19, 2021, Defendants are in violation of their statutory duties, entitling Plaintiffs to declaratory and injunctive relief.

(15) The Legislature's determination in I.C. 22-4-37-1 is an instruction to the Department of Workforce Development to administer unemployment benefits available in the Unemployment Trust Fund. Similar to the Legislature's determination of other aspects of the system of unemployment benefits in Indiana, like the number of weeks a claimant may be

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eligible or how to calculate a claimant's monetary benefit amount, I.C. 22-4-37-1's directive to secure all rights and benefits conferred by 42 U.S.C. § 1104 is binding on the State.

(16) A preponderance of the evidence demonstrates the State of Indiana's decision to prematurely end PUA, PEUC and FPUC benefits in Indiana violates I.C. 22-4-37-1. Therefore, Plaintiffs have shown reasonable likelihood of prevailing on the merits of their declaratory judgment action.

(17) The third factor in the preliminary injunction analysis is whether the threatened injury to the Plaintiffs outweighs the potential harm to the State resulting from the granting of an injunction.

(18) The State's costs to administer the CARES Act Benefits are also covered by CARES Act funding. 15 U.S.C. §§ 9021(g), 9023(d), 9025(a)(4)(A). Therefore, the State is not harmed in continued distribution of CARES Act benefits during the pendency of this litigation.

(19) The balance of harms in granting the injunction favors the Plaintiffs. The harm created by the loss of benefits by the plaintiffs far outweighs any potential harm to the State.

(20) As previously cited, "Economic insecurity due to unemployment is declared hereby to be a serious menace to the health, morale and welfare of the people of this state and to the maintenance of public order within this state." Ind. Code § 22-4-1-1. In describing the consequences of poverty Plaintiffs will face without the CARES Act unemployment benefits, the Plaintiffs have contextualized the problems of economic insecurity described in I.C 22-4-1-1.

(21) Indiana law requires that to further this public policy, the State is required to coordinate with federal agencies with the same mission. Ind. Code § 22-4-1-1.

(22) The injunction is in the public interest because it is the articulated public policy

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interest in Ind. Code § 22-4-1-1 and the benefits at issue are instrumental in allowing Hoosiers to regain financial stability at an individual level while the State continues to face challenges presented by the COVID-19 pandemic during its return to normalcy.

(23) Indiana law recognizes the importance of these benefits. Indiana law requires the State to accept these benefits.

(24) Plaintiffs' proposed injunction would not disserve the public interest. Rather, the public interest is served by granting injunctive relief which secures Federal benefits for unemployed Hoosiers at no cost to the State.

(25) The plaintiffs in this cause of action seek relief which is both basic and modest: to maintain receipt of their current benefits pending a more complete consideration of their claims which are before the Court. That is the status quo that they seek to preserve. Contrary to the assertion of the Defendants, this request would not create a disruption in the operation of state government. The total amount of time that could be affected here is only at most eighty (80) days: June 19 – September 6, 2021.

(26) The law is with the Plaintiffs and against the Defendants in the issues presented for determination. Accordingly, based on the applicable law, the Plaintiffs have carried the burden in seeking a preliminary injunction.

JUDGMENT

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Defendants, Governor Eric Holcomb and Commissioner Frederick Payne, their officers, employees, and agents; all persons acting in active concert or participation with any Defendant, or under any Defendant's supervision, direction, or control; and all other persons within the scope of Indiana

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Trial Rule 65, are enjoined from withdrawing the State of Indiana from unemployment benefits offered through the Coronavirus Aid, Relief, and Economic Security ("CARES") Act until this Court renders a final judgment on the merits. Indiana shall notify the U.S. Department of Labor immediately of its continued participation in the CARES Act programs pending further action by this Court.

ALL OF WHICH IS ORDERED, ADJUDJED AND DECREED THIS 25 DAY OF JUNE, 2021.

JUDGE, MARION SUPERIOR COURT
CIVIL DIVISION, ROOM NUMBER ELEVEN

cc:
All counsel of record

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D.A., *et al.*, **Plaintiffs,** **v.** **LARRY HOGAN, in his official capacity as GOVERNOR of the State of Maryland, *et al.*,** **Defendants.**	**IN THE** **CIRCUIT COURT** **FOR BALTIMORE CITY** **Case No. 24-C-21-002988**
LEONARD HARP, *et al.*, **Plaintiffs,** **v.** **GOVERNOR LARRY HOGAN, *et al.*,** **Defendants.**	**Case No. 24-C-21-002999**

MEMORANDUM OPINION

These two actions are not consolidated. The Court heard them together and issues this Memorandum Opinion and the accompanying Preliminary Injunction jointly in both actions because of the similar issues raised and relief sought in both actions.

Plaintiffs in both actions include Maryland residents who currently receive one or more of several types of expanded or supplemental unemployment benefits made available to the states by the federal government under the Coronavirus Aid, Relief, and Economic Security ("CARES") Act and/or the American Rescue Plan Act of 2021 ("ARPA"). There are six individual Plaintiffs in *D.A., et al. v. Hogan, et al.*, Case No. 24-C-21-002988. There are also six individual Plaintiffs in *Harp, et al. v. Hogan, et al.*, Case No. 24-C-21-002999. The *Harp* Plaintiffs also seek to represent a class of allegedly similarly situated persons. The Defendants in both actions are Governor Larry Hogan and Maryland Secretary of Labor Tiffany P. Robinson.

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The Court issued a Temporary Restraining Order jointly in both actions on July 3, 2021 at 10:00 a.m. Both actions are now before the Court on Plaintiffs' requests for preliminary injunctive relief. The parties have briefed the issues extensively, and the Court conducted an evidentiary hearing by remote electronic means pursuant to Maryland Rule 2-803 on July 12, 2021. The Court commends all counsel for presenting complex and contested issues in a short time and with a very high degree of cooperation.

Procedural History

The *D.A.* Plaintiffs filed their action on June 30, 2021. They filed with their Complaint a Motion for Temporary Restraining Order and Preliminary Injunction (Paper No. 3). Defendants removed the action to the United States District Court for the District of Maryland on July 1, 2021. On the same day, however, Judge Richard D. Bennett granted Plaintiffs' Emergency Motion for Remand to State Court and remanded the action to this Court. Defendants filed a Response in Opposition to Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction on July 2, 2021 (Paper No. 3/1). The *D.A.* Plaintiffs filed a reply memorandum (Paper No. 3/2).

The *Harp* Plaintiffs initially filed an earlier action in this Court, which Defendants removed to federal court. The *Harp* Plaintiffs chose to dismiss that action in federal court, and they then filed this action on July 1, 2021. The *Harp* Plaintiffs appended a Motion for Temporary Restraining Order and Emergency Hearing (Paper No. 2) to their Verified Class Action Complaint (Paper No. 1). Within the prayers for relief in their Complaint, they have requested preliminary injunctive relief. Defendants also filed a Response in Opposition to Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction on July 2, 2021 (Paper No. 2/1).

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The Court conducted a joint hearing on the requests for a temporary restraining order on July 2, 2021 by remote electronic means using Zoom for Government pursuant to Maryland Rule 2-802. All parties appeared by counsel. The Court issued a Memorandum Opinion and Temporary Restraining Order the next morning, July 3, 2021, at 10:00 a.m. The Temporary Restraining Order is effective for ten days, until July 13, 2021 at 10:00 a.m. Also on July 3, 2021, this Court denied a stay of enforcement of the Temporary Restraining Order.[1] Defendants sought appellate review of the Temporary Restraining Order, but it has remained in effect.

On July 6, 2021, the first business day after the July 4 holiday, the Court held a conference with counsel for all parties to schedule proceedings on the requests for preliminary injunctive relief. The Court initially scheduled an evidentiary hearing to begin at 2:00 p.m. on Friday, July 9, 2021, and to continue to July 12, 2021. Counsel undertook productive discussions over the possibility of limited formal or informal discovery to prepare for the hearing. On July 9, 2021, counsel asked for a further conference with the Court and jointly requested postponement of the beginning of the hearing. The Court granted the request and postponed the start of the hearing to 9:30 a.m. on July 12, 2021.

In addition to the memoranda submitted before issuance of the Temporary Restraining Order, the Court has and has considered the following memoranda on the issues:[2]

- Supplement to [*D.A.*] Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Temporary Restraining order and Preliminary Injunction (Paper No. 3/7 in No. 24-C-21-002988);

[1] The Court realized in preparing this Memorandum Opinion that the order denying the stay was not docketed because the Court issued it from home. The Court will have it docketed now. The Court also notes that Defendants' notices of appeal transmitted to the Court electronically on Saturday, July 3, 2021 also have not been docketed.

[2] There are some irregularities in the way papers are docketed in the two actions.

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- [*Harp*] Plaintiffs' Memorandum in Support of Prayer for Preliminary Injunctive Relief (Paper No. 5 in No. 24-C-21-002999);

- Defendants' Response to Plaintiffs' Supplemental Memorandum of Law in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (Paper No. 3/8 in No. 24-C-21-002988 and Paper No. 2/6 in No. 24-C-21-002999);

- Defendants' Bench Memorandum and Opposition to Plaintiffs' Motions for Preliminary Injunction (Paper No. 11 in No. 24-C-21-002988; captioned but apparently not yet docketed in No. 24-C-21-002999);

- [*D.A.* Plaintiffs'] Response to Defendants' Bench Memorandum and Reply Memorandum in Further Support of Plaintiffs' Motion for Preliminary Injunction (Paper No. 11/2 in No. 24-C-21-002988);

- Defendants' Reply to Plaintiffs' Response to Defendants' Bench Memorandum (Paper No. 11/1 in No. 24-C-21-002988 and Paper No. 11 in No. 24-C-21-002999);

- Defendants' Motion to Dismiss the D.A. Amended Complaint (Paper No. 15 in No. 24-C-21-002988);

- Defendants' Motion to Dismiss (Paper No. 9 in No 24-C-21-002999); and

- Memorandum in Support of Defendants' Motion to Dismiss the D.A. Amended Complaint and Harp Complaint (Paper No. 15 in No. 24-C-21-002988 and Paper No. 8 in No. 24-C-21-002999).

In the midst of this briefing, the *D.A.* Plaintiffs filed their First Amended Complaint (Paper No. 10).

Facts and Allegations

As the health threats resulting from accelerating transmission of the novel coronavirus disrupted economic activity in the United States in March 2020, Congress passed and the President signed the CARES Act on March 27, 2020. At issue here are three types of enhanced

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unemployment benefits established and funded by the United States government in the CARES Act. Pandemic Unemployment Assistance ("PUA") provides benefits to people who otherwise would not be eligible for traditional unemployment insurance benefits, including self-employed individuals and workers who could not work because of a lack of childcare assistance. 15 U.S.C. § 9021. Pandemic Emergency Unemployment Compensation ("PEUC") extended benefits to workers who exhausted the number of weeks of benefits for which they previously were eligible. 15 U.S.C. § 9025. Federal Pandemic Unemployment Compensation ("FPUC") provided supplemental benefits of $600 per week from March 27, 2020 to July 31, 2020. 15 U.S.C. § 9023. The ARPA, Pub. L. No. 117-2, then amended the CARES Act to revive this supplemental benefit at a level of $300 per week from December 27, 2020 through September 6, 2021.

To implement these and other unemployment benefit programs, Maryland almost immediately entered into an "Agreement Implementing the Relief for Workers Affected by Coronavirus Act" with the United States Secretary of Labor. Defs.' Exh. 1. On June 1, 2021, Governor Hogan wrote to U.S. Secretary of Labor Martin J. Walsh to give notice that "the State of Maryland will end its participation in the unemployment insurance programs listed below, effective at 11:59 p.m. on July 3, 2021." Defs.' Exh. 3. Governor Hogan listed for termination the PUA, PEUC, and FPUC programs, as well as the Mixed Earners Unemployment Compensation ("MEUP") program. Plaintiffs do not include claims about the MEUP program. Governor Hogan offered the following explanation:

> Thanks to Marylanders' resilience and tenacity, our state has seen a dramatic drop in COVID-19 cases, and we have reached the milestone set by President Biden of vaccinating 70% of adults. Businesses large and small across our state are reopening and hiring workers, but many are facing severe worker shortages. While we have experienced 12 straight months of job growth in

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> our state, we will not truly recover until our workforce is fully participating in the economy.
>
> Our administration, in partnership with your agency, will continue working with Marylanders who need reskilling and retraining to reach the next stages of their careers. The comprehensive resources available to our customers through a great variety of training and apprenticeship programs will continue to serve the needs of both Maryland businesses and jobseekers.

Id. at 2.

The *D.A.* Plaintiffs allege that Defendants' early termination of enhanced unemployment benefits under the CARES Act would affect more than 300,000 Maryland residents.[3] First Amended Complaint ¶ 2. But for the State's early termination of its participation in those programs, those benefits would continue until September 6, 2021. At stake when these actions were filed was nine weeks or just over two months of additional benefits. Plaintiffs allege, and Defendants do not dispute, that these benefits are funded entirely by the federal government. The evidence shows that the federal government also reimburses Maryland for most but not all the costs of administering these benefits.

The six *D.A.* Plaintiffs allege that each of them currently receives some combination of PUA, PEUC, and/or FPUC unemployment benefits. First Amended Complaint at ¶¶ 9-44. Their benefits range from $476 to $730 per week. *Id.* Each alleges that she or he lost work as a result of the pandemic and has been unable to find a suitable new job. All except A.M.[4] allege that all of their current unemployment benefits would end if an injunction is not issued. *Id.*

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[3] This appears to be based on the allegation that 304,013 Marylanders were receiving some form of unemployment benefits on May 29, 2021. First Amended Complaint ¶ 80. Although no more current figure was provided in the evidence, the number of current recipients of PUA, PEUC, and/or FPUC benefits appears to be very large, but less than 300,000. The evidence is not clear to the Court, but a discrepancy might be due to recipients, like most of the *D.A.* Plaintiffs, who receive more than one category of the enhanced unemployment benefits.

[4] Three of the six *D.A.* Plaintiffs identify themselves by initials only.

Plaintiff A.M. receives both regular unemployment insurance benefits and FPUC benefits, so his regular unemployment benefits would continue. *Id.* ¶ 28.

The *D.A.* Plaintiffs assert four claims. In Count I, they seek a declaratory judgment that the Defendants' early termination of enhanced unemployment benefits would violate Title 8 of the Labor and Employment Article of the Maryland Code and the Maryland Constitution. They do not specify what Constitutional provision is implicated in this count. In Count II, Plaintiffs seek a similar declaratory judgment that the Defendants' early termination of enhanced unemployment benefits would violate Article 24 or the Maryland Declaration of Rights. Plaintiffs added Count III after the Court issued its Temporary Restraining Order. In that count, Plaintiffs seek a declaration, apparently based on contract law, that if the Court denies further injunctive relief, Defendants must give a new thirty-day notice of their intention to terminate the enhance benefit programs before the programs can be terminated. In Count IV, Plaintiffs request temporary, preliminary, and permanent injunctive relief either (1) enjoining termination of the enhanced benefit programs or (2) in the alternative, requiring Defendants to give another thirty-day notice before termination.

The six *Harp* Plaintiffs assert claims for themselves and on behalf of an alleged class of similarly situated plaintiffs. Only two of the six Plaintiffs – Plaintiffs Langford and Evans – allege that they currently are receiving enhanced unemployment benefits that they would lose because of Defendants' early termination of those programs. Complaint ¶¶ 17-19. Plaintiffs Harp and Wilson allege that they lost work because of the pandemic and have never received unemployment benefits because of errors in the administration of the benefit programs. *Id.* ¶¶ 6-11. Plaintiffs Pennix and Ceci allege or at least suggest that they received Maryland unemployment benefits at one time during the pandemic but that they are not now receiving benefits, also as a result of errors in the administration of the benefit programs. *Id.* ¶¶ 12-16. At

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least by implication, these latter four Plaintiffs appear to allege that they should be receiving benefits under one or more of the enhanced unemployment benefit programs. The *Harp* Plaintiffs seek to represent two subclasses of plaintiffs: Subclass A of plaintiffs who are receiving enhanced unemployment benefits and would lose them if Defendants terminate the programs early and Subclass B of plaintiffs who wrongfully have not received those enhanced benefits. *Id.* ¶¶ 43-44.

The *Harp* Plaintiffs assert three claims. In Count I, they seek a declaratory judgment that Governor Hogan's early termination of enhanced unemployment benefits would violate Title 8 of the Labor and Employment Article of the Maryland Code. In Count II, Plaintiffs request temporary, preliminary, and permanent injunctive relief to enjoin early termination of the enhanced benefit programs. In Count III, they seek declaratory relief that Defendant Robinson has failed to administer the unemployment insurance benefit programs in compliance with Title 8 of the Labor and Employment Article during the pandemic. At the temporary restraining order hearing, counsel stated that the *Harp* Plaintiffs on the current motions are seeking relief only with respect to the early termination of the enhanced benefit programs.

At the evidentiary hearing on July 12, 2021, all parties agreed that Plaintiffs in both actions would rely on the affidavits filed by all twelve Plaintiffs without the need for cross-examination of any of them. Plaintiffs also submitted fourteen exhibits by stipulation.[5] Later in the hearing, Defendants stipulated to admission of two additional Plaintiffs' exhibits, Plaintiffs' Exhibits 15 and 16. Defendants initially submitted by stipulation Defendants' Exhibits 1-8, 13-

[5] The stipulations by all parties were only to the admissibility of exhibits and not to the truth of the statements in the exhibits. Defendants stipulated to consideration of Plaintiffs' affidavit testimony without cross-examination but not to the truth of that testimony. Plaintiffs later in the hearing stipulated to admission in evidence of Defendant Robinson's affidavit. She was subject to cross-examination.

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17, 19, and 21-23. Later in the hearing, Defendants' Exhibits 9 and 24 also were admitted without objection. Defendants called four witnesses to testify: Michael Siers, an economist with the Maryland Department of Commerce; Neil Bradley, Executive Vice President of the United States Chamber of Commerce; John Kashuba, a senior policy advisor to the Maryland Secretary of Labor; and Maryland Secretary of Labor Tiffany P. Robinson. The Court had the opportunity to observe the demeanor of all of the witnesses as all appeared by high-quality video and audio connections through Zoom for Government. The Court found all of the witnesses to be forthright and cooperative in their testimony on both direct and cross-examination.

Discussion

Plaintiffs bear the burden of establishing the basis for granting a preliminary injunction. *Ademiluyi v. Egbuonu*, 466 Md. 80, 115 (2019). Plaintiffs must establish four factors weighing in favor of an injunction: (1) the likelihood of success on the merits; (2) the "balance of convenience" or "balance of harms," determined by weighing whether greater injury would be done to Defendants by granting an injunction than to Plaintiffs by denying one; (3) that Plaintiffs will suffer irreparable harm unless an injunction is granted; and (4) the public interest. *Id.* at 114; *Dep't of Transp. v. Armacost*, 299 Md. 392, 404-05 (1984). All four factors must be present for Plaintiffs to be entitled to a preliminary injunction. *Ademiluyi*, 466 Md. at 115.

1. Likelihood of Success on the Merits

a. Article 24 of the Maryland Declaration of Rights

Invoking *Ehrlich v. Perez*, 394 Md. 691 (2006), Plaintiffs claim the State's early termination of unemployment benefits for them draws impermissible distinctions that result in a violation of their equal protection rights recognized under Article 24 of the Maryland Declaration of Rights. Based on the Court's finding of no likely success on this claim in

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connection with the Temporary Restraining Order, Plaintiffs offered minimal argument on this claim at the preliminary injunction hearing, but they declined to concede the issue.

Plaintiffs do not place themselves in any demographic category that would establish or even allege a suspect classification leading to strict or elevated constitutional scrutiny. Indeed, Plaintiffs strain to articulate any categories of differentiation at all. They advance allegations that about 85% of the Marylanders who are receiving unemployment benefits under one of the enhanced programs at issue are receiving unemployment benefits *only* under those programs. They suggest that this creates an irrational distinction. If early termination of the enhanced programs is carried out, this means that 85% of those affected will then receive no unemployment benefits at all, while 15% will continue to receive some benefits because they have some residual eligibility for unemployment benefits under the State's existing standard program of benefits. According to Plaintiffs, this is not a rational way to carry out the Governor's stated goal of encouraging workers to return to work. Some allegedly will be more encouraged than others.

The Court still sees no chance of success for Plaintiffs on this claim. The classifications that have been made have been made at a program level. For example, benefits have been extended to individuals who are or were self-employed even though they previously were not qualified for unemployment benefits. Or an amount – currently $300 per week – has been added to whatever benefits a class of eligible or once-eligible workers receive. The Governor's action would end benefits for whole classes of recipients at the program level, with no discrimination within each separate program. If the result is that one person is left with no benefits at all while another person retains some benefits under a remaining program, the reason is not because the early termination treats similarly situated people differently but because some people have some remaining residual eligibility under the standard unemployment benefit program. Put another

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way, any discrimination or differentiation would result from the eligibility criteria of the programs themselves. Those distinctions were created when the individual programs were created and are not the result of the early termination of certain programs. The Court concludes that Plaintiffs are not likely to succeed on the merits of their Article 24 claims.

b. Title 8 of the Labor and Employment Article of the Maryland Code

Plaintiffs advance a very different statutory claim based on Title 8 of the Labor and Employment Article of the Maryland Code. The claim centers on § 8-310(a)(1), which provides:

> In the administration of this title, the [Maryland] Secretary [of Labor] shall cooperate with the United States Secretary of Labor to the fullest extent that this title allows.

Id. § 8-310(a)(1). The Court concludes that Plaintiffs are likely to succeed in establishing that this provision operates in this context as a mandate requiring the Maryland Secretary of Labor to cooperate in accessing any federal benefits that are available to Marylanders within the bounds of Title 8.

The first goal of statutory interpretation is to ascertain and implement the intention of the General Assembly. *Wheeling v. Selene Finance LP*, 473 Md. 356, 250 A.3d 197, 209 (2021). The starting point for this exercise, and sometimes the ending point, is the normal, plain language used. *Id.* Plain language is not read in isolation:

> We, however, do not read statutory language in a vacuum, nor do we confine strictly our interpretation of a statute's plain language to the isolated section alone. Rather, the plain language must be viewed within the context of the statutory scheme to which it belongs, considering the purpose, aim, or policy of the Legislature in enacting the statute. We presume that the Legislature intends its enactments to operate together as a consistent and harmonious body of law, and, thus, we seek to reconcile and harmonize the parts of a statute, to the extent possible consistent with the statute's object and scope.

Id. (quoting *Lockshin v. Semsker*, 412 Md. 257, 275-76 (2010)).

Defendants isolate "cooperate," immediately associating it as "a common term of art employed when the federal government provides funding to states pursuant to conditions," Defs.' Bench Memo. at 4, and aligning it with the concept of "cooperative federalism," *id.* at 6-8. In doing so, Defendants make two mistakes. First, they detach "cooperate" from the other critical language of the provision. The Maryland Secretary is charged to "cooperate . . . to the fullest extent that this title allows." Those simple words are both expansive and limiting. Second, Defendants fundamentally misstate the operation of federalism in this context.

Defendants' dictionary starting point is useful. "Cooperate" means "to act or work with another or others" or to "act together or in compliance." Defs.' Bench Memo. at 6 (quoting https://www.merriam-webster.com/dictionary/cooperate (last visited July 8, 2021)). The second definition from the same source is also useful: "to associate with another or others *for mutual benefit*." https://www.merriam-webster.com/dictionary/cooperate (last visited July 12, 2021) (emphasis added). The American Heritage Dictionary of the English Language stresses this idea of mutual benefit: "To work or act together *toward a common end or objective*." https://ahdictionary.com/word/search.html?q=cooperate (last visited July 12, 2021) (emphasis added). Defendants leap immediately from this idea of mutuality to an implied rejection in the statute of "an absence of discretion or complete obeisance to federal authority." Defs.' Bench Memo. at 6. Defendants ignore almost completely the stronger phrase in the statute: "to the fullest extent." This is plain language of maximization, especially when associated with the command "shall." This Court is not free to ignore the General Assembly's mandatory direction that the Maryland Secretary must go as far as possible in cooperation with the United States Secretary of Labor to achieve "a common end or objective."

Defendants argue that the section deals only with administrative cooperation and is limited by the specific reporting and expenditure requirements in § 8-310(a)(2). But the

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structure of the statute belies such a limitation. Sub-subsection 8-310(a)(1), containing the "fullest extent" command, stands alone as a sentence with a broad and generalized requirement. Sub-section 8-310(a)(2) has its own separate command – "The Secretary shall . . ." – preceding the three specific administrative actions. Even there, those three actions show breadth of application. The first two involve reporting to the federal Labor Secretary, but the third item involves compliance with federal regulations that "govern the expenditure of any money that may be allotted and paid to the State" for administration. *Id.* § 8-310(a)(2)(iii). Thus, while all the items are administrative, they include the administration of federal funding. Structurally, the command that the Maryland Secretary "*shall* cooperate" with the federal Secretary "to the *fullest* extent" also contrasts with the discretion accorded in subsection (b) that she "*may* afford *reasonable* cooperation" with other federal units. *Id.* § 8-310(b)(1) (emphasis added).

Defendants seek to diminish the significance of the grammatical or structural separations in § 8-310(a)(1) and (a)(2) by pointing out that this structure evolved from a statutory version in which the clauses were separated by semicolons instead of a period. Defendants point out that the period and the separation of the sub-subsections occurred in a 1991 recodification that was deemed not to involve substantive changes. The grammatical distinctions existed before the punctuation and structural modification. As quoted by Defendants, *see* Defs.' Bench Memo. at 9, the original "shall cooperate to the fullest extent consistent with [Maryland law]" was separated by a semicolon from "shall make such reports" and "shall comply with such provisions" and "shall comply with the regulations." Indeed, the second and third of these commands, both related to reporting, were grouped together within one semicolon-bounded clause and separated from the first and fourth commands. This is nothing but a stylistic change. There has never been a blurring of these requirements, such as would be the case if the statute

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provided "the Secretary shall cooperate to the fullest extent in submitting reports, verifying reports, and complying with regulations concerning expenditures."

Defendants trace the "fullest extent" language to the origins of the statute in 1936 and the Great Depression. Originally, they say, unemployment relief was state-funded, so cooperating "to the fullest extent" cannot possibly mean accepting any federal benefits that are made available. Assuming the history is accurate, the Court does not accept the implication as a necessary one. The statutory language has survived as a key feature of implementation of the unemployment benefit programs through decades as the funding structure has changed. If maximum cooperation once meant creating a state-funded program consistent with federal requirements, so long as those requirements comported with Maryland law provided in Title 8 or its predecessors, there is no reason why maximum cooperation does not now mean operating the program to administer all benefits made available through federal funding, still only to the extent consistent with Maryland law.

Although Plaintiffs risk placing too much emphasis on the broad legislative findings and purpose provisions behind the State's unemployment insurance system, those broader provisions inform the "common end or objective" toward which the Secretary must "cooperate." Those provisions identify "economic insecurity due to unemployment" as a "serious menace" and establish the unemployment insurance system as a necessary exercise of the State's police power for "the public good and the general welfare of the citizens of the State." Md. Code, Lab. & Empl. § 8-102(b)(1), (c). These broad statements serve as "a guide to the interpretation and application" of Title 8, but the Court does not see in them alone a mandate for the Secretary to maximize all available federal benefits. In the absence of the "fullest extent" requirement of § 8-310(a), the more general policy prescriptions would not require specific actions by the Maryland

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Secretary. The powerful statements of purpose do, however, support the interpretation of § 8-310(a) as mandating more than just administrative harmony.[6]

Defendants base much of their statutory construction argument on an alleged inconsistency between Plaintiffs' interpretation of § 8-310 and the concept of "cooperative federalism." At the preliminary injunction hearing, the *D.A.* Plaintiffs' counsel aptly labeled this argument a "parade of horribles." Defendants see Plaintiffs' argument as requiring a surrender to federal authority – "a state-authorized federal takeover." Defs.' Bench Memo. at 7. "[S]tates may not be coerced by the federal government into accepting federal funds or implementing federal programs." *Id.* (citing the "gun to the head" of the States peril of *National Federation of Independent Business v. Sibelius*, 567 U.S. 519, 581 (2012)).[7] There will be "disastrous results,"

[6] During the pandemic, the General Assembly adopted 2021 Md. Laws ch. 49 as an emergency measure. It requires that "the Maryland Department of Labor shall identify all changes in federal regulations and guidance that would expand access to unemployment benefits or reduce bureaucratic hurdles to prompt approval of unemployment benefits." *Id.* § 3(a). This is consonant with the mandatory interpretation of § 8-310(a). The General Assembly expected the Executive branch to be doing everything possible to maximize unemployment benefits available to Maryland residents.

[7] Ironically, in *NBIF v. Sibelius*, the Court cited a case arising from the original funding scheme for state unemployment benefits to illustrate the permissible application of Congress's spending clause powers:

> [*Charles c. Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937)] involved a federal tax on employers that was abated if the businesses paid into a state unemployment plan that met certain federally specified conditions. An employer sued, alleging that the tax was impermissibly "driv[ing] the state legislatures under the whip of economic pressure into the enactment of unemployment compensation laws at the bidding of the central government." 301 U.S., at 587, 57 S.Ct. 883. We acknowledged the danger that the Federal Government might employ its taxing power to exert a "power akin to undue influence" upon the States. *Id.*, at 590, 57 S.Ct. 883. But we observed that Congress adopted the challenged tax and abatement program to channel money to the States that would otherwise have gone into the Federal Treasury for use in providing national unemployment services. Congress was willing

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with Maryland "obliged to accept whatever legal conditions were attached to those funds," "no matter how onerous the funding conditions were." *Id.* at 14 (some emphasis deleted).

In reality, there is no threat of federal compulsion here at all. The statute, read as a whole, requires the Maryland Secretary to cooperate with the federal Secretary "to the fullest extent *that this title allows*." Md. Code, Lab. & Empl. § 8-310(a) (emphasis added). The statute thus carries its own protection against federal coercion because the Maryland Secretary is not required to agree to any funding or conditions that are not consistent with *Maryland* law. Thus, the real constraint here is not that the Maryland Secretary must bend to federal dictates, but that she must maximize efforts as provided by the General Assembly. The regulation of governmental power here is not between the two sovereigns of the United States and Maryland governments, it is between the two policy-making branches of State government. The General Assembly has used strong language to require maximization of effort in relation to the federal government in providing unemployment relief for Maryland residents. The Maryland Secretary is bound *by Maryland law*, not federal law, to maximize those available benefits.

> to direct businesses to instead pay the money into state programs only on the condition that the money be used for the same purposes. Predicating tax abatement on a State's adoption of a particular type of unemployment legislation was therefore a means to "safeguard [the Federal Government's] own treasury." *Id.*, at 591, 57 S.Ct. 883. We held that "[i]n such circumstances, if in no others, inducement or persuasion does not go beyond the bounds of power." *Ibid.*
>
> In rejecting the argument that the federal law was a "weapon[ ] of coercion, destroying or impairing the autonomy of the states," the Court noted that there was no reason to suppose that the State in that case acted other than through "her unfettered will." *Id.*, at 586, 590, 57 S.Ct. 883.

NFIB v. Sebelius, 567 U.S. at 578-79.

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The specific context of this dispute well illustrates the fallacy of Defendants' cooperative federalism argument. No doubt there are situations where the federal government seeks to impose substantial conditions on access to federal funds or even seeks to induce adoption of particular policies through exercise of its spending powers. Here, however, there is no dispute that the federal government has made these enhanced unemployment benefits optional for the states. There is also no dispute that the benefits themselves are being paid entirely with federal funds. The Court accepts Secretary Robinson's testimony that these programs are certainly not cost-free to Maryland. Even though the federal government theoretically will pay all of the administrative costs incurred with the programs, the reality is that Maryland is unlikely to be reimbursed for all of its costs, by a significant margin. Secretary Robinson estimates an administrative expense shortfall of $60 million by the end of the calendar year. Even if that is over-estimated, it is a significant State burden, although it appears to be a total estimate for the programs, not an estimate limited to the two-month period at stake in this case. But the point is that *any* compulsion that is operative here comes not from the federal government, but from State law.

For Defendants, the ultimate extension of the federalism argument is federal preemption. Defendants suggest that a State-law requirement that Maryland must avail itself of benefits that are available for Maryland residents somehow makes it impossible for the federal government to carry out its objective to make these benefits optional. This is backward. Conflict preemption arises when there is a federal mandate and a state acts to thwart it with a law that cannot be obeyed consistent with the federal requirement. Here there is a federal *option*. Defendants are suggesting that by continuing to accept available benefits for another two months on the same terms on which Maryland has accepted them for more than a year, Maryland suddenly will be acting to thwart a federal program.

In the Court's opinion, Plaintiffs' likelihood of success depends on this construction of Maryland law as creating a mandate for executive officials to seek and to obtain all federally funded benefits that are available to the State. In the absence of such a mandate that controls executive discretion, Plaintiffs are left to debate the wisdom of the Governor's strategy as a matter of policy. In any such debate, the Governor and the Secretary of Labor are entitled to very substantial deference in framing public policy and strategy for the State if the statutory framework leaves them that scope of discretion. Much of the testimony at the hearing was about that debate. Some of that evidence is relevant to the other three preliminary injunction factors and is discussed below, but it is not the Court's function to adjudicate that policy debate on the merits. The Court concludes that Plaintiffs are likely to prevail on the merits not because they necessarily have the better policy position, but because the "fullest extent" language of § 8-310(a)(1) should be interpreted in this context to constrain administrative discretion and to require the Maryland Labor Secretary to maximize use of any available federal unemployment benefits.

2. Balance of Harms

The Court must examine the harm that would be experienced by each party with or without issuance of a preliminary injunction and then compare those relative harms.

Plaintiffs have shown by very particularized affidavits that they face significant personal hardship if their remaining unemployment benefits terminate now rather than on September 6, 2021. Plaintiffs have been strained economically and emotionally by the pandemic. In its global scope and in the anxiety that almost all people experience over the threat of disease, the impact of the pandemic has been universal, but the brief stories of these Plaintiffs reminds the Court that the impact of the pandemic has been cruelly uneven. Some have suffered death or debilitating illness themselves, in their families, or among their friends. Others have experienced severe

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economic hardship from involuntary unemployment or the inability to work because of the need to take on childcare and elder care responsibilities. As one who has enjoyed the privilege of continuous, secure employment, the Court is particularly struck by the plight of those who have had to struggle with irregular or no employment. To their credit, Defendants, along with officials at every level of government, have devoted themselves to the effort to ameliorate these problems. The Court has no doubt that Defendants have made and are continuing to make very difficult decisions in all good faith.

With their evidentiary presentation at the preliminary injunction hearing, Defendants have shown that the State will experience harm if a preliminary injunction is granted. The Court was impressed by Secretary Robinson's testimony to the magnitude and complexity of the effort required of her Department to administer these enhanced unemployment benefits. Although the cost of the enhanced benefits themselves is a federal responsibility, it is clear from the evidence that the State will bear some additional costs of administration from these programs. More difficult is trying to focus on the increased costs associated only with continuing the enhanced benefits for a longer period because of a preliminary injunction. At the narrowest level, the Department of Labor states that it has experienced additional costs to prepare its systems for early termination of the enhanced benefit programs and then scrambling to return those systems to functionality with the forced continuation of the benefits. The Court accepts that there is no simple on-off switch here and that these are real costs, but they were predictable in the decision to terminate benefits before the natural expiration of the programs.

More broadly, the Secretary has presented her estimate that federal reimbursement of administrative costs for the enhanced benefit programs by the end of 2021 will fall approximately $60 million short of the actual costs, placing that burden on the State budget. Without necessarily accepting the accuracy of the estimate, the Court accepts Defendants'

showing that the programs as a whole will impose significant costs on the State. This estimate, however, is an estimate of the shortfall for the entire programs, not limited to the two-month period of continued benefits. That amount should be only a fraction of the total amount of the shortfall. Moreover, if Plaintiffs ultimately are correct, these are the costs of public administration of programs that the State has a duty to administer.

There is an additional element in Defendants' evidence. A significant emphasis of Mr. Kashuba's and Secretary Robinson's testimony was on the problem of fraudulent applications for benefits.[8] The Court accepts that testimony and finds that these programs have attracted a profound increase in the number of people applying fraudulently for benefits, including many attempts to use identity theft to obtain benefits falsely. The Department has had to devote large amounts of resources to combatting this fraud, and the problem has complicated the effort to get benefits to legitimate and deserving applicants. To the extent Defendants argue this fact is a justification for early termination of the programs because doing so might save money, the Court rejects the argument as a consideration in the balance of harms. Unemployed Maryland residents should not be penalized by the criminal activities of bad actors. Although one could rationally limit or change a program because of the risk of fraudulent activity, these programs have been administered for more than one year with this problem. To say now that there is a new or increased risk of fraud for a two-month period is not supported by the evidence. This is not a new or unusual cost, and it should not be considered in the calculus of an appropriate saving the State might achieve by terminating benefits early for people who are not involved in any fraud.

[8] Although Mr. Kashuba testified that he drafted the Governor's June 1, 2021 termination letter to the United States Secretary of Labor, this concern with rampant fraud was not cited in that letter as a reason to terminate the programs.

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Balancing these harms, the balance tips in favor of Plaintiffs and issuing a preliminary injunction. The personal magnitude of the harm associated with losing benefits for Plaintiffs and other individuals currently receiving them is greater than the purely fiscal impact on the State of being required to continue to administer these benefits.

3. Irreparable Harm

Plaintiffs clearly face the threat of irreparable harm if a preliminary injunction is not granted. Although "only" money is at stake, the potential consequences are irreparable because it is very unlikely that any Plaintiff would gain payment of lost benefits at some time in the future. If this were a situation in which Plaintiffs claimed that Defendants had made or were making legally or factually incorrect eligibility determinations, it might be possible that the errors ultimately could be addressed by a lump sum award of benefits that were due. Here, however, there is no dispute about most of the Plaintiffs' eligibility. They allege instead that they will lose benefits because Defendants choose to terminate access to a federal source of benefits that otherwise would continue to provide them benefits. If the Court denied injunctive relief and then later determined that Defendants should not have terminated the programs early, it is extremely unlikely that access to the federal funds that the State abandoned could be restored. This alone amounts to irreparable harm.

In addition, Plaintiffs have shown in their affidavits with varying degrees of severity that the immediate loss of benefits, when some of them already are in vulnerable financial condition, likely will lead to loss of housing, short-term diversion of effort to less valuable employment, and/or significant emotional consequences. These non-monetary effects would never be compensated and therefore add to the threat of irreparable harm.

In this respect, before the Court issued the Temporary Restraining Order, Defendants mistook the assessment of the *status quo* that is to be preserved. Defendants argued that

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Governor Hogan had already acted to terminate Maryland's participation in the enhance benefit programs, so the *status quo* was termination and that termination should be preserved. In the Court's view, the proper perspective is to look at the situation that existed before the challenged action was taken. The *status quo* today for each individual Plaintiff is she or he is receiving benefits. The action that Plaintiffs challenge has been announced and put in motion, but the change in the *status quo* has not yet occurred because their benefits have not yet ended. Most important, in this particular situation, there is still an opportunity to preserve that status during a period of further examination of the issues. Defendants argue that the U.S. Department of Labor has already acknowledged the impending termination, but Plaintiffs have rebutted that by submission of an email from the same federal official indicating that there is still time for Maryland to rescind its termination and to remain in the enhanced benefit programs.

Plaintiffs have satisfied the requirement to show irreparable harm.

4. The Public Interest

Plaintiffs and Defendants offer competing views of what is best for the public good at this particular moment in Maryland's recovery from the pandemic. Because the statute controls on the merits, the Court has no role in deciding these issues on the merits. The Court must consider them briefly, however, in assessing whether a preliminary injunction is in the public interest.

At the outset of these actions, the policy question seemed relatively focused: Are the enhanced unemployment benefits creating a disincentive for unemployed Marylanders to return to available employment? On the one hand, Defendants have demonstrated, and Plaintiffs do not dispute, that Maryland has a temporary labor shortage. On a generalized level, there are a significant number of job openings in the State – perhaps on the order of 300,000 – and employers are having difficulty finding qualified workers to fill those jobs. On the other hand

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and to their credit, every one of Defendants' witnesses acknowledged the complexity of this problem. Although Defendants established that there are relatively low-wage segments of the workforce in which the average amount of unemployment benefits is equal to or even above the wages available, that is true only in certain segments of the economy. Defendants' witnesses readily acknowledged that other factors are in play. Some unemployed workers still fear the risk of disease in the workplace despite the wide availability of effective vaccines. The pandemic has had a profound impact on childcare availability, both in terms of requiring a parent or other caregiver to be in the home to supervise remote schooling and in terms of the cost and availability of childcare outside the home. This effect has been particularly dramatic for women in the labor market. Some labor shortages have been caused by the absence of foreign workers normally available under special visa programs that have been disrupted by the pandemic. The Court was struck by the lack of disagreement on the basic disincentive hypothesis. At most, Defendants' evidence suggested that no more than about 20% of unemployed workers surveyed identified the amount of unemployment benefits as a strong factor in causing them not to seek new employment urgently. Defendants showed that the Governor's announcement of an imminent end to enhanced unemployment benefits likely caused a surge in job seeking, but the dynamic of recovery is complex.

This complexity bears on the public interest as a factor in granting preliminary injunctive relief. Defendants tout the economic benefits of putting Maryland residents back to work in productive employment. Even assuming that an early cutoff of unemployment benefits would increase the urgency of job searching and gradually result in increased employment and economic activity, Defendants' witnesses also admitted a downside. Unemployment benefits themselves stimulate the economy and have a secondary ripple effect. One can accept the broad proposition that this ripple effect is greater with increased employment, but the focus here must

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be on just a transition period from now until September 6, 2021. If the disincentive of unemployment benefits is real for some relatively small segment of the workforce, the cutoff of benefits would be real and immediate for almost all currently unemployed Marylanders. Not all of those workers will instantly move into new jobs, meaning uneven economic struggles at the individual level and an immediate loss of economic stimulus at the generalized level. Moreover, Congress and the President presumably did not set a September 6, 2021 end to the programs arbitrarily. As the pandemic eases in this country, children will go back to school in person, thereby allowing parents and other caregivers an opportunity to return to more customary family living patterns. Those affected parents do not have the ability to start the school year earlier just because their unemployment benefits are terminated.

The Court concludes that the public interest supports issuance of a preliminary injunction. Some economic benefits may be delayed by continuation of enhanced benefits for two months. Any delay in such benefits, however, will be balanced by continuation of the economic stimulus produced by the benefits and by support for displaced workers transitioning back into available jobs.

5. Alternative Requested Injunctive Relief

In the alternative to the primary preliminary injunction they seek, Plaintiffs ask the Court to require Defendants to give the United States Department of Labor another thirty-day notice in the event Defendants were permitted to terminate the enhanced unemployment benefits early. Although this request is now moot in light of the Court's issuance of a preliminary injunction on Plaintiffs' primary request, Plaintiffs nevertheless asked the Court to rule on this issue to enable them to present it on appeal if necessary. The issue is moot, and the Court will not rule on it. The Court will comment only that it did not mean its Temporary Restraining Order to control the contractual relationship between the United States Department of Labor and the Maryland

Secretary of Labor on the issue of notice. Defendants fully complied with the Temporary Restraining Order by causing the enhanced unemployment benefit programs to be preserved temporarily in Maryland, and the procedural steps necessary to reinstate the termination, if that had occurred, would be matters of contract between the two governmental agencies.

Conclusion

For these reasons, the Court finds that Plaintiffs have satisfied all four requirements for issuance of a preliminary injunction. The motions of Plaintiffs in both actions therefore will be granted, and the Court will issue a separate Preliminary Injunction.

The judge's signature appears on the original document in the court file.

July 13, 2021
9:45 a.m.

Judge Lawrence P. Fletcher-Hill
Circuit Court for Baltimore City

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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

Civil Action No. 2021-CP-40-03774

S.B., S.S., T.S. and B.B.,

Plaintiffs,

v.

HENRY DARGAN MCMASTER, in his official capacity as Governor of the State of South Carolina; and G. DANIEL ELLZEY, in his official capacity as the Director of the South Carolina Department of Employment and Workforce,

Defendants.

Defendants' Motion to Dismiss

Defendants Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina ("Governor McMaster") and G. Daniel Ellzey, in his official capacity as the Executive Director of the South Carolina Department of Employment and Workforce ("DEW") ("Director Ellzey") (collectively, "Defendants"), move to dismiss the Complaint under Rule 12(b)(6), SCRCP. In support of this motion, Defendants would respectfully show the Court:

1. Section 41-29-230(1) of the South Carolina Code of Laws requires DEW to secure advantages for the States and its citizens under only four specific federal statutes, which are expressly listed in the statute. The CARES Act is not included in section 41-29-230(1)'s list. Congress enacted all of the programs at issue in this case, PUA, PEUC, and FPUC, as part of the CARES Act. Because section 41-29-230(1) does not require anything regarding the CARES Act, section 41-29-230(1) is irrelevant to these CARES Act programs.

2. Section 41-29-230(1) is limited to DEW cooperating with the U.S. Department of Labor and provides only that DEW act through rules, regulations, administrative methods, and standards. Section 41-29-230(1) does not mention the Governor and does not purport to require the Governor to do anything or limit his discretionary authority. This is dispositive because, according to the U.S. Department of Labor, the Governor decides whether South Carolina participates in the optional CARES Act programs, not DEW. The Governor exercised his discretion in agreeing to participate initially, and he likewise exercised his discretion 13 weeks ago when he directed DEW to terminate that participation. Section 41-29-230(1) does not provide a basis for challenging a decision by the Governor. Plaintiffs may not like the latter decision, but that does not give them a legal basis to ask this Court to overturn it.

3. Although the Court need not reach this issue in light of the plain language of the statute, section 41-29-230(1) requires action only to the extent consistent with other provisions in Title 41 and only to secure "advantages" for the "State and its citizens." Among the mandates of Title 41 are helping people with "involuntary unemployment," S.C. Code Ann. § 41-24-20, "tak[ing] appropriate steps to reduce and prevent unemployment," *id.* § 41-29-120(A)(1)(a), and "promot[ing] the reemployment of unemployed workers . . . in every other way that is feasible," *id.* § 41-29-120(A)(1)(d). As Governor McMaster expressed in announcing the end of the CARES Act programs effective June 30, 2021, continuing to pay unemployment benefits that, in many cases, exceed an individual's paycheck in the face of a labor shortage is not an advantage for South Carolina or its citizens.

4. In addition to the grounds set forth above, this Motion is further based on and supported by, among other things, the pleadings and other matters of record, all applicable law, oral argument, Defendants' contemporaneously filed Memorandum in Support of Motion to

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Dismiss and in Opposition to Plaintiffs' Motion for Preliminary Injunction, and any additional memoranda or other materials as may be properly submitted to the Court in advance of or in connection with any hearing in this matter. To the extent applicable, Governor McMaster would further rely upon the grounds and arguments stated in Defendants' previously filed Motion to Require Plaintiffs to Identify Themselves and to Strike Anonymous Certifications and incorporate those arguments by reference as if set forth herein verbatim.

WHEREFORE, for the foregoing reasons, Defendants respectfully request that the Court enter an Order dismissing Plaintiffs' Complaint and granting such other and further relief as the Court deems just and proper.

Respectfully submitted,

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August 6, 2021
Columbia, South Carolina

STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	**Civil Action No. 2021-CP-40-03774**

S.B., S.S., T.S. and B.B., *Plaintiffs*, v. HENRY DARGAN MCMASTER, in his official capacity as Governor of the State of South Carolina; and G. DANIEL ELLZEY, in his official capacity as the Director of the South Carolina Department of Employment and Workforce, *Defendants*.	**Defendants' Memorandum in Support of Motion to Dismiss and in Opposition to Plaintiffs' Motion for Preliminary Injunction**

Defendants Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina ("Governor McMaster") and G. Daniel Ellzey, in his official capacity as the Executive Director of the South Carolina Department of Employment and Workforce ("DEW") ("Director Ellzey") (collectively, "Defendants"), submit this memorandum in support of their Motion to Dismiss and in opposition to Plaintiffs' Motion for Preliminary Injunction.

Introduction

When COVID-19 first appeared in the United States, it presented an emerging public health threat and disrupted a thriving economy (as well as life generally). Governments at every level responded in unprecedented ways. Among the responses was the federal government creating expansive new unemployment assistance. In the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, the federal government created new programs that (1) extended unemployment benefits to classes of individually traditionally ineligible for unemployment benefits (Pandemic

Unemployment Assistance, 15 U.S.C. § 9021), (2) allowed claimants to remain on benefits beyond what state laws allowed (Pandemic Emergency Unemployment Compensation, *id.* § 9025), and (3) granted generous new federal unemployment benefits on top of whatever state benefits were already provided (Federal Pandemic Unemployment Compensation, *id.* § 9023). Like governors in every other state, Governor McMaster agreed that South Carolina would participate in these three voluntary programs as unemployment numbers quickly spiked in the spring of 2020.

Now, more than a year later, circumstances have changed. Thanks to natural immunity, vaccines, and greater knowledge of COVID-19 and its transmission, COVID-19 does not pose the same uncertain threats to communities in the way it did last spring. Businesses have already resumed or are in the process of resuming normal operations. Accordingly, tens of thousands of jobs are available across South Carolina, but employers cannot find people ready and willing to fill them. *Cf.* Latest Developments, Dashboard – Employment, accelerateSC, https://accelerate.sc.gov/ (last visited Aug. 5, 2021) (providing economics statistics on unemployment rate, open jobs, and workforce participation). To ensure people have an incentive to work and would not be making more by staying on unemployment than by earning a paycheck, Governor McMaster directed DEW to terminate South Carolina's voluntary participation in these three CARES Act programs. Indeed, more than half of the nation's governors took the same or similar action, concluding that continuing the emergency programs was not advantageous to their states. *Cf. Stories from the Great American Labor Shortage*, N.Y. Times Daily Podcast (Aug. 3, 2021), https://tinyurl.com/y7f7cr79 (interviewing employers and employees across the country and describing job openings, people not wanting to return to work because of increased unemployment benefits, and employers struggling to fill positions). Initial reports from these states

indicate that people are reentering the workforce now that federal unemployment benefits are no longer available.

Plaintiffs challenge that decision, insisting that section 41-29-230(1) of the South Carolina Code of Laws requires South Carolina to participate in these federal programs. Their interpretation of this statute is incorrect. *First*, section 41-29-230(1) requires DEW to secure advantages for the States and its citizens under only four specific federal statutes, which are expressly listed in the statute. The CARES Act is not included in section 41-29-230(1)'s list. Congress enacted all of the programs at issue in this case, PUA, PEUC, and FPUC, as part of the CARES Act. Because section 41-29-230(1) does not require anything regarding the CARES Act, section 41-29-230(1) is irrelevant to these CARES Act programs.

Second, section 41-29-230(1) is limited to DEW cooperating with the U.S. Department of Labor and provides only that DEW act through rules, regulations, administrative methods, and standards. Section 41-29-230(1) does not mention the Governor and does not purport to require the Governor to do anything or limit his discretionary authority. This is dispositive because, according to the U.S. Department of Labor, the Governor decides whether South Carolina participates in the optional CARES Act programs, not DEW. The Governor exercised his discretion in agreeing to participate initially, and he likewise exercised his discretion 13 weeks ago when he directed DEW to terminate that participation. Section 41-29-230(1) does not provide a basis for challenging a decision by the Governor. Plaintiffs may not like the latter decision, but that does not give them a legal basis to ask this Court to overturn it.

Third, although the Court need not reach this issue in light of the plain language of the statute, section 41-29-230(1) requires action only to the extent consistent with other provisions in Title 41 and only to secure "advantages" for the "State and its citizens." Among the mandates of

Title 41 are helping people with "involuntary unemployment," S.C. Code Ann. § 41-24-20, "tak[ing] appropriate steps to reduce and prevent unemployment," *id.* § 41-29-120(A)(1)(a), and "promot[ing] the reemployment of unemployed workers . . . in every other way that is feasible," *id.* § 41-29-120(A)(1)(d). As Governor McMaster expressed in announcing the end of the CARES Act programs effective June 30, 2021, continuing to pay unemployment benefits that, in many cases, exceed an individual's paycheck in the face of a labor shortage is not an advantage for South Carolina or its citizens.

In addition to these shortcomings on the merits, Plaintiffs' delay in bringing this action means that laches bars their claim for preliminary injunctive relief. Plaintiffs knew for 83 days before filing this lawsuit that South Carolina was terminating its participation in the CARES Act programs. Four weeks went by after South Carolina's participation actually terminated until this lawsuit was filed. Why this delay before seeking drastic relief from this Court? If Plaintiffs were so sure of the merits, it makes no sense to have waited this long. And if Plaintiffs were facing such irreparable harm, this delay is inexplicable. Ultimately, this delay has undermined their claim of the need for emergency relief and has prejudiced Defendants. Therefore, Plaintiffs' request for a preliminary injunction is barred by laches.

Background

COVID-19 disrupted life in myriad ways, including employment. Many industries were affected by the changes to life's rhythms, and unemployment increased significantly and quickly. *See* Compl. ¶ 7. Attempting to alleviate the economic hardship that was expected to follow, Congress passed the CARES Act, Pub. L. 116-136, 134 Stat. 281 (Mar. 27, 2020). *See* Compl. ¶ 9. The CARES Act included three sources of optional federal unemployment benefits. *See* Compl. ¶¶ 10–12. The Governor (like every governor in the country) agreed South Carolina should

participate in all three of these new federal unemployment-assistance programs. On March 28, 2020, Governor McMaster notified DEW that he had delegated his authority to DEW—specifically Director Ellzey—to enter into an agreement with the U.S. Department of Labor. *See* Ex. A, Mar. 28, 2020 Letter from Gov. McMaster to Asst. Sec. Pallasch; *see also* Compl. ¶ 17.

First, there is Pandemic Unemployment Assistance ("PUA"). *See* 15 U.S.C. § 9021. This provides unemployment benefits to people who were ineligible for them under existing state and federal unemployment programs, including the self-employed, the underemployed, and independent contractors.

Second, there is Pandemic Emergency Unemployment Compensation ("PEUC"). *See id.* § 9025. This provision provides up to 51 weeks of federal unemployment benefits for claimants who exhausted the traditional 20 weeks they can receive under state law. Thus, it allows claimants to extend their time on unemployment by almost an entire additional year.

Third, there is Federal Pandemic Unemployment Compensation ("FPUC"). Here, Congress appropriated money to increase all federal and state unemployment benefits by $600 per week. *See* 15 U.S.C. § 9023. Congress initially allowed this benefit to lapse, before reinstating it at $300 per week starting December 27, 2020. *See* Consolidated Appropriations Act, 2021, Pub. L. 116-260, § 203, 134 Stat 1182, 1953 (Dec. 27, 2020); American Rescue Plan Act of 2021 ("ARPA"), Pub. L. 117-2, § 9013, 135 Stat. 4, 119 (Mar. 11, 2021).

More than a year after agreeing South Carolina should participate in these programs, Governor McMaster directed Director Ellzey and DEW on May 6, 2021 to terminate South Carolina's participation in PUA, PEUC, and FPUC effective June 30, 2021. *See* Compl. ¶ 20 & Ex. E. That termination took place as scheduled and consistent with the 30 days' prior-notice requirement for a state to stop participating in those CARES Act programs.

On July 28, 2021, 83 days after the Governor announced his decision, Plaintiffs sued Governor McMaster and Director Ellzey to challenge the decision to stop participating in PUA, PEUC, and FPUC. Plaintiffs are four anonymous individuals who allege that they are South Carolina residents who received unemployment benefits (including the new federal benefits) after the COVID-19 pandemic began. *See* Compl. ¶¶ 29, 31, 42, 43, 52, 53, 63, 64. They also allege that they received notice in June 2021 that the extra federal unemployment benefits would not be continuing. *See* Compl. ¶¶ 34, 46, 56, 65.

They seek a declaratory judgment that section 41-29-230(1) requires DEW to participate in these three CARES Act programs and that the decision to terminate that participation was unlawful. *See* Compl. ¶¶ 73–80. They demand injunctive relief to require DEW to participate in PUA, PEUC, and FPUC. *See* Compl. ¶¶ 81–83. In the alternative, they request a writ of mandamus to obtain this same extraordinary relief. *See* Compl. ¶¶ 84–89.

As part of their desired relief, Plaintiffs have moved for a preliminary injunction or, alternatively, a writ of mandamus. *See* Mot. for Prelim. Inj.

Legal Standard

I. Motion for Preliminary Injunction

A plaintiff "must establish three elements" to obtain a preliminary injunction: (1) irreparable harm, (2) likelihood of success on the merits, and (3) no adequate remedy at law. *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011). Whether to grant a preliminary injunction is in a trial court's discretion. *Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). A preliminary injunction "is a drastic remedy," *id.*, that should "preserve the status quo," *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.,* 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010); *see also Pashby v. Delia*, 709 F.3d

307, 320 (4th Cir. 2013) (defining the status quo as "the last uncontested status between the parties which preceded the controversy" (internal quotation mark omitted)). This extraordinary remedy is even more drastic when, like here,[1] it is a mandatory injunction that seeks to change the status quo. *See Wetzel v. Edwards*, 635 F.2d 283, 286 (4th Cir. 1980) (describing a mandatory injunction); *Gantt v. Clemson Agr. Coll. of S.C.*, 208 F. Supp. 416, 418 (W.D.S.C. 1962) ("at the preliminary stage of proceedings," a mandatory injunction should be granted only "in rare instances in which the facts and law are clearly in favor of the moving party").

II. Motion to Dismiss

A motion to dismiss should be granted whenever a defendant fails "to state facts sufficient to constitute a cause of action." Rule 12(b)(6), SCRCP. A circuit court's "ruling on a 12(b)(6) motion must be based solely upon the allegations set forth on the face of a complaint." *Stiles v. Oranato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995). "Viewing the evidence in favor of the plaintiff, the motion must be granted if facts alleged in the complaint and inferences reasonably deducible therefrom do not entitle the plaintiff to relief on any theory of the case."[2] *Brown v. Theos*, 338 S.C. 305, 309–10, 526 S.E.2d 232, 235 (Ct. App. 1999).

Argument

I. Plaintiffs' claims all fail because Section 41-29-230(1) conveys no entitlement to CARES Act benefits.

Plaintiffs' case focuses heavily on the one provision of the South Carolina Code of Laws:

[1] Plaintiffs implicitly conceded they seek a mandatory injunction because they alternatively seek mandamus relief, which requires a government official to take a certain action, just as a mandatory injunction orders a defendant to take a certain action.

[2] Defendants maintain that Plaintiffs have failed to state facts sufficient to constitute a cause of action under any theory of the case. Defendants cite to or rely upon documents or other materials outside of the pleadings solely in the context of opposing Plaintiffs' Motion for Preliminary Injunction.

> In the administration of Chapters 27 through 41 of this title, the department must cooperate with the United States Secretary of Labor to the fullest extent consistent with the provisions of these chapters, and act, through the promulgation of appropriate rules, regulations, administrative methods and standards, as necessary to secure to this State and its citizens all advantages available under the provisions of the Social Security Act that relate to unemployment compensation, the Federal Unemployment Tax Act, the Wagner-Peyser Act, and the Federal-State Extended Unemployment Compensation Act of 1970.

S.C. Code Ann. § 41-29-230(1). According to Plaintiffs, this provision means that South Carolina has no choice and *must* participate in PUA, PEUC, and FPUC.

Plaintiffs are wrong for at least three reasons, so their claim for declaratory relief fails (and they thus are not entitled to a preliminary injunction or writ of mandamus). *First*, PUA, PEUC, and FPUC are not available "under the provisions of the Social Security Act," but under the CARES Act. *Second*, the decision whether (and for how long) to participate in PUA, PEUC, and FPUC belongs to the Governor, and section 41-29-230(1) does not apply to the Governor. *Third*, interpreting section 41-29-230(1) to require South Carolina to participate in the voluntary CARES Act programs is untethered from the text and would lead to a result in which some unemployed South Carolinians are incentivized not to work at a time when businesses across the State are actively searching for employees. The statute does not require such an unintended outcome, and the Governor exercised his discretion to avoid such an outcome. The Court should not judicially impose that outcome.

A. Section 41-29-230(1) does not require anyone to do anything regarding PUA, PEUC, and FPUC.

When interpreting a provision of the South Carolina Code, the "cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). This process "begins (and often ends) with the text of the

statute in question." *Smith v. Tiffany*, 419 S.C. 548, 555, 799 S.E.2d 479, 483 (2017). When the text is clear, its plain meaning must be given effect. *Id.*

1. PUA, PEUC, and FPUC are provisions of the CARES Act, not the Social Security Act.

Section 41-29-230(1) does not require DEW to participate in every federal program that provides benefits to individuals. Rather, the statute requires DEW to take action with respect to programs that provide "this State and its citizens" with "advantages available under" four federal statutes: the Social Security Act, the Federal Unemployment Tax Act, the Wagner-Peyser Act, and the Federal-State Extended Unemployment Compensation Act of 1970. This list is exclusive. Section 41-29-230(1) does not include language (as other parts of Title 41 do) like "including, but not limited to" that would make these federal statutes merely examples. *See, e.g.*, S.C. Code Ann. § 41-27-260(20); *see also Hodges*, 341 S.C. at 86, 533 S.E.2d at 582 (noting the canon of construction that "to express or include one thing implies the exclusion of another, or of the alternative").

Recognizing this, Plaintiffs contend that the federal unemployment benefits they demand are available under the Social Security Act because the federal money is funneled through accounts connected to the Social Security Act. *See* Compl. ¶ 75; Mem. in Supp. of Mot. for Prelim. Inj. 9. That argument, however, misses the mark.

The critical fact here is that PUA, PEUC, and FPUC are not provisions of the Social Security Act. Look no further than what Congress did in enacting these benefits:

- Congress adopted PUA in the CARES Act in a subtitle known as the Relief for Workers Affected by Coronavirus Act. *See* CARES Act, Div. A, Title II, § 2102, 134 Stat. at 313. When Congress amended this provision, Congress amended the CARES Act, not the Social Security Act. *See* Consolidated Appropriations Act, 2021, § 241(a), 134 Stat

at 1959; ARPA, § 9011(a), 135 Stat. at 118.

- The same thing is true of PEUC. It was passed as part of the CARES Act. *See* CARES Act, Div. A, Title II, § 2107, 134 Stat. at 323. And when it was amended, Congress again amended the CARES Act, not the Social Security Act. *See* Consolidated Appropriations Act, 2021, Div. N, Title II, § 206, 134 Stat. at 1961–62; ARPA, § 9016, 135 Stat. at 119.
- And this is true of FPUC as well. It was enacted as part of the CARES Act. CARES Act, Div. A, Title II, § 2104, 134 Stat. at 323. To change it, Congress amended the CARES Act, not the Social Security Act. *See* Consolidated Appropriations Act, 2021, § 203, 134 Stat at 1953; ARPA, § 9013, 135 Stat. at 119.

Indeed, one could read all one thousand-plus provisions of the Social Security Act and not find a single mention of PUA, PEUC, or FPUC.

If Congress had wanted these new unemployment benefits to be part of the Social Security Act, Congress knew exactly how to do that. In fact, that is what Congress did with unemployment relief for governmental entities and nonprofits (right in the middle of the CARES Act sections creating PUA, PEUC, and FPUC, no less): "Section 903 of the Social Security Act (42 U.S.C. § 1103) is amended by adding . . . ."[3] CARES Act, Div. A, Title II, § 2103, 134 Stat. at 317. No such language appears in the surrounding sections that created PUA, PEUC, and FPUC. Thus, Congress intended specific programs of the CARES Act to amend the Social Security Act and did not intend

[3] Congress amended the Social Security Act in many other places of the CARES Act as well. *See, e.g.*, CARES Act, Div. A, Title III, § 3706, 134 Stat. at 418 (amending conditions and limitations of payments under the Social Security Act); *id.* Div. A, Title V, § 5001, 134 Stat. at 501 (creating the Coronavirus Relief Fund as part of the Social Security Act).

other programs of the CARES Act to amend the Social Security Act. PUA, PEUC, and FPUC fall into the latter category.

In the face of this plain text and clear legislative action, Plaintiffs grasp at the fact that funding for these CARES Act-created programs flow through accounts referenced in the Social Security Act and argue that logistical detail alone brings PUA, PEUC, and FPUC within section 41-29-230(1). *See, e.g.*, 15 U.S.C. § 9021(g) (referring to 42 U.S.C. §§ 1104, 1105). They are mistaken, as a careful review of where the money for each of these benefits comes from reveals.

Start with FPUC. As an initial matter, Plaintiffs incorrectly cite the PEUC section in their argument about FPUC and funding. *See* Mem. in Supp. of Mot. for Prelim. Inj. 9 (citing 15 U.S.C. § 9025(d)). FPUC's funding source is in 15 U.S.C. § 9023(d)(3), and it provides that the money for FPUC is "appropriated from the general fund of the Treasury." Put simply, FPUC has nothing to do with the Social Security Act. In fact, the only reference to the Social Security Act in 15 U.S.C. § 9023 is one that exempts FPUC payments from determining income for purposes of Medicaid and CHIP eligibility. *See* 15 U.S.C. § 9023(h). Thus, contrary to Plaintiffs' assertion, FPUC funding does not flow through accounts referenced in the Social Security Act.

Turning to PUA and PEUC, these benefits are also neither funded by nor conferred under the Social Security Act. The detailed eligibility requirements, the administrative requirements for states, and the funding for PUA are established under 15 U.S.C. § 9021 and for PEUC under 15 U.S.C. § 9025, which are part of the CARES Act, not the Social Security Act. Just like FPUC, these programs are funded from "the general fund of the Treasury." *Id.* § 9021(g)(1)(B) (PUA); *id.* § 9025(d)(1)(B) (PEUC).

That these funds are transferred to accounts connected to the Social Security Act before being sent to the states, *see id.* § 9021(g)(1)(A) (referring to 42 U.S.C. §§ 1104(a), 1105(a)); *id.*

§ 9025(d)(1)(A) (same), is of no import. That transfer does not transmogrify those entire programs (with their novel and extensive eligibility and reporting requirements) into advantages available under the Social Security Act. By using the accounts connected to the Social Security Act, Congress merely found an efficient way to facilitate payment of these federal benefits to citizens during the middle of a once-in-a-century pandemic and avoid the time and effort of creating an entirely new financial accounting structure. This logistical detail is of no legal consequence, and Plaintiffs efforts to argue around the plain text of the CARES Act is unavailing.

Plaintiffs thus mischaracterize these programs by claiming they "do not create new benefits." Mem. in Supp. of Mot. for Prelim. Inj. 9. This claim is intended to slip them into the Social Security Act. But this sleight of hand is unavailing and untethered from the text of the CARES Act for many reasons. For a first, PUA, PEUC, and FPUC all have new eligibility requirements created in the CARES Act, not the Social Security Act. For a second, they all (as their names suggest) were created because of COVID-19, so they could not even have existed before March 2020. For a third, Congress treated them as new and different from the Social Security Act. After all, PUA, PEUC, and FPUC are all codified in Title 15 of the U.S. Code. *See id.* §§ 9021, 9023, 9025. The Social Security Act, meanwhile, is codified in Title 42. *See* 42 U.S.C. § 301 *et seq.* And for a fourth, the administrator for unemployment insurance at the U.S. Department of Labor called PUA, PEUC, and FPUC "new" programs in a March 27, 2020 email to states. *See* Ex. 1 to Ex. B (D. Ellzey Aff.) (Mar. 27, 2020 Email of G. Gilbert to D. Ellzey and others).

Accordingly, PUA, PEUC, and FPUC are part of the CARES Act—which is separate and distinct from the Social Security Act—and section 41-29-230(1) does not require DEW to obtain any advantages of or to participate in PUA, PEUC, or FPUC.

2. The General Assembly could have—but did not—amend section 41-29-230 to include the CARES Act.

The General Assembly spoke clearly and plainly in section 41-29-230(1): DEW is required to cooperate and act, to the extent consistent with South Carolina law, to secure "advantages" to the State and its citizens made available by federal programs under the provisions of only certain statutes. That list of statutes does not include the voluntary programs created by the CARES Act. Had the General Assembly wanted to add the CARES Act to the list in section 41-29-230(1), the General Assembly had ample opportunity to do so over the 16 months since Congress created the CARES Act. The General Assembly came to Columbia many times since March 2020 (including for its regular session this year), and, despite passing a plethora of COVID-19-related legislation, it did not amend section 41-29-230(1). The Court should reject Plaintiffs' invitation to do via judicial command what the General Assembly declined to do via legislative action.

Unlike the General Assembly's silence with respect to the CARES Act, the General Assembly has amended state law before when changes were made to federal law for certain benefits. For example, after Congress enacted the Federal-State Extended Unemployment Compensation Act of 1970, the General Assembly amended state law the following year, including the predecessor statute to section 29-41-230. *See* 1971 S.C. Acts No. 516, § 11 (amending S.C. Code § 68-73 (1962)). The General Assembly therefore knows how to add to the list of statutes in section 41-29-230(1) when it wants to. The Court should respect its decision not to amend that section to include the CARES Act.

B. Section 41-29-230(1) does not impose any limitation on the Governor's decision whether South Carolina should participate in PUA, PEUC, and FPUC.

PUA, PEUC, and FPUC all require that states agree to participate in those programs. *See* 15 U.S.C. § 9021(f)(1) (PUA); *id.* § 9023(a) (FPUC); *id.* § 9025(a) (PEUC). That agreement must

be made pursuant to the authority of a state's governor. *See* Ex. 1 to Ex. B (D. Ellzey Aff.) (Mar. 27, 2020 Email of G. Gilbert to D. Ellzey and others (discussing the process for participating in PUA, PEUC, and FPUC: "If someone other than the Governor is to sign the agreement with the [U.S.] Department [of Labor], then the signer must have a delegation of authority from the Governor. Your Regional Office will be providing you a sample Delegation of Authority that your state may use to allow someone other than the Governor to sign the Agreement. If the Governor will be signing, preparations must be made to get that signature as soon as it is needed.")). Here, Governor McMaster specifically delegated his authority with respect to these voluntary programs to Director Ellzey for purposes of signing the necessary agreements with the U.S. Department of Labor

Section 41-29-230, however, does not apply to Governor McMaster. It applies only to DEW. *See* S.C. Code Ann. §§ 41-29-230(1) ("the department must . . ."); *id.* § 41-29-230(2) (same). Thus, whatever section 41-29-230 might require DEW to do, that section does not require anything of the Governor. Thus, under its plain language, that section cannot impose any limit on the Governor's discretionary authority to determine whether, and for how long, South Carolina should participate in PUA, PEUC, and FPUC.

In addition to section 41-29-230 not restricting the Governor's authority under state and federal law, the Governor enjoys broad power as the State's "Chief Magistrate" with "supreme executive authority." S.C. Const. art. VI, § 1; *cf.* S.C. Code Ann. § 25-1-440(a)(8) (giving the Governor power during emergencies to request and accept certain types of federal funding). Even assuming the General Assembly could require the Governor to have South Carolina participate in PUA, PEUC, and FPUC, the General Assembly has not done so. *Cf. Edwards v. State*, 383 S.C. 82, 678 S.E.2d 412 (2009) (interpreting the American Rescue and Reinvestment Act as allowing

the General Assembly to override a governor's decision not to accept certain federal funds). No part of the South Carolina Code of Laws therefore even purports to limit the Governor's authority here, and his decision is not *ultra vires*.

C. Continuing the CARES Act programs through September 6 is not mandatory because that action is not consistent with Title 41 and does not provide an advantage for the State and its citizens.

The plain language of section 41-29-230(1) should end the inquiry. The CARES Act under which PUA, PEUC, and FPUC were enacted is not one of the four statutes listed in section 41-29-230(1), and nothing in section 41-29-230(1) is relevant to the Governor's authority whether to participate in those programs.

Nevertheless, if Plaintiffs could get past those issues, they still lose. That is because they ignore the opening part of section 41-29-230(1). DEW's cooperation with the U.S. Secretary of Labor must be "consistent with the provisions" in Chapters 27 through 41 of Title 41, and the program—if available under the four specific statutes—must provide "advantages" to the State and its citizens.

So we must take a step back and consider those chapters more generally and what the General Assembly intended to accomplish in them. Thankfully, the General Assembly told us that its policy goal was to combat the "[e]conomic insecurity" of "involuntary unemployment" by "setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own." S.C. Code Ann. § 41-27-20. In other words, unemployment poses risks for individuals and society, so the General Assembly determined that a safety net should exist for when people lose their job through no fault of their own. But the unemployment must be and remain involuntary. *See id.* § 41-35-110(3) (requiring a claimant to be "actively seeking work" as an ongoing, weekly eligibility requirement for receiving unemployment benefits). Unemployment

benefits are not intended to be a long-term substitute for a paycheck, and DEW "shall take appropriate steps to reduce and prevent unemployment." *Id.* § 41-29-120(A)(1)(a); *cf.* 42 U.S.C. § 505(a)(1) (allowing the Secretary of Labor to work with states to develop projects "to expedite the reemployment" of unemployment claimants); *id.* § 506(b)(1) (allowing the Secretary of Labor to award grants "to reduce the average duration of receipt of such compensation through employment").

Early in the pandemic, unemployment in this State reached 12.1 percent. *See* D. Ellzey Aff. ¶ 4. The uncertainty of COVID-19 led to many people suddenly being laid off or furloughed. But as time passed and we learned how to combat COVID-19 and slow its spread, the economy rebounded. Unemployment in May 2021 was down to 4.6 percent. *See* D. Ellzey Aff. ¶ 5. As of May 6, 2021, there were over 81,000 job openings across the State, with business resuming and employers continuing to return to normal operations. *See* D. Ellzey Aff. ¶ 6. With greater knowledge of how to operate safely despite COVID-19, lower unemployment, and ample open jobs, Governor McMaster determined—like a bipartisan group of more than half of the nation's other governors—that continuing to accept the most generous unemployment benefits in history from the federal government until the programs ended entirely on September 6, 2021, did not provide an advantage to South Carolina, particularly in light of the ongoing labor shortage. *See, e.g.*, Eric Morath and Joe Barrett, *Americans Are Leaving Unemployment Rolls More Quickly in States Cutting Off Benefits*, Wall St. Journal (June 27, 2021), https://tinyurl.com/bxxmsf56 ("The number of unemployment-benefit recipients is falling at a faster rate in Missouri and 21 other states canceling enhanced and extended payments this month, suggesting that ending the aid could push more people to take jobs."); Luke Pardue, *Hiring Trends as Enhanced Unemployment Insurance Benefits Expire*, Gusto (July 27, 2021), https://tinyurl.com/hnbrrw5f ("Looking at employment

trends by employee age, we observe that around the time of governors announcements in the first week of May, hirings rates for workers 25 and older rose in states ending these benefits early, which indicates that [unemployment insurance] did play a role in the labor decisions of a group of adult workers.").

It is inconceivable that—when we are well on the road to economic recovery after a global pandemic—the General Assembly would have wanted to require the Governor to perpetuate a system in which people were incentivized not to work by providing unemployment benefits that exceeded the claimants' wages while working. After all, unemployment benefits are supposed to be a safety net; they were just that when the pandemic upended the economy. But these benefits are not a long-term entitlement program, like Medicare or Social Security in retirement. The General Assembly did not intend to require anything that would transform unemployment benefits into something more than a stopgap. *See Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016) (a statute should not be interpreted in a manner that would lead to "a result so plainly absurd that it could not have been intended by the General Assembly").

Plaintiffs' alleged individual circumstances do not compel a different result. Even accepting their anonymous certifications as true for purposes of the Motion to Dismiss,[4] statutory interpretation here must look at the plain text in the context of the big picture, not anecdotal cases. Put differently, the need for putting more South Carolinians back in the workforce takes priority over any anonymous and untested allegations regarding individual circumstances. *Cf. Richards v. City of Columbia*, 227 S.C. 538, 547, 88 S.E.2d 683, 687 (1955) ("the law will never, by any construction, advance a private interest to the destruction of a public interest; but, on the

[4] Defendants have separately moved to strike these certifications for purposes of the Motion for Preliminary Injunction. As offered, the certifications give Defendants no way to verify or challenge Plaintiffs' contentions.

contrary, . . . it will advance the public interest, so far as it is possible, though it be to the prejudice of a private one"). Indeed, section 41-29-230(1) says as much: DEW must secure "advantages" under the Social Security Act for "this State and its citizens." And DEW must cooperate to secure only those "advantages" with the goals to "reduce and prevent unemployment" and "promote the reemployment of unemployed workers throughout the State in every other way that is feasible." S.C. Code Ann. § 41-29-120(A)(1)(a), (c).

D. The cases Plaintiffs cite from other States are unavailing.

There have been two states (Ohio and Arkansas) to take up the question of injunctive relief after PUA, PEUC, and FPUC benefits ceased. *See State ex rel. Bowling v. DeWine*, No. 21 CVH07-4469 (Ohio Ct. Comm. Pls.); *Armstrong v. Hutchinson*, No. 60CV-21-4507 (Ark. Cir. Ct. July 28, 2021). In Ohio, the Court denied the plaintiffs' request for a temporary restraining order and a preliminary injunction. After analyzing a statute nearly identical to section 41-29-230(1), the Court held that the plaintiffs were not likely to succeed on the merits because "[t]he wording chosen by the Ohio General Assembly clearly does not include the CARES Act. Moreover, the Court finds that the provisions of the Social Security Act that relate to unemployment insurance are not applicable." Order 5, *State ex rel. Bowling v. DeWine*, No. 21 CVH07-4469 (Ohio Ct. Comm. Pls. July 29, 2021) (attached as Ex. C). The Court went on to find, as Defendants argue here, that the statute did not place any obligation on Governor DeWine because it is limited to the state workforce agency "specifically [its] adoption of rules, regulations, administrative methods and standards." *Id.*

In Arkansas, the Court granted Plaintiffs' request for injunctive relief. *See* Order, *Armstrong v. Hutchinson*, No. 60CV-21-4507 (Ark. Cir. Ct. July 28, 2021) (attached as Ex. D). That order, however, merely recites the statutory language (which is admittedly like South

Carolina's). The order never engages with any of the legislative history of the new federal unemployment benefits or how incentivizing people not to work undermines the purpose of unemployment benefits. In comparison to the Ohio order issued after the benefit of extensive briefing, time to reflect on the issues, and insight from *amici curiae*, the proceedings in Arkansas offer this Court minimal value in reaching a comprehensive and informed decision on the arguments here.

As to the Maryland and Indiana cases Plaintiffs cite, courts in both Maryland and Indiana granted preliminary injunctions *before* those states had terminated their participation in the voluntary CARES Act programs—a markedly different posture than this case. In Maryland, Governor Hogan announced the end of the CARES Act programs on June 1, 2021, and the complaint was filed July 1, 2021. In Indiana, Governor Holcomb announced the end of CARES Act programs on May 17, 2021, and the complaint was filed on June 14, 2021. In both cases, the judges issued orders to preserve the status quo until the case could be more fully heard. Plaintiffs here, despite having considerably more notice of the CARES Act programs being terminated in South Carolina (Governor McMaster announced the decision on May 6, 55 days before the termination was effective), did not seek injunctive relief until four weeks *after* the CARES Act programs had ended (or 83 days after Governor McMaster's announcement). Due to Plaintiffs' delay, whether to maintain the status quo while the case plays out is not the question before this Court, as it was in Indiana and Maryland. Instead, their delay means that they are now seeking a mandatory injunction to require Defendant to change the status quo, which is that South Carolina is not currently participating in PUA, PEUC, and FPUC.

As for those decisions themselves, in Maryland, Plaintiffs completely ignore the fact that Maryland's legislature adopted "an emergency enactment during the pandemic that requires that

the Maryland Department of Labor shall identify all changes in federal regulations and guidance that would expand access to unemployment benefits or reduce bureaucratic hurdles to prompt approval of unemployment benefits." *D.A. v. Hogan*, No. 24-C-21-002988, 2021 WL 2879726, at *4 (Md. Cir. Ct. July 03, 2021) (internal quotation mark omitted). Our General Assembly did no such thing. Moreover, the Maryland court focused on the "fullest extent possible" language in Maryland law regarding obtaining benefits from the federal government. But that court did not engage with any comparable provision like sections 41-27-20 and 41-29-120(A)(1)(a) that focus on involuntary unemployment and getting people back to work. If the maximum amount of federal unemployment benefits incentivizes people to choose to remain unemployed because they could bring home more money through government benefits than a paycheck, then the entire legislative scheme is undermined.

As for Indiana, the statute is different. Unlike section 41-29-230, Indiana's statute speaks to what "the state" must do. South Carolina's statute is more limited, addressing only the actions of DEW, an administrative agency. Beyond that, Indiana's statute speaks to "rights and benefits," whereas South Carolina's statute speaks to "advantages." South Carolina's choice to use "advantages," when other legislatures spoke to "rights and benefits," conveys an expectation that value judgments and discretion were needed as to whether a program under the cited federal statutes provides an advantage. Additionally, the Indiana court never explained how the nature of the accounts through which money flows, rather than the act under which those benefits were adopted (the CARES Act) or where the federal money was appropriated from (the general fund of the U.S. Treasury), controlled the analysis. *See* Order 8, *T.L. v. Holcomb*, No. 49D11-2106-PL-020140 (Ind. Super. Ct. June 25, 2021). It also never addressed the fact that FPUC benefits are not even part of this funding schema. Nor did it address the fundamental purpose of unemployment

benefits and the counterintuitive result of incentivizing able-bodied individuals not to work and forcing businesses large and small to compete with such incentives amidst a labor shortage.

II. Plaintiffs' delay in filing suit means their request for a preliminary injunction is barred by laches.

Beyond the merits (or lack thereof) of Plaintiffs' claims, Plaintiffs' delay in bringing this case forecloses the possibility of preliminary injunctive relief. An injunction, of course, is an equitable remedy. *See Grosshuesch v. Cramer*, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005). Parties seeking equitable relief must act promptly and not sleep on their rights. *See Robinson v. Est. of Harris*, 388 S.C. 616, 627, 698 S.E.2d 214, 220 (2010) (applying laches when a plaintiff unreasonably delayed and prejudiced the defendant).

Governor McMaster directed Director Ellzey and DEW on May 6 to terminate South Carolina's participation in the CARES Act programs effective June 30. *See* Compl. Ex. E. Plaintiffs finally filed the Complaint and moved for preliminary injunctive relief on July 28.

That means that on May 6, Plaintiffs knew that South Carolina would stop participating in the three federal unemployment benefits on June 30. Yet—for some unexplained reason—Plaintiffs did not file this lawsuit for 83 days (or almost twelve weeks). They even delayed 28 days (or four weeks) after the termination became effective to file this lawsuit. To think about it another way, there are 123 days between Governor McMaster's May 6 directive and the date FPUC ends nationwide on September 6. More than two-thirds of that time elapsed before Plaintiffs brought this lawsuit.

Further highlighting Plaintiffs' delay are the cases from Indiana and Maryland they cite. *See* Mem. in Supp. of Mot. for Prelim. Inj. 12–13. As already discussed, the Indiana plaintiffs filed their lawsuit on June 14 (more than six weeks before Plaintiffs and less than a month after Indiana's

decision was announced on May 17). The Maryland plaintiffs did so on June 30 (four weeks before Plaintiffs and only a month Maryland's decision was announced on June 1).

Plaintiffs' delay here is unreasonable and has prejudiced Defendants. Plaintiffs did not seek injunctive relief during that period of time and allowed the benefits to expire. Now, they argue that, on an emergency basis, Governor McMaster and DEW must reinstate the voluntary CARES Act benefits after administration of these programs ended. Plaintiffs have prejudiced Defendants by their lack of notice and the events DEW took to end the benefits without any inclination Plaintiffs considered the actions to be unlawful. Had Plaintiffs sought injunctive relief within a week or two, the question of injunctive relief, indeed the entire merits of the case, could have been litigated on an expedited basis and resolved before benefits ended.

As it stands now, DEW made the programmatic and technical changes to end the programs and reduced its staffing considerably. While it is true that administrative costs are federally funded, that is not the end of the prejudice equation. Certainly, it would require significant staff time and effort to reverse course *on an emergency basis* and resume operation of three federal programs that have been dormant for four weeks. In light of Plaintiffs' delay and the prejudice to Defendants, this Court should reject Plaintiffs' request for a preliminary injunction.

III. Plaintiffs have not shown irreparable harm.

No one disputes that Plaintiffs describe hardships in their anonymous certifications. But even hardships like those do not necessarily constitute irreparable harm. At bottom, Plaintiffs contend they need the federal unemployment benefits to make rent, utility, or car payments.[5] *See* Certification of S.B. ¶ 11 (July 20, 2021); Certification of S.S. ¶ 9 (July 20, 2021); Certification of

[5] Plaintiffs ignore that there is federal relief for people struggling with rent and utility payments. *See Now Open: SC Stay Plus Rental, Utility Assistance Program*, SC Housing (last visited Aug. 6, 2021), https://tinyurl.com/e3asncmh.

T.S. ¶ 9 (July 20, 2021); Certification of B.B. ¶ 9 (July 20, 2021). Whatever the consequences of their financial distress, Plaintiffs' alleged harm is still the loss of money. And "monetary damages generally do not give rise to irreparable harm." *Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.*, 700 F. App'x 251, 263 (4th Cir. 2017); *see also Joyner v. Lancaster*, 553 F. Supp. 809, 816 (M.D.N.C. 1982) ("plaintiff's loss of income and present inability to find new employment fail to show the type of irreparable harm necessary to justify the issuance of a preliminary injunction"). Were the consequences of financial trouble sufficient to give rise to irreparable harm, this important factor in the preliminary injunction test would be virtually toothless, and an individual plaintiff would satisfy this prong of the test anytime he even alleged lost wages or similar money damages.

IV. A writ of mandamus cannot be issued here.

A "writ of mandamus is an extraordinary remedy," *Jolly v. Marion Nat'l Bank*, 267 S.C. 681, 686, 231 S.E.2d 206, 208 (1976), and the "highest" of all the "judicial writ[s]," *City of Rock Hill v. Thompson*, 349 S.C. 197, 199, 563 S.E.2d 101, 102 (2002). The writ exists "only to compel a public official to perform a mandatory legal duty." *Id.*; *see also In re Lyde*, 284 S.C. 419, 421, 327 S.E.2d 70, 71 (1985) (a writ will not issue when "the performance of duty rests in discretion"). To obtain that writ, a "petitioner must show: (1) a duty of respondent to perform the act; (2) the ministerial nature of the act; (3) the petitioner's specific legal right for which discharge of the duty is necessary; and (4) a lack of any other legal remedy." *Wilson v. Preston*, 378 S.C. 348, 354, 662 S.E.2d 580, 582–83 (2008).

As discussed at length already, Governor McMaster had no duty to participate in or remain in the CARES Act programs that Congress allowed states to administer on a voluntary basis. Additionally, even with a tortured reading of section 41-29-230(1) as somehow binding Governor

McMaster in addition to DEW, the actions in the statute are not ministerial. *See id.* (defining a ministerial act as one that is "is absolute, certain, and imperative" and "involve[es] merely the execution of a specific duty arising from fixed and designated facts"). As noted above, section 41-29-230(1) speaks to "cooperation" and "promulgation of appropriate rules, regulations, administrative methods and standards." It also addresses "advantages," not "rights" or "benefits." This language requires policy or value judgment—exactly the type of thing that involves discretion. (And for what it is worth, the Governor's decision here is hardly an anomaly. Governors in more than half the states similarly concluded that some or all of these CARES Act programs were no longer advantageous to their states and terminated their states' participation prior to September 6.) For that reason, there is no ministerial duty to be enforced here. A judicially issued writ of mandamus compelling Governor McMaster to act one way or the other—here, in a manner directly at odds with his previous discretionary determination—on a topic that is not specifically addressed in state law would be inappropriate. Plaintiffs disagree, but they are viewing the issue (as expected) only from their personal circumstances. The Governor has the discretionary legal authority to make this determination and the responsibility to act in the best interests of the entire State, and all its citizens, facing a critical labor shortage. Governor McMaster decided that continuing to participate in PUA, PEUC, and FPUC no longer provided an advantage to the State. Whatever policy disagreements Plaintiffs may have, those disagreements do not entitle them to a writ of mandamus.

* * *

For these myriad reasons, Plaintiffs' claims fail and should be dismissed. That said, if the Court is inclined to grant Plaintiffs' belated request for preliminary injunctive relief, Defendants request that the Court stay any such order pending a decision by the Supreme Court of South

Carolina (which Defendants would seek expeditiously). Under federal law, a state may terminate its participation in the CARES Act program only with 30 days' notice. If South Carolina is forced to participate in these programs again before appellate review is complete, Defendants will have no recourse even if they prevail on appeal.

Additionally, a bond is required. *See* Rule 65(c), SCRCP ("no . . . temporary injunction shall issue except upon the giving of security by the applicant"). Substantial time and effort from DEW will be required to have South Carolina participate in PUA, PEUC, and FPUC again, so a nominal bond is insufficient. *See Atwood Agency v. Black*, 374 S.C. 68, 73, 646 S.E.2d 882, 884 (2007) (a bond must be "in an amount sufficient to protect [a defendant] in the event the injunction is ultimately deemed improper").

Conclusion

For the foregoing reasons, the Court should deny Plaintiffs' Motion for Preliminary Injunction and grant Defendants' Motion to Dismiss.

Respectfully submitted,

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August 6, 2021
Columbia, South Carolina

HENRY MCMASTER
GOVERNOR

March 28, 2020

The Honorable John P. Pallasch
Assistant Secretary for Employment and Training
United States Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210
CARES_Act_Agreements@dol.gov

Dear Assistant Secretary Pallasch:

I hereby authorize Executive Director G. Daniel Ellzey of the South Carolina Department of Employment and Workforce to serve as my designee for purposes of executing any necessary agreements with the United States Department of Labor related to the Relief for Workers Affected By Coronavirus Act of 2020 and exercising any authority and responsibility associated with implementation of the same. This letter will serve as my delegation of authority as to the above-referenced matters.

Should you have any questions or need anything further in this regard, please do not hesitate to contact me. I appreciate your continued leadership and attention to this important matter.

Yours very truly,

Henry McMaster

HM/tl
cc: The Honorable G. Daniel Ellzey, Executive Director
South Carolina Department of Employment and Workforce

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
Civil Action No. 2021-CP-40-03774

S.B., S.S., T.S. and B.B.,

Plaintiffs,

v.

HENRY MCMASTER, in his official capacity as Governor of the State of South Carolina; and G. DANIEL ELLZEY, in his official capacity as the Director of the South Carolina Department of Employment and Workforce,

Defendants.

Declaration of G. Daniel Ellzey

I, G. Daniel Ellzey, submit this affidavit:

1. I am the Executive Director of the South Carolina Department of Employment and Workforce ("DEW") and have had this role for over two years.

2. I have personal knowledge of the facts in this affidavit or obtained them from records that DEW keeps in the ordinary course of its business.

3. I received an email on March 27, 2020 from Gay Gilbert at the U.S. Department of Labor providing instructions as to how states may choose to participate in Pandemic Unemployment Assistance, Pandemic Emergency Unemployment Compensation, and Federal Pandemic Unemployment Compensation. A true and correct copy of that email is attached to the affidavit as Exhibit 1.

4. As of April 2020, the seasonally adjusted unemployment rate in South Carolina reached 12.1 percent.

5. As of May 2021, the seasonally adjusted unemployment rate in South Carolina had decreased to 4.6 percent.

6. As of May 6, 2021, there were 81,694 job openings in South Carolina.

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

G. Daniel Ellzey

Notary: Corinne L Newsom

My Commission expires: June 18, 2029

From: Gilbert, Gay - ETA <Gilbert.Gay@dol.gov>
Sent: Friday, March 27, 2020 3:44 PM
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Subject: Delegation Authority for CARES Act State Agreements

Hello, Everyone.

We are providing you a heads up that your ETA Regional Office will be reaching out shortly to provide help in the event you need a Delegation of Authority in the event pending federal UI legislation is enacted today or early tomorrow.

The Relief for Workers Affected by Coronavirus Act, which is part of the CARES Act that is awaiting action today by the House of Representatives, includes many UI-related new programs. States will need to enter into agreements with the US Department of Labor to activate these programs in their state. Some of these programs become effective the week beginning after the agreement is signed. For this reason, if the President signs the law today or early tomorrow, in almost all states, **agreements must be signed by states and returned to USDOL by 11:59 PM tomorrow (Saturday, March 28, 2020) for certain programs to become effective starting with the week of unemployment beginning on Sunday, March 29, 2020.**

In order to meet this deadline, states need to prepare now. We will send Agreement templates to states shortly after the law is signed by the President. We may be sending these agreement templates by today or tomorrow (depending on when the legislation is passed and signed). If someone other than the Governor is to sign the agreement with the Department, then the signer must have a delegation of authority from the Governor. Your Regional Office will be providing you a sample Delegation of Authority that your state may use to allow someone other than the Governor to sign the Agreement. If the Governor will be signing, preparations must be made to get that signature as soon as it is needed.

We encourage you to complete the Delegation of Authority as soon as possible – so that agreements can be signed when they become available by tomorrow. Please work you're your Regional Office to complete the Delegation of Authority if you need one. And then send a scanned version of the executed Delegation Authority document to your Regional Office and to CARES_Act_Agreements@dol.gov

In addition, we need you to provide us contact information for the individual in your state who will be on call to receive the Agreement template and who will submit the signed Agreement to USDOL.

The Department's Office of Congressional and Intergovernmental Affairs will be reaching out to your governor's office to provide them a heads on this matter as well.

At this time, the legislation will require agreements with States to activate at least the following five UI-related programs:

- Pandemic Unemployment Assistance (Section 2102) – which is a DUA-like program to provide benefits to individuals not covered by the regular UI program
- Emergency Unemployment Relief For Governmental Entities And Nonprofit Organizations (Section 2103)
- Federal Pandemic Unemployment Compensation (Section 2104) – which will provide an additional federally-funded $600 on all UI and PAU benefits through July 31, 2020.
- Temporary Full Federal Funding Of The First Week Of Compensable Regular Unemployment For States With No Waiting Week (Section 2105)
- Pandemic Emergency Unemployment Compensation (Section 2107)

There are also Short-Time Compensation (STC) provisions that will require agreements, but we will be providing additional information about these agreements soon in the future.

Please direct questions through your ETA Regional Office.

Thanks in advance for your quick attention to this issue.

Gay

Gay M. Gilbert, Administrator
Unemployment Insurance
U.S. Department of Labor
Employment and Training Administration
(202) 693-3029
gilbert.gay@dol.gov

<DELEGATION OF AUTHORITY.docx>

DELEGATION OF AUTHORITY

IN ACCORDANCE WITH (Insert State Law here), I, (Insert Governor name here), GOVERNOR OF THE STATE OF (Insert State Law here), DELEGATE THE AUTHORITY AND RESPONSIBILITY FOR EXECUTING THE AGREEMENTS WITH THE U.S. DEPARTMENT OF LABOR RELATED TO THE RELIEF FOR WORKERS AFFECTED BY CORONAVIRUS ACT, 2020 TO _____(Insert Name and Title here).

DATED: _____

_____

NAME, GOVERNOR

IN THE FRANKLIN COUNTY, OHIO COURT OF COMMON PLEAS
CIVIL DIVISION

STATE ex rel CANDY BOWLING, et al	:	
Plaintiffs,	:	Case No. 21 CVH07-4469
v.	:	JUDGE HOLBROOK
MICHAEL DEWINE, et al	:	
Defendants.	:	

DECISION AND ENTRY DENYING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

This matter came before the Court on July 23, 2021, for a hearing on plaintiffs' motion for temporary restraining order and preliminary injunction. The hearing was recorded on the Court's JAVS system in Courtroom 5B. At the culmination of the hearing, the Court invited the parties to submit any supplemental briefs on or before 5:00 p.m. July 26, 2021.

Having considered the briefs submitted, arguments of counsel, affidavits in support of the motion, and the salient law, the Court issues the following decision.

Background

On March 27, 2020, in response to the COVID-19 Pandemic, Congress passed the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, which, inter alia, provided enhanced unemployment insurance benefits for workers who would not otherwise be eligible for relief. 15 U.S.C. § 9001 et seq. Three types of benefits are created by the CARES Act: (1) Pandemic Unemployment Assistance ("PUA"); (2) Pandemic Emergency Unemployment Compensation ("PEUC"); and (3) Federal Pandemic Unemployment Compensation ("FPUC"), which increased the amount of unemployment

insurance benefit payments a worker could receive by $300 a week from December 27, 2020 to September 6, 2021. See 15 U.S.C. § 9023, further amended by the American Rescue Plan Act of 2021 ("ARPA"), Pub L. No. 117-2, §§ 9011, 9013, 9016 (March 11, 2021). The CARES Act requires the U.S. Secretary of Labor to provide CARES Act Benefits through agreements with the States and specifically provides that agreements regarding the receipt of PEUC and FPUC benefits may be terminated by a state upon 30 days' written notice. 15 U.S.C. §§ 9023(a), 9025(a).

On May 13, 2021, Governor Mike DeWine announced that Ohio will end its participation in the FPUC program effective June 26, 2021.[1] As a result of this announcement, plaintiffs, who allege they are all recipients of FPUC benefits filed the instant action for Declaratory Judgment, Injunctive Relief and a Writ of Mandamus against Governor DeWine and Matt Damschroder, in his official capacity as Director of the Ohio Department of Job and Family Services. Simultaneous to the filing of the complaint, plaintiffs moved the court for a temporary restraining order and preliminary injunction. Within the motion, plaintiffs argue they are entitled to a preliminary injunction enjoining the State of Ohio from prematurely terminating their FPUC benefits.

Law and Analysis

The party requesting the preliminary injunction must show that "(1) there is a substantial likelihood that the plaintiff will prevail on the merits, (2) the plaintiff will suffer irreparable injury if the injunction is not granted, (3) no third parties will be unjustifiably harmed if the injunction is granted, and (4) the public interest will be served

[1] It is the Court's understanding that the State of Ohio is continuing to participate in PUA and PEUC benefits through the expiration of the same on or about September 6, 2021.

by the injunction." *Procter & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267 (1st Dist.2000). Each of the forgoing elements must be established by a showing of clear and convincing evidence. *Vanguard Transp. Sys. Inc. v. Edwards Transfer & Storage Co.*, 109 Ohio App.3d 486, 790 (10th Dist.1996). Clear and convincing evidence is a degree of proof that "will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *DHSC, LLC v. Ohio Dep't of Job and Family Servs.*, 2012-Ohio-1014, ¶40 (10th Dist.).

Substantial Likelihood of Success on the Merits – R.C. Chapter 4141

The bulk of the parties' argument addresses the first element of an injunction – there is a substantial likelihood that the plaintiffs will prevail on the merits. Accordingly, the Court will start there. Pursuant to the complaint and motion, R.C. 4141.43(I) and R.C. 4141.45 provide the basis for the injunctive relief plaintiffs seek. R.C. 4141.43(I) provides in its entirety:

> The director shall cooperate with the United States department of labor to the fullest extent consistent with this chapter, and shall take such action, through the adoption of appropriate rules, regulations, and administrative methods and standards, as may be necessary to secure to this state and its citizens all advantages available under the provisions of the 'Social Security Act' that relate to unemployment compensation, the 'Federal Unemployment Tax Act,' (1970) 84 Stat. 713, 26 U.S.C.A. 3301 to 3311, the 'Wagner-Peyser Act,' (1933) 48 Stat. 113, 29 U.S.C.A. 49, the 'Federal-State Extended Unemployment Compensation Act of 1970,' 84 Stat. 596, 26 U.S.C.A. 3306, and the 'Workforce Innovation and Opportunity Act,' 29 U.S.C.A. 3101 et seq.

R.C. 4141.45 states, "[a]ll the rights, privileges, or immunities conferred by sections 4141.01 to 4141.46, inclusive, of the Revised Code, or by acts done pursuant thereto, shall exist subject to the power of the general assembly to amend or repeal such sections at any time."

In reliance on this language, plaintiffs contend the statutes mandate that defendants continue the State's participation in the FPUC program. Defendants, on the other hand, submit that the terms of the statutes do not support plaintiffs' position.

When the Court considers the meaning of a statute, the first step is to determine whether the statute is "plain and unambiguous." *State v. Hurd*, 89 Ohio St.3d 616, 618, 2000-Ohio-2 (2000). If "the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation," because "an unambiguous statute is to be applied, not interpreted." *Sears v. Weimer*, 143 Ohio St. 312 (1944), paragraph five of the syllabus. Ambiguity means that a statutory provision is "capable of bearing more than one meaning." *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, ¶ 16. Without "an initial finding" of ambiguity, "inquiry into legislative intent, legislative history, public policy, the consequences of an interpretation, or any other factors identified in R.C. 1.49 is inappropriate." Id.; *State v. Brown*, 142 Ohio St.3d 92, 2015-Ohio-486¶ 10. The Court "do[es] not have the authority" to dig deeper than the plain meaning of an unambiguous statute "under the guise of either statutory interpretation or liberal construction." *Morgan v. Ohio Adult Parole Auth.*, 68 Ohio St.3d 344, 347, 1994-Ohio-380 (1994). Indeed, were the Court to ignore the unambiguous language of a statute, or if find a statute to be ambiguous only after delving deeply into the history and background of the law's enactment, it would "invade the role of the legislature: to write the laws." *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, ¶ 8

Applying these principles, the Court finds that plaintiffs have not met their burden of establishing a substantial likelihood of success on the merits by clear and convincing

evidence. R.C. 4141.45 simply gives the General Assembly the power to amend or repeal the provisions of R.C. 4141.01 to R.C. 4141.46 at any time. And R.C. 4141.43(I), by its plain and unambiguous terms, is limited to:

> all advantages available under the provisions of the 'Social Security Act' that relate to unemployment compensation, the 'Federal Unemployment Tax Act,' (1970) 84 Stat. 713, 26 U.S.C.A. 3301 to 3311, the 'Wagner-Peyser Act,' (1933) 48 Stat. 113, 29 U.S.C.A. 49, the 'Federal-State Extended Unemployment Compensation Act of 1970,' 84 Stat. 596, 26 U.S.C.A. 3306, and the 'Workforce Innovation and Opportunity Act,' 29 U.S.C.A. 3101 et seq.

The wording chosen by the Ohio General Assembly clearly does not include the CARES Act. Moreover, the Court finds that the provisions of the Social Security Act that relate to unemployment compensation are not applicable. Such provisions are not what afford the advantage that Ohio's citizens are seeking here; rather, the FPUC extended benefits were undeniably created by the CARES Act. Moreover, the FPUC benefits are funded by the general fund of the Treasury as opposed to accounts established under the Social Security Act. See 15 U.S.C. § 9023(d)(3) (There are appropriated from the general fund of the Treasury, without fiscal year limitation, such sums as may be necessary for purposes of this subsection.) Accordingly, the FPUC benefits are wholly created and administered outside of the Social Security Act thereby abrogating any application of R.C. 4141.43(I).

Beyond the forgoing, the Court also notes that the mandate of R.C. 4141.43(I) sought to be enforced by plaintiffs is limited to the director of the Ohio Department of Job and Family Services, and specifically, his adoption of appropriate rules, regulations, and administrative methods and standards. The actions taken by Governor DeWine to terminate the State's agreement with the Secretary of Labor with respect to FPUC benefits

do not qualify as the adoption of appropriate rules, regulations, and administrative methods and standards. In other words, the statute does not contemplate the Court's enforcement of voluntary agreements like the one at issue here.

Simply put, because the clear and unambiguous language of R.C. 4141.45 and R.C. 4141.43(I) do not place an obligation on Governor DeWine to continue participation in the FPUC program, the Court finds plaintiffs cannot meet their burden of proving a substantial likelihood of success on the merits by clear and convincing evidence. Therefore, the Court further finds that plaintiffs are not entitled to a preliminary injunction or temporary restraining order.

Finally, plaintiffs' citation to the decisions out of Arkansas, Indiana and Maryland do not operate to alter this Court's findings. Such decisions are neither binding nor persuasive. The statutes at issue in Indiana and Maryland are broader than R.C. 4141.43(I). The burden of proof for a preliminary injunction is greater in Ohio. See *Ind. High Sch. Athletic Ass'n, Inc. v. Martin,* 731 N.E.2d 1, 7 (Ind. App. 2000) (elements of preliminary injunction must be proven by more than a scintilla and less than preponderance); *Air Lift, Ltd. v. Board of County Comm'rs*, 262 Md. 368, 394 (1971) (applicant for a preliminary injunction must present strong prima facie evidence of the facts and must prove material allegations by a preponderance of the evidence*); Custom Microsystems Inc. v. Blake*, 344 Ark. 536, (2001) (the test for determining the likelihood of success is whether there is a reasonable probability of success in the litigation). And finally, the benefits being terminated are different. Accordingly, the Court declines to follow these distinguishable cases.

Substantial Likelihood of Success on the Merits – Defendants' Authority to Act

Plaintiffs additionally argue that they have a substantial likelihood of success on the merits because Governor DeWine acted outside the authority granted to him under the Ohio Constitution. Conversely, defendants argue that Governor DeWine had constitutional authority to so act.

Section 5, Article III of the Ohio Constitution says: "The supreme executive power of this State shall be vested in the governor." Although the phrase "executive power" has not been specifically defined, it appears to be well established in Ohio law that the Governor not only has the powers necessary to perform the duties specifically required of him by the Constitution and statutes, but he is also empowered to act in the interest of the state and in ways not specified, so long as his actions do not contravene the Constitution or violate laws passed by the legislature within its constitutional authority. *State ex rel. S. Monroe & Son Co. v. Baker* (1925), 112 Ohio St. 356, 371 (1925).

As discussed above, Governor DeWine's actions to terminate the State's participation in FPUC benefits are not in conflict with R.C. 4141.43(I) or R.C. 4141.45. In point of fact, R.C. 4141.45 clearly contemplates the General Assembly's authority to amend R.C. 4141.43(I). Had the General Assembly taken it upon itself to exercise such power, and amended the statute to include the CARES Act, this would be a very different decision. Without a provision in the law which would preclude Governor DeWine from terminating an agreement for FPUC benefits, this Court cannot find that plaintiffs have established by clear and convincing evidence that Governor DeWine acted outside the scope of his authority by doing so here. Therefore, the Court further finds that plaintiffs are not entitled to a preliminary injunction or temporary restraining order.

Plaintiffs' Irreparable Injury

Though the inquiry could end here, the Court would be remiss not to address the element that plaintiffs did prove by clear and convincing evidence – plaintiffs' irreparable injuries.

Plaintiff Candy Bowling used the weekly $300.00 FPUC benefit to pay for household and medical expenses including the necessary expenses of a service animal. Bowling Aff. at ¶8. Without the FPUC compensation, Plaintiff Bowling is unable to meet these basic living expenses. Id. at ¶10. The same is true for Plaintiff David Willis and countless other Ohioans. And as aptly stated in plaintiffs' reply brief, any delay in the issuance FPUC benefits months or years down the road were plaintiffs to ultimately prevail does not pay for rent and food today. To be sure, this Court finds plaintiffs' loss of benefits as a result of Governor DeWine's actions to terminate the State's participation in FPUC to be a significant and irreparable injury. To argue otherwise is disingenuous.

Even with such a significant and irreparable loss, the Court is bound by the laws of the State of Ohio. In this case, said laws mandate that plaintiffs not only establish their irreparable injuries, but also the substantial likelihood of success by clear and convincing evidence. That has not occurred here.

Conclusion

As with all decisions to be made during the pandemic, this is not one that can be taken lightly. The Court is aware of, and sympathetic to, the thousands of Ohioans without work and in desperate need of any assistance available; however, the injuries suffered by said Ohioans, including plaintiffs here, are but one element for the Court's consideration on a motion for a preliminary injunction. Indeed, the Court simply cannot

legislate from the bench and overlook the clear terms of R.C. 4141.45 and R.C. 4141.43(I). Accordingly, for the reasons set forth herein, the Court finds plaintiffs' motion for a temporary restraining order and preliminary injunction is not well-taken, and hereby **DENIES** the same**.**

Though plaintiffs' claims for declaratory judgment and a writ of mandamus remain pending, the Court finds that pursuant to R.C. 2505.02 and Civ.R. 54(B) **this is a final appealable order; there is no just reason for delay.**

IT IS SO ORDERED.

Electronic notification to counsel of record

Franklin County Court of Common Pleas

Date: 07-29-2021

Case Title: THE STATE OF OHIO ET AL -VS- MICHAEL DEWINE ET AL

Case Number: 21CV004469

Type: DECISION/ENTRY

It Is So Ordered.

/s/ Judge Michael J. Holbrook

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60CV-21-4507
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IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

LOGAN ARMSTRONG, EMILY BALL,
RONALD BATES, CYNTHIA EYIUCHE,
and KURT JOHNSEN PLAINTIFFS

VS. CV 2021-4507

ASA HUTCHINSON, IN HIS OFFICIAL CAPACITY
AS GOVERNOR OF ARKANSAS, AND
CHARISSE CHILDERS, IN HER OFFICIAL
CAPACITY AS DIRECTOR, ARKANSAS DIVISION
OF WORKFORCE SERVICES DEFENDANTS

ORDER

Comes now before the Court the Matter of the Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, and based on the files and records of the case, the arguments made at the hearing held July 28, 2021, and all other matters considered, the Court DOTH FIND:

Plaintiffs have sued the Defendants by way of a Complaint filed with the Pulaski County Circuit Clerk on July 23, 2021. Both Defendants were served with a copy of the Complaint on July 26, 2021. The Complaint is styled as a plea for declaratory and injunctive relief against the Governor of the State of Arkansas and the Director of the Department of Workforce Services owing to the Governor's decision to terminate the extended pandemic-relief unemployment benefit plans funded by the federal government. On the same date as the filing of the Complaint, the Plaintiffs filed a Motion for Temporary Restraining Order and Preliminary Injunction, alleging that the Governor's decision will subject the Plaintiffs to irreparable harm and that they have a reasonable probability of success on the merits. An emergency hearing was held the morning of July 28, 2021.

These programs are clearly voluntary, and a state may decide whether to participate in them or not. This Court is faced with the question of who gets to determine whether to participate – the executive branch or the legislative.

Arkansas Code Annotated § 11-10-312 mandates that "[i]n the administration of this chapter, the Director of the Division of Workforce Services shall cooperate with the United States Department of Labor to the fullest extent consistent with the provisions of this chapter and shall take such action, through the adoption of such appropriate rules, administrative methods, and standards as may be necessary to secure to this state and its citizens all advantages available under the provisions of the Social Security Act that relate to unemployment compensation[.]" This provision, as well as others in Subchapter 3 of the Arkansas Code Chapter on Department of Workforce Services Law, indicates to the Court that the State legislature has clearly stated its public policy. The clear meaning of Arkansas law in this regard is that the State is to participate in these types of programs for the benefit of its citizens.

Ark. Code Ann. § 11-10-102 speaks directly to the public policy of this issue. "Involuntary unemployment is a subject of general interest and concern which requires appropriate action by the General Assembly to prevent its spread and to tighten its burden which may fall with crushing force upon the unemployed worker and his or her family…The General Assembly, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this state require the enactment of this measure, under the police power of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own."

The Court finds that the Plaintiffs have a reasonable likelihood of success on the merits and are likely to suffer harm in the absence of a preliminary injunction. The Court has serious doubts that the Governor and the Director of Workforce Services were acting within the scope of their duties, as these decisions would normally be the subject of legislation from the General Assembly.

The Motion for Preliminary Injunction should be granted. With an eye toward the plain meaning of the statutes above and the clear public policy of this State, the State is ordered to reengage these terminated programs if the United States Government will agree to permit the

State to do so. If the appropriate federal authorities reject such a reinstatement, the State will immediately provide proof of such communication to the Court.

IT IS SO ORDERED

_____
HERBERT T. WRIGHT, JR. – CIRCUIT JUDGE

_____
DATE

Arkansas Judiciary

Case Title: LOGAN ARMSTRONG ET AL V ASA HUTCHINSON ET AL

Case Number: 60CV-21-4507

Type: ORDER MOTION GRANTED

So Ordered

Honorable Herbert T Wright

Electronically signed by HTWRIGHT on 2021-07-28 12:09:44 page 4 of 4

STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND**	**IN THE COURT OF COMMON PLEAS** **FIFTH JUDICIAL CIRCUIT** **Civil Action No. 2021-CP-40-03774**
S.B., S.S., T.S. and B.B., *Plaintiffs*, v. HENRY DARGAN MCMASTER, in his official capacity as Governor of the State of South Carolina; and G. DANIEL ELLZEY, in his official capacity as the Director of the South Carolina Department of Employment and Workforce, *Defendants*.	**Defendants' Motion to Require Plaintiffs to Identify Themselves and to Strike Anonymous Certifications**

Defendants Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina ("Governor McMaster") and G. Daniel Ellzey, in his official capacity as the Executive Director of the South Carolina Department of Employment and Workforce ("DEW") ("Director Ellzey") (collectively, "Defendants") (1) move to require Plaintiffs to proceed under their names, rather than anonymously; and (2) if Plaintiffs do not identify themselves, move to strike the unsworn, anonymous certifications submitted in connection with their Motion for Preliminary Injunction.

Legal Standard

Rule 10(a), SCRCP, mandates that a summons and complaint "shall include the names of all parties." In view of this requirement and the general rule that "the identity of the parties in an action should not be concealed," "some courts have held that, absent permission to proceed anonymously, if a complaint fails to comply with Rule 10(a) and does not divulge the plaintiff's identity, its filing is ineffective to commence an action and the court lacks jurisdiction over the

unnamed parties." *Richard S. v. Sebelius*, No. CA 3:12-007-TMC, 2012 WL 1909344, at *1 (D.S.C. May 25, 2012). Although courts "do[] not condone the filing of an action anonymously without permission," *id.*, when presented with a proper motion, a decision whether a plaintiff should be allowed to depart from the general rule and "proceed anonymously is committed to the discretion of the trial court" but must be considered in light of the "presumption of openness of judicial proceedings," *Doe v. Howe*, 362 S.C. 212, 218, 607 S.E.2d 354, 357 (Ct. App. 2004).

Rule 12(e), SCRCP, provides that when a pleading "is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading." Similarly, under Rule 12(f), SCRCP, when a pleading is facially defective, "[u]pon motion pointing out the defects complained of, . . . the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." A motion to strike is addressed to the sound discretion of the trial court. *Totaro v. Turner*, 273 S.C. 134, 135, 254 S.E.2d 800, 801 (1979).

Argument

I. Plaintiffs should not be allowed to proceed anonymously.

All four Plaintiffs offer the same reason for wanting to proceed anonymously. They are "concerned that if it becomes public that [they were] part of this lawsuit, [they] could face harassment, retaliation, or the loss of job opportunities." Certification of S.B. ¶ 12 (July 20, 2021); Certification of S.S. ¶ 10 (July 20, 2021); Certification of T.S. ¶ 10 (July 20, 2021); Certification of B.B. ¶ 10 (July 20, 2021). This generic assertion falls far short of the high bar to proceed anonymously.

It is a "rare dispensation" for a plaintiff to be allowed to proceed anonymously. *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993); *see also* Rule 10(a), SCRCP (providing that the

summons and complaint "shall include the *names* of all parties" (emphasis added)). Plaintiffs bear the burden of showing they warrant such exceptional treatment. *CTH 1 Caregiver v. Owens*, No. CA 8:11-2215-TMC, 2012 WL 2572044, at *3 (D.S.C. July 2, 2012).

"There is no litmus test in South Carolina to determine whether a litigant in a civil proceeding should be allowed to proceed anonymously." *Howe*, 362 S.C. at 217, 607 S.E.2d at 356. A court thus has "a degree of flexibility in this fact-sensitive area." *Id.* That said, "there is a presumption of openness of judicial proceedings" in this State. *Id.* at 218, 607 S.E.2d at 357. Factors to consider in deciding whether a plaintiff can proceed anonymously include:

> (1) whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of sensitive and highly personal nature;
>
> (2) whether identification poses a risk of retaliatory physical or mental harm to the requesting party or even more critically, to innocent non-parties;
>
> (3) the ages of the persons whose privacy interests are sought to be protected;
>
> (4) whether the action is against a governmental or private party; and
>
> (5) the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously.

Id. at 217–18, 607 S.E.2d at 356–57 (quoting *James*, 6 F.3d at 238). In this case, no factor favors allowing Plaintiffs to proceed anonymously.

First, "courts have generally been reluctant to provide anonymity based on a plaintiff's fear of embarrassment over the revelation of personal matters." *Richard S.*, 2012 WL 1909344, at *2. Only the most sensitive subjects—such as cases involving sexual abuse of minors, *see Howe*, 362 S.C. at 217, 607 S.E.2d at 356—typically justify allowing a plaintiff to proceed anonymously.

This case involves nothing of that sort. It involves only a claim to government benefits. Such benefits, of course, are derived from taxpayers and administered by the government, both of which are matters of public concern. The receipt of unemployment benefits, standing alone, is not a matter that would subject one to ridicule, particularly in the context of a global pandemic when unemployment in this State was, at one time, over 12 percent. Nor would a challenge to the ability to receive federal supplemental unemployment benefits bring embarrassment. Plaintiffs may have put other information in their certifications about their personal circumstances, but difficulty in one's personal or professional life, without more, is not the type of situation that warrants anonymity.

Second, there is no real risk of retaliation. Plaintiffs do not identify who might retaliate against them. Certainly DEW, Director Ellzey, and Governor McMaster would not. (As a public entity and public officials, facing lawsuits is not unusual.) And there is no reason a nameless private individual or entity would retaliate against Plaintiffs for asserting these claims. Bald, generic, and speculative assertions like Plaintiffs' are not enough. *See Richard S.*, 2012 WL 1909344, at *2. (refusing to allow a plaintiff to proceed anonymously when there was "no evidence of any retaliation"). This factor also cuts against anonymity.

Third, Plaintiffs do not allege that they are minors. Accordingly, this factor weighs against anonymity.

Fourth, Defendants are government officials. Although government may not suffer reputational harm from a lawsuit the way a private defendant might, "[t]he simple fact that plaintiff sues a governmental entity does not give the court more reason to grant her request for anonymity." *Doe v. Pittsylvania Cty., Va.*, 844 F. Supp. 2d 724, 730 (W.D. Va. 2012). In fact, "the public interest in the underlying litigation is especially compelling" when the plaintiff sues a government

agency. *Doe v. Pub. Citizen*, 749 F.3d 246, 274 (4th Cir. 2014). Thus, "in only a very few cases challenging government activity can anonymity be justified." *Pittsylvania Cty., Va.*, 844 F. Supp. at 730. Nothing about this case is so unusual as to be one of those "very few cases" meriting anonymity. This factor therefore, like the previous three, counsels against anonymity.

Fifth, Defendants will be prejudiced if Plaintiffs remain anonymous. Defendants have no way of searching DEW's records to determine whether anonymous Plaintiffs would be entitled to *any* unemployment benefits. What if, for example, Plaintiffs have been disqualified from benefits for reasons that predated the termination of South Carolina's participation in the CARES Act programs? Or what if other eligibility issues exist? The answers to these questions could prove dispositive of Plaintiffs' claims (or potentially prove they even lack standing). Yet Defendants have no way of determining whether the allegations in the anonymous certifications are true. That is the definition of prejudice. *See, e.g.*, *Or. Socialist Workers 1974 Campaign Comm. v. Paulus*, 432 F. Supp. 1255, 1259 (D. Or. 1977) ("While we have some sympathy for these affiants, our system of justice does not contemplate the judicial resolution of disputes based on secret testimony. Basic concepts of Due Process require, moreover, that defendant have the opportunity to rebut this testimony."). And so this factor likewise cuts against anonymity.[1]

[1] Plaintiffs' counsel has suggested that Plaintiffs' identities be revealed to Defendants, subject to a confidentiality order. Although that would let DEW check its own records, it is still insufficient. *See, e.g.*, *Richard S.*, 2012 WL 1909344, at *1 ("Plaintiffs' response that Defendants could have easily discovered, or already know, Plaintiffs' identities misses the point. It is the public, not the opposing party or the court, which has an interest in the disclosure of the parties' identities. Without identification of Plaintiffs or permission form the court to proceed anonymously or under a pseudonym, the court may lack jurisdiction and, furthermore, the burden should not fall on Defendants to request identification of Plaintiffs."). Moreover, such an approach does not necessarily resolve any reporting obligations DEW may have depending on what its records reveal. Nor does it cure any of the shortcomings on the first four factors.

Stepping back from the factors to consider the first principles at issue here, open courts are a constitutional right. *See* S.C. Const. art. I, § 9. "Pseudonymous litigation undermines the public's right of access to judicial proceedings" and the public's "interest in knowing the names of the litigants." *Pub. Citizen*, 749 F.3d at 273–74. These considerations are why plaintiffs may proceed anonymously only in an "exceptional case." *Richard S.*, 2012 WL 1909344, at *1. Challenges to unemployment benefits are not exceptional cases. Indeed, Plaintiffs' counsel's other pending lawsuits prove as much. In another action pending against DEW, the South Carolina Appleseed Legal Justice Center filed the case with named plaintiffs. *See Robinson v. S.C. Dep't of Emp't & Workforce*, No. 2013-CP-06-00059 (S.C. Ct. Comm. Pls.). There has never been an allegation that the plaintiffs in that case have suffered harassment, retaliation, loss of job opportunities, or any other harm as a result of being named in that litigation.[2] Moreover, hundreds of claimants file appeals with the Administrative Law Court every year asserting DEW made an error in deciding benefit eligibility. They all proceed under their real name, and none have alleged any harassment, retaliation, loss of job opportunities, or any other harm due to those legal proceedings.

Plaintiffs can find no more refuge in cases in other states about these same CARES Act programs. To be sure, Plaintiffs in some states sued without using their names. *See T.L. v. Holcomb*, No. 49D11-2106-PL-020140 (Ind. Super. Ct.); *D.A. v. Hogan*, No. 24-C-21-002988 (Md. Cir. Ct. July 03, 2021). But there is no indication they were challenged on that front. *Cf. United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (an issue that "was not . . . raised in the briefs or argument nor discussed in the opinion of the Court" cannot be "binding precedent"). Meanwhile, just as many plaintiffs in different states saw no need to hide behind their

[2] Notably, two of the original four named plaintiffs in *Robinson* were dismissed from that lawsuit because, once the actual unemployment claims were reviewed, the parties agreed that those individuals were not, in fact, entitled to the relief requested.

initials. *See Armstrong v. Hutchinson*, No. 60CV-21-4507 (Ark. Cir. Ct. July 28, 2021); *State ex rel. Bowling v. DeWine*, No. 21 CVH07-4469 (Ohio Ct. Comm. Pls.).

The Court should protect the constitutional right to open judicial proceedings and not permit Plaintiffs to proceed anonymously. The Court should therefore order Plaintiffs to identify themselves as the procedural rules and precedent require

II. The anonymous certifications are improper.

At the start, it is important to be clear what is not at issue here. Plaintiffs submitted certifications instead of affidavits. The supreme court's order regarding trial court operations during COVID-19 allows signed certifications to be used in lieu of affidavits. *See In re Operation of the Trial Courts During the Coronavirus Emergency*, App. No. 2020-000447, Am. Order No. 2021-06-15-01, ¶ (c)(16) (S.C. Sup. Ct. filed June 15, 2021), *as extended by* Am. Order No. 2021-07-30-01 (S.C. Sup. Ct. filed July 30, 2021). The issue here is that the certifications are redacted such that no one—not the public, not this Court, not Defendants—knows who Plaintiffs are and who submitted the (presumably signed) certifications, despite the fact that Plaintiffs have not obtained this Court's permission to proceed anonymously.

That poses a fatal problem for this entire case. It is elementary that "[i]n the summons and complaint the title of the action *shall include the names of all parties*." Rule 10(a), SCRCP (emphasis added). The Fourth Circuit has relied upon the federal counterpart to Rule 10(a) to require disclosure of the names of parties. *See Pub. Citizen*, 749 F.3d at 273 (citing Fed. R. Civ. P. 10(a)). Notably, the comment to our state rule provides that "Rule 10(a) is substantially the same as the Federal Rule." *Id.* cmt. And it is well settled that, "[i]n construing the South Carolina Rules of Civil Procedure, [a state court] looks for guidance to cases interpreting the federal rules." *Maybank v. BB&T Corp.*, 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016). Thus, under Rule 10,

the Complaint and the Motion for Preliminary Injunction are facially defective and proceeding on either of them is procedurally improper. *See* Rule 10(e), SCRCP (stating "[t]he clerk of the court shall not file any pleadings or other papers not prepared in accordance with this rule"); *see also See Roe v. N.Y.*, 49 F.R.D. 279 (S.D.N.Y 1970) (holding a complaint that does not identify any plaintiff in the title is ineffective to commence an action).

Plaintiffs cannot rely upon phantom individuals without giving Defendants any notice of the names of the purported individuals or the factual details necessary to plead and prove a cognizable claim. Without this most basic information, Defendants have no opportunity to ascertain the truth of these allegations, much less to subject them to the requisite adversarial testing. Moreover, this is not a certification pursuant to *In re Operation of the Trial Courts During the Coronavirus Emergency*, App. No. 2020-000447, Am. Order No. 2021-03-04-01, ¶ (c)(16) (S.C. Sup. Ct. filed Mar. 4, 2021) *as extended by* Am. Order No. 2021-07-30-01 (S.C. Sup. Ct. filed July 30, 2021), because it contains no "signed certification of the maker." A signature may be under the black box, but neither Defendants nor the Court can know that.

Given the insufficiency of the anonymous certifications, the Court should strike them. Established case law and due process demand it.

Conclusion

The Court should grant Defendants' Motion and require Plaintiffs to identify themselves and file corrected pleadings, motions, and exhibits without redactions before entertaining any further proceedings. In the meantime, the Court should strike the anonymous certifications that Plaintiffs have already filed.

Respectfully submitted,

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August 6, 2021
Columbia, South Carolina

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND S.B., S.S., T.S., and B.B. Plaintiffs vs. Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina, and G. Daniel Ellzey, in his official capacity as Director of the South Carolina Department of Employment and Workforce; Defendants	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT **PLAINTIFFS REPLY IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION AND RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

ARGUMENT

Defendants seek to make a policy question out of a legal question. It is not the province of this Court to pass judgment on pure policy questions. Plaintiffs have never asserted that it is. But this case presents a clear and simple question of statutory interpretation: Does money that is available to the State through the provisions of the SSA (and would not be available but for the SSA), is administered pursuant to the SSA, and is governed by the SSA constitute "advantages available under the" SSA as that term is used in Section 41-29-230(1). We believe that it does and urge this Court to reach the same conclusion.

At the time this action was filed state courts in Indiana and Maryland had ruled on requests for declaratory and injunctive relief similar to that which Plaintiffs have made in this case. Both courts granted the relief requested.[1] Defendants in Indiana appealed and moved for a stay of the injunction. That request was denied.[2]

Three more states have now joined the fray. In Arkansas, a state where the relevant statute is functionally identical to ours, the trial court granted plaintiffs' request for declaratory and injunctive relief finding "[t]he court has serious doubts that the Governor and the Director of

[1] See Exhibits K and L to Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction.
[2] See Exhibit M attached hereto.

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Workforce Services were acting within the scope of their duties, as these decisions would normally be the subject of legislation from the general assembly."[3] In Oklahoma, another state where the relevant statute is functionally identical to ours, the trial court has likewise granted plaintiffs' request for declaratory and injunctive relief.[4] Of the five states to rule, four have now held that their unemployment benefits laws require the state to participate in Pandemic Unemployment Benefits. A summary of these decisions and the relevant statutory language is attached hereto as Appendix A.

The sole exception, Ohio, is both against the weight of authority and distinguishable.[5] Specifically, as the Ohio court noted, the burden of proof for a preliminary injunction is greater in Ohio than it is in Indiana, Maryland, or Arkansas, the only states to rule in similar cases at the time the Ohio decision came down.[6] To obtain a preliminary injunction in Ohio, the plaintiff must show a substantial likelihood that they will prevail on the merits and must do so by clear and convincing evidence. *Procter & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267 (1st Dist.2000); *Vanguard Transp. Sys. Inc. v. Edwards Transfer & Storage Co.*, 109 Ohio App.3d 486, 790 (10th Dist.1996). Clear and convincing evidence is a degree of proof that "will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *DHSC, LLC v. Ohio Dep't of Job and Family Servs.,* 2012-Ohio-1014, ¶40 (10th Dist.)

As with Indiana, Maryland, and Arkansas, a plaintiff seeking a preliminary injunction in South Carolina is not required to meet such a high burden. Plaintiffs do not need to prove an absolute legal right to the relief request. Instead, the plaintiffs need only to present "a fair question to raise as to the existence of such a right." *Peek*, 367 S.C. at 456 (quoting *Williams v. Jones*, 92 S.C. 342, 347, 75 S.E. 705, 710 (1912)). Further, for the reasons discussed more fully herein, the Indiana, Maryland, Arkansas, and Oklahoma decisions are better-reasoned and offer sound guidance toward the appropriate result here.

[3] Exhibit N attached hereto .
[4] *Owens v. Sumwalt*, Oklahoma County District Court, Case No. CV-21-1703, August 9, 2021 (Exhibit O attached hereto.)
[5] Exhibit P
[6] Exhibit P, p. 6.

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I. Section 41-29-23(1) requires Defendants to accept enhanced unemployment benefits.

PUA, PEUC, and FPUC[7] perform three simple functions. Respectively, they expand the reach of, extend eligibility periods for, and increase the amounts of unemployment benefits that already exist, and only exist, pursuant to the provisions of Social Security Act ("SSA"). Like regular UI benefits, the Pandemic Unemployment Benefits would not exist but for the SSA. Defendants make several arguments in an effort to show that, despite this simple truth, these benefits are somehow "new" and not "available under the Social Security Act". Each of these arguments is unavailing.

A. Funding, administration, and governance of PUA, PEUC, and FPUC through the SSA[8]

First, Defendants argue that, because Congress chose to enhance existing unemployment benefits by passing the CARES Act rather than amending the Social Security Act, these benefits are not "available under the provisions of the Social Security Act" as that phrase is used in Section 41-29-230(1). This argument ignores the fact that PUA, PEUC, and FPUC are all enhancements to existing UI benefits and are provided pursuant to the funding, administration, and governance provisions of the SSA, the same mechanisms under which regular UI benefits are provided.

Each of the Pandemic Unemployment Benefits, along with any costs that the States incur in their administration, is 100% federally funded. 15 U.S.C. §§ 9021(f)(2), 9023(d)(1)(A),

[7] Collectively "Pandemic Unemployment Benefits"

[8] Defendants raise two additional arguments which require only a brief response. First, they argue that Pandemic Unemployment Benefits are not "available under the" SSA because the CARES Act was codified at Title 15 and not Title 42. Dft. Response, p. 12. However, where a law is codified has little to say about Congressional intent because it is the Office of the Law Revision Counsel, and not Congress directly, that decides which Public Laws are placed into the United States Code and under what Title(s). See https://uscode.house.gov/about_classification.xhtml;jsessionid=BE4DE757134DE3181FBC28004CE6C21F. Second, Defendants assert that the administrator for unemployment insurance at the U.S. Department of Labor referred to Pandemic Unemployment Benefits as "new" programs in an email to states. Dft. Response, p. 12. This is far from a reliable indicator of legislative intent.

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9025(d)(2)(A).[9] This funding is provided either as an advance payment to States, or by way of reimbursement, as determined by the United States Secretary of Labor. 15 U.S.C. § 9021(f)(3) (PUA), 15 U.S.C. § 9023(d)(1)(B) (FPUC), 15 U.S.C. § 9025(c)(3) (PEUC). These payments are all made from accounts of the Unemployment Trust Fund established by the SSA. PUA benefits are funded through the extended unemployment compensation account of the Unemployment Trust Fund. 15 U.S.C. § 9021(g)(1)(A). Any costs that states incur in the administration of PUA benefits are funded through the employment security administration account of the Unemployment Trust Fund. 15 U.S.C. § 9021(g)(2)(A). PEUC benefits and their administration costs are likewise funded through the extended unemployment compensation and employment security administration accounts of the Unemployment Trust Fund, respectively. 15 U.S.C. § 9025(d)(1)(A) (PEUC benefits); 15 U.S.C. § 9025(d)(2)(A) (PEUC administration costs). FPUC benefits are included in the weekly benefit amount for both the PUA and PEUC programs and, as a result, are funded through the extended unemployment compensation account just like those benefits. 15 U.S.C. § 9021(d)(1)(A) (defining PUA amount of assistance to include FPUC); 15 U.S.C. § 9025(a)(4) (same for PEUC).

In short, the CARES Act provides that both PUA and PEUC benefits, including the temporary FPUC increase, are funded through the extended unemployment compensation account of the Unemployment Trust Fund. Both of which were created by the SSA. Administrative costs incurred by states in providing these benefits are funded through the employment security administration account of the Unemployment Trust Fund. Both of which were, again, created by the SSA.

Defendants claim that FPUC does not flow through SSA accounts. Dft. Mem. in Suppt. of Mot. to Dissm. and in Opp. to Plt. Mot. for Prelim. Inj. ("Dft. Response"), p. 11. They are mistaken. It is true that the section of the CARES Act which authorizes FPUC benefits states that "[t]here are appropriated from the general fund of the Treasury, without fiscal year limitation, such sums as may be necessary for the purposes of this subsection." 15 U.S.C. § 9023(d)(3). However, those funds do not end their journey at that point. Instead, as further explained above, funds for FPUC benefits and their administration costs are allocated to the extended

[9] See also Unemployment Insurance Program Letter ("UIPL") 15-20, p. 3 (FPUC); 16-20, p. 5 (PUA), 17-20, p. 3-4 (FPUC) (Exhibits A, B, and C to Plaintiffs' Complaint).

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unemployment compensation account and employment security administration account, respectively, of the Unemployment Trust Fund. The Fund and these accounts were all established by the SSA. Transfers between various SSA accounts and the general fund of the treasury are not unusual. For example, funds in the employment security administration account are appropriated from the general fund of the treasury. 42 U.S.C. § 1101(b)(2). And excess funds in the extended unemployment compensation account are required to be repaid into the general fund of the treasury from time to time. 42 U.S.C. § 1105(d). In any event, Defendants do not suggest where any sort of federal funding might come from except, initially, from the general fund of the treasury.

A summary of the funding authorizations for these programs and their administrative costs, along with the SSA sources of these funds follows:

		Funding Authorization	**SSA Source of Funding**
PUA	Benefits	15 U.S.C. § 9021(g)(1)(A)	Extended unemployment compensation account 42 U.S.C. § 1105(a)
	Administration costs	15 U.S.C. § 9021(g)(2)(A)	Employment security administration account 42 U.S.C. § 1101(a)
PEUC	Benefits	15 U.S.C. § 9025(d)(1)(A)	Extended unemployment compensation account 42 U.S.C. § 1105(a)
	Administration costs	15 U.S.C. § 9025(d)(2)(A)	Employment security administration account 42 U.S.C. § 1101(a)

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FPUC	Benefits	15 U.S.C. § 9023 (general fund appropriation); 15 U.S.C. § 9021(g)(1)(A) (allocation to extended unemployment compensation account for FPUC enhancement to PUA); 15 U.S.C. § 9025(d)(1)(A) (allocation to extended unemployment compensation account for FPUC enhancement to PEUC)	Extended unemployment compensation account 42 U.S.C. § 1105(a)
	Administration costs	15 U.S.C. § 9023 (general fund appropriation); 15 U.S.C. § 9021(g)(2)(A) (allocation to employment security administration account for FPUC enhancement to PUA); 15 U.S.C. § 9025(d)(2)(A) (allocation to employment security administration account for FPUC enhancement to PEUC)	Employment security administration account 42 U.S.C. § 1101(a)

Finally, with regard to governance, the Pandemic Unemployment Benefits and regular UI benefits both operate under the same SSA infrastructure. The state agency that processes claims, determines eligibility, and pays regular UI benefits, DEW in this case, does the same for the Pandemic Unemployment Benefits. The features of state law which apply to key aspects of regular UI and which are mandated by the SSA – like appeal procedures, overpayments, fraud determinations, and work availability or search requirements – also apply to the Pandemic Unemployment Benefits. *See, e.g.*, 15 U.S.C. §§ 9021(c)(5)(B)(ii), 9023(f)(4), 9025(a)(4)(B), (e)(4).

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In summary, Pandemic Unemployment Benefits are funded, administered, and governed by the same provisions of the SSA as regular UI benefits. They are not new benefits, but rather temporary enhancements to benefits that have long been provided under the SSA. Thus, they are "advantages available under the Social Security Act" that fall within Section 41-29-230(1) and DEW has a statutory obligation to secure them.

B. It was not necessary for Congress to amend the SSA in order to provide PUA, PEUC, and FPUC benefits.

Defendants next argue that Pandemic Unemployment Benefits are not benefits available under the SSA because, if Congress wanted these benefits to be part of the SSA, it would have amended the SSA as it did for unemployment relief for governmental entities and nonprofits established by the CARES Act. Dft. Response, p. 10. There is a simple answer to the question of why Congress did not amend the SSA to provide Pandemic Unemployment Benefits, but it did amend the SSA to provide benefits for governmental entities and nonprofits: it didn't have to.

As explained more fully above, the SSA already contained the funding, administrative, and governance provisions for regular UI benefits. The fact that Congress did not need to amend the SSA to temporarily enhance UI benefits as a response to the pandemic is further evidence that the Pandemic Unemployment Benefits are "available under" the SSA. In contrast, the unemployment relief for governmental entities and nonprofits that the CARES Act provided for did not exist prior to the passage of the CARES Act and the SSA contained no infrastructure to fund or administer them. These "new" benefits required an amendment to the SSA to create that infrastructure. The provision of existing UI benefits and the temporary enhancement that the Pandemic Unemployment Benefits provide, required no such amendment because these benefits were already "available under" the SSA. And Congress' amendment of the SSA to include new benefits for nonprofits and governmental entities evidences its intent to include all Pandemic Unemployment Benefits, even those not at issue in this case, within the SSA.

C. It was not necessary for the General Assembly to amend Section 41-29-230 to include the CARES Act.

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Defendants next argue that the General Assembly has had ample opportunity to amend Section 41-29-230 to include the CARES Act if it wanted to. This argument fails for a simple reason: it didn't have to. As discussed more fully above, the plain language of Section 41-29-230 already encompasses the Pandemic Unemployment Benefits which are available under the SSA. The General Assembly's failure to amend that plain language demonstrates legislative intent that DEW be required to secure Pandemic Unemployment Benefits for South Carolina and its citizens.

Defendants' argument also glosses over the fact that the General Assembly has had essentially no opportunity to *react*, by statutory amendment or otherwise, to Governor McMaster's announcement that he would end South Carolina's participation in Pandemic Unemployment Benefits. Governor McMaster announced his decision to end these benefits on May 6, 2021.[10] The General Assembly adjourned its regular session, *sine die*, at 5:00pm on May 13, 2021.[11] During this interval, the General Assembly was in session for four days.[12] And this was nearly a month after the crossover date meaning that any new legislation, such as an unnecessary amendment to Section 41-29-230, would have required a two-thirds majority vote to even be considered. The General Assembly's intent cannot be derived from its failure to amend Section 41-29-230 both because such an amendment was unnecessary and because the General Assembly had no meaningful opportunity to do so.

Further, recent events in Arkansas support Plaintiffs' theory and show that a statutory amendment would be required to allow the Governor or DEW to prematurely withdraw the state from Pandemic Unemployment Benefits. The version of Arkansas Code Annotated § 11-20-312 that was considered by the Arkansas court is functionally identical to Section 41-29-230(1) and provides that

> [i]n the administration of this chapter, the Director of the Division of Workforce Services shall cooperate with the United States Department of Labor to the fullest extent consistent with the provisions of this chapter and shall take such action,

[10] Exhibit E to Plaintiffs Complaint
[11] H. 4285 (available at https://www.scstatehouse.gov/query.php?search=DOC&searchtext=4285&category=LEGISLATION&session=124&conid=36815910&result_pos=0&keyval=1244285&numrows=10)
[12] See S.C. House and Senate Calendars (available, respectively, at https://www.scstatehouse.gov/sessphp/houcal.php and https://www.scstatehouse.gov/sessphp/sencal.php)

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> through the adoption of such appropriate rules, administrative methods, and standards as may be necessary to secure to this state and its citizens all advantages available under the provisions of the Social Security Act that relate to unemployment compensation[.]

On July 23, 2021, several unemployed Arkansans filed suit seeking declaratory and injunctive relief requiring the Governor and State employment agency director to reverse their decision prematurely withdrawing from Pandemic Unemployment Benefits.[13] The trial court granted plaintiffs request for relief on July 28, 2021 and defendants appealed.[14] The Arkansas General Assembly then introduced an amendment to its statute "to clarify the law concerning the state's participation in certain federal funded unemployment programs; to terminate the state's participation in certain federal unemployment programs; and to declare an emergency."[15] This amendment clearly expressed the General Assembly's intent to withdraw from Pandemic Unemployment Benefits and also amended the language "shall take such action . . . to secure to this state and its citizens all advantages available under the provisions of the Social Security Act that relate to unemployment compensation . . . " as follows: "~~shall~~ may take such action, through the adoption of such appropriate rules, administrative methods, and standards as may be necessary to secure to this state and its citizens all advantages available under ~~the provisions of~~ the Social Security Act that relate to unemployment compensation . . ." Thus, the Arkansas legislature deemed it necessary to amend a functionally identical statute in order to allow their governor and employment agency director to do what Defendants have done here. Our general assembly has taken no such action, and, without it, this Court should not reach the result Defendants seek.

D. Section 41-29-230 prohibits Governor McMaster from directing DEW to act contrary to its mandate.

[13] *Armstrong v. Hutchinson*, Pulaski County Circuit Court, Fourth Division, Case No. CV 2021-4507 (order granting preliminary injunction attached hereto as Exhibit N)
[14] Defendants' motion to stay the injunction was granted on appeal was granted the same day that the Arkansas Senate passed the statutory amendment discussed herein.
[15] Arkansas SB 1 (attached hereto as Exhibit Q and available at https://www.arkleg.state.ar.us/Bills/Detail?id=SB1&ddBienniumSession=2021%2F2021S1)

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Defendants also argue that, because Section 41-29-230 only mentions DEW and not the Governor, it imposes no limit on the Governor's authority. In doing so, Defendants read Section 41-29-230 out of existence.

Defendants do not contest that Section 41-29-230(1) requires DEW to secure to this State and its citizens all advantages available under the provisions of the Social Security Act that relate to unemployment compensation. Their argument is that, since Section 41-29-230(1) does not mention the Governor, he is permitted to direct DEW to act contrary to this statutory mandate. It cannot have been the General Assembly's intent to require DEW to take this action, but permit the Governor, on a whim, to direct DEW to act otherwise. If that were the General Assembly's intent, there would be no need for Section 41-29-230(1) in the first place and the question of whether DEW should secure unemployment benefits available under the SSA could be left entirely to the Governor. That is not what the General Assembly did, and this Court should not construe Section 41-29-230(1) in a way that renders it meaningless or leads to the absurd result that Defendants advocate for. *Florence County Democratic Party v. Florence County Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) ("This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless.")

Defendants then suggest that the General Assembly may not have authority to require the Governor to have South Carolina participate in Pandemic Unemployment Benefits. Dft. Response, p. 14. However, that authority is clear. "Once the legislature enacts a law, all that remains is the efficient enforcement and execution of that law." *Knotts v. S.C. Dep't of Natural Resources*, 348 S.C. 1, 7, 558 S.E.2d 511, 514 (2002). The Governor's Constitutional obligation is to execute the law, not to write it. S.C. CONST. art. IV, § 15 ("The Governor shall take care that the laws be faithfully executed.") And it is surely within the General Assembly's power to determine the total amount of money expended by state agencies, including federal funds. *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 295 S.E.2d 633 (1982).

E. <u>Pandemic Unemployment Benefits are "advantages" available under the SSA and securing them is consistent with the provisions of Chapters 27 through 41 of Title 41.</u>

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Defendants next argue that Pandemic Unemployment Benefits do not provide an advantage to South Carolina and its citizens and, as a result, DEW is not required by Section 41-29-230(1) to secure them. This argument fails for the following reasons.

First, Defendants misconstrue the term "advantage" in Section 41-29-230(1). The term "advantage", as it is used in Section 41-29-230(1), refers simply to advantages available under the SSA and not, as Defendants argue, to vague and debatable notions of what Defendants believe constitutes an "advantage" in a larger public policy sense. Words in a statute must be construed in context and their meaning may be ascertained by reference to words associated with them in the statute. *Travelscape, LLC v. South Carolina Dep't. of Revenue*, 391 S.C. 89, 101, 705 S.E.2d 28, 34 (2011). Defendants' interpretation of "advantages" in Section 41-27-230 is so broad as to, once again, read the General Assembly's mandate out of existence. If "advantages" is as vague and open to interpretation as Defendants would have it, the General Assembly would have had no need to pass Section 41-29-230(1) and could, instead, simply have left the decision as to what federal unemployment benefits to seek up to the Governor and DEW. It did not.

Second, Defendants argue that excerpts from the statement of public policy contained in Section 41-27-20 support their strained reading of "advantages" in Section 41-29-230(1). They do not. Initially, Defendants fail to note how Section 41-27-20 begins, that is, with a clear statement that this section is not intended to "alter or modify the specific provisions contained in Chapters 27 thorough 41 [Title 41], but as a guide to the interpretation and application of Chapters 27 through 41. . . ." As discussed above, Section 41-29-230(1) is clear in its mandate that DEW secure all benefits available under the SSA that relate to unemployment compensation. Thus, even if the statement of public policy contained in Section 41-27-20 could be read to express some intention to the contrary, the express mandate contained in Section 41-29-230(1) prevails.

Third, Defendants ignore key parts of the State's public policy, as expressed in Section 41-27-20. Defendants argue that the policy goal expressed in that section was to "combat the economic insecurity of involuntary unemployment." Dft, Response, p. 15. To be sure, that is one aspect of the public policy expressed in Section 41-27-20. But that section goes further. It notes also the objective of "maintaining purchasing power" and "limiting the serious social

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consequences of poor relief assistance." Defendants fail to explain how somewhere between $600 million and nearly $1 billion flowing into the South Carolina economy as it recovers from the pandemic and providing for the needs of South Carolina workers who are unable to find work is inconsistent with this objective. Indeed, DEW's own analysis finds that between $600 and $650 million in federal unemployment benefits will be lost because of Defendants' decision to opt out of these benefits early and that these losses will not nearly be offset by the $223 million to $372 million in wages that could, potentially, be earned in that time.[16] Other estimates put the loss of federal benefits to South Carolina much closer to $1 billion.[17]

Fourth, Defendants suggest that large numbers of South Carolinians receiving Pandemic Unemployment Benefits are not involuntarily unemployed. In support of this argument, they cite a Wall Street Journal article and an excerpt from one study. The former tells only part of the story and, as to the latter, only part of the story is told. While the Wall Street Journal article does report a disparity in the number of people entering the labor force in states that stopped benefits early versus those that did not, that effect is marginal and fails to take account of the negative effect on personal income and spending that these benefits reductions have.[18] Next, Defendants cite the Pardue study for the proposition that "around the time of governors announcements in the first week of May, hirings rates for workers 25 and older rose in states ending these benefits early, which indicates that [unemployment insurance] did play a role in the labor decisions of a group of adult workers." Dft. Responses, p. 17. However, Defendants fail to note that the effect was marginal and that the Pardue study ultimately concludes that "Overall, employment growth in states that ended UI supplements in mid-June has been on par with those ending benefits in September: cumulative headcount has risen 11.6% since the start of April 2021 in states that have ended these provisions, compared to 11.2% growth in non-ending states."[19] The author of

[16] Exhibit D to Plaintiffs Complaint., pp. 4-5. DEW's estimate of wages earned to offset this loss also incredibly assumes that between 30 and 50% of unemployment claimants would return to work immediately earning an average of $500 per week once Pandemic Unemployment Benefits ended.
[17] Stettner, Andrew, *Fact Sheet: What's at Stake As States Cancel Federal Unemployment Benefits*, The Century Foundation, May 13, 2021 (available at https://tcf.org/content/commentary/fact-sheet-whats-stake-states-cancel-federal-unemployment-benefits/).
[18] Schneider, Howard, *U.S. states ending federal unemployment benefit saw no clear job gains*, Reuters, July 21, 2021 (available at https://www.reuters.com/world/us/us-states-ending-federal-unemployment-benefit-saw-no-clear-job-gains-2021-07-20/)
[19] Pardue, Luke, *Hiring Trends as Enhanced Unemployment Insurance Benefits Expire: Evidence from High-Frequency Small Business Data*, Gusto, July 27, 2021, https://gusto.com/company-news/hiring-

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that study, when later interviewed by CBS News, indicated that States that want to boost hiring "would be much better off increasing the vaccination rate" rather than cutting off unemployment aid.[20]

Contrary to Defendants' position, the great weight of data and research conducted to date indicates that ending Pandemic Unemployment Benefits early has little to no effect on job seeking and, instead, has a profound negative effect on the States doing so. Defendants' position relies on overly simplistic assumptions which a substantial body of research has debunked. For example, a study conducted by the Becker Friedman Institute for Economics at the University of Chicago finds that "[s]imple job search models predict a sharp decline in search in the wake of a substantial benefit expansion, followed by a sustained rebound when benefits expire. We instead find that the jobfinding rate is quite stable. . . . Jointly, these spending and job finding facts suggest that benefit expansions during the pandemic were a more effective policy than predicted by standard structural models."[21] Indeed, the Federal Reserve Bank of Chicago found that those receiving unemployment insurance benefits actually exert a higher level of effort to find work and that those who are not receiving those benefits search less intensely."[22]

Defendants also ignore the fact that, like regular UI benefits, Pandemic Unemployment Benefits all require that recipients be able to work and available to work within the meaning of State law, including applicable work search requirements. 15 U.S.C. § 9021(a)(3)(A)(ii)(I) (PUA), 15 U.S.C. § 9025(a)(7) (PEUC).[23] Defendants' concern that Pandemic Unemployment Benefits somehow make individuals eligible simply because they do not want to return to work or because they feel they can make more in federal benefits than in wages is illusory. Yet, in an

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trends-as-enhanced-unemployment-insurance-benefits-expire-evidence-from-high-frequency-small-business-data.

[20] Picchi, Aimee, *These states cut unemployment aid early to supercharge hiring. It isn't working*., CBS News, July 30, 2021, https://www.cbsnews.com/news/unemployment-aid-ending-early-job-growth/

[21] Ganong, Peter *et al*., *Spending and Job Search Impacts of Expanded Unemployment Benefits: Evidence from Administrative Micro Data*, Becker Friedman Institute for Economics at the University of Chicago, Working Paper No. 2021-19, February 11, 2021.

[22] Faberman, R. Jason, *How do Unemployment Benefits Relate to Job Search Behavior?*, The Federal Reserve Bank of Chicago, Essays on Issues, 2020 Number 441, https://doi.org/10.21033/cfl-2020-441.

[23] Because an individual is only eligible for FPUC if they are receiving regular UI, PUA, or PUEC, all of which require that a recipient be able to work and available for work there is no separate work search requirement for FPUC. PUA makes individuals eligible for benefits where they are unavailable or unable to work if the reason behind their unavailability is one of several pandemic-related grounds.

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effort to prove their concerns valid, Defendants cite to the number of job openings in South Carolina as of May 6, 2021 (81,694). Dft. Response, Declaration of G. Daniel Ellzey, par. 6. Defendants neglect to note that, on the same day, there were 110,437 unemployed South Carolinians.[24] Thus, if every single unemployed South Carolinian found, qualified for, and could accept one of those open positions and the entire state had zero job openings, nearly 29,000 South Carolinians would still be unemployed and facing the "crushing force" of the "greatest hazard of our economic life" without the assistance of Pandemic Unemployment Benefits, a result that the General Assembly clearly sought to avoid. *See* S.C. Code Ann. § 41-27-20.

II. Defendants' laches defense is without merit.

Defendants also argue that Plaintiffs request for injunctive relief is barred by the doctrine of laches because they filed this case 83 days after Governor McMaster announced that he would be ending Pandemic Unemployment Benefits and 28 days after those benefits actually ended. They are incorrect.

Laches is defined as "[n]eglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Whitehead v. State*, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002). "Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of a right does not constitute laches." *Id*. Defendants cite no cases finding that such a short interval as the one at issue here can support a laches defense, nor can they. And Defendants fail to show how plaintiffs and their counsel, given the resources available, have failed to act diligently in preparing and bringing this action. Defendants also fail to address the fact that, in

[24] Bureau of Labor Statistics, Local Area Unemployment Statistics, https://data.bls.gov/timeseries/LASST450000000000004?amp%253bdata_tool=XGtable&output_view=data&include_graphs=true.

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both Arkansas[25] and Oklahoma[26], courts granted nearly identical relief to that requested by Plaintiffs here despite the fact that they filed suit weeks after benefits were terminated.

Defendants argue that they are prejudiced by this purported delay because DEW has already taken steps to end Pandemic Unemployment Benefits and has reduced its staffing considerably. This is incorrect for two reasons. First, as the agency charged with the statutory obligation to "take appropriate steps to reduce and prevent unemployment", one would reasonably expect DEW to take this opportunity to increase its staffing levels particularly when it can do so with federal funds. *See*. S.C. Code Ann. § 41-29-120(A)(1)(a). Second, the U.S. Department of Labor (DOL) has made clear that an avenue exists for states to re-enter the Pandemic Unemployment Benefits programs by simply entering into a new agreement with DOL to do so.[27] As DEW has admitted, administrative costs, including the significant staff time and effort that they complain of, would be entirely federally funded. *See* Dft. Response, p. 22.

For these reasons, Defendants have failed to show unreasonable delay or prejudice and their laches defense should fail.

III. Plaintiffs have suffered and will continue to suffer irreparable harm absent injunctive relief.

Defendants next argue that Plaintiffs have not, and will not, suffer irreparable harm in the absence of injunctive relief. They seek to characterize the harm that Plaintiffs have and will continue to suffer merely as the loss of money. However, the fact that a deprivation of money is involved does not mean that the harms that plaintiffs have suffered, and will continue to suffer, are any less irreparable. These harms include homelessness, loss of utility service, food insecurity, and lack of needed medical treatment. For example, the mere prospect of eviction,

[25] Benefits terminated June 26, 2021 (https://www.ky3.com/2021/06/26/pandemic-unemployment-benefits-arkansas-set-end-saturday/#:~:text=After%20June%2026%2C%20Arkansas%20will,citing%20a%20shortage%20of%20workers.) Lawsuit filed July 23, 2021 (See Exhibit N).

[26] Benefits terminated June 26, 2021 (https://www.usnews.com/news/best-states/oklahoma/articles/2021-05-17/oklahoma-governor-announces-end-to-extra-unemployment-money); Lawsuit filed July 20, 2021 (https://www.oscn.net/dockets/GetCaseInformation.aspx?db=oklahoma&number=CV-2021-1703&cmid=3993676)

[27] Unemployment Insurance Program Letter No. 14-21, Change 1 (Exhibit F to Plaintiffs Complaint, available at https://wdr.doleta.gov/directives/corr_doc.cfm?docn=9502)

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which may lead to homelessness, has been held to certainly be a severe and irreparable harm. *Williams v. Hous. Auth. of Raleigh*, 2005 U.S. Dist. LEXIS 46791, 9-10 (E.D.N.C. Apr. 14, 2005). While Defendants point to a federal relief program for people struggling with rent and utility payments, they neglect to note that funds from those programs are being distributed at a glacial pace while the risk of the CDC eviction moratorium expiring continues to loom.[28] Further, these relief funds do not address all of the hardships that Defendants' actions have caused.

That it is Defendants' actions depriving Plaintiffs of money that ultimately leads to this harm makes it no less irreparable. Even the Ohio court, which ultimately denied the plaintiffs motion for preliminary injunction, held "[t]o be sure, this Court finds plaintiffs' loss of benefits as a result of Governor DeWine's actions to terminate the State's participation in FPUC to be a significant and irreparable injury. To argue otherwise is disingenuous."[29] No court to consider the early termination of Pandemic Unemployment Benefits has yet found that plaintiffs are not subject to irreparable harm by their termination.

IV. Defendants are not entitled to a stay of any injunctive relief that this Court grants.

Defendants next request a stay of any injunction should this Court grant the relief Plaintiffs request. Defendants have offered no ground for granting such a stay other than that they will be unable to withdraw again from the Pandemic Unemployment Benefits programs unless one is granted. In doing so, Defendants seek to counterbalance the myriad severe and irreparable harms that plaintiffs and tens of thousands of other South Carolinians are facing and will continue to face if injunctive relief is granted only to be stayed, with their interest in pursuing their ill-

[28] Slade, David, *Millions for SC rent assistance remain as eviction moratorium extended through July*, Post and Courier, June 27, 2021 (available at https://www.postandcourier.com/news/millions-for-sc-rent-assistance-remain-as-eviction-moratorium-extended-through-july/article_dee17624-d532-11eb-a729-770138cd9cbe.html).

[29] Exhibit P, p. 8

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supported policy preferences. Defendants will not suffer homelessness, loss of utility service, food insecurity, and lack of needed medical treatment if injunctive relief is granted. Plaintiffs will if it is stayed. Further, because Rule 62(e), SCRCP, prevents this Court from requiring security as a condition of any stay, Plaintiffs will have no recourse for these harms if the stay is later dissolved. This request should be denied.

CONCLUSION

For the reasons stated above and in Plaintiffs' memorandum in support of their motion for preliminary injunction, Plaintiffs' motion for preliminary injunction should be granted without stay or bond and Defendants' motion to dismiss should be denied.

Respectfully Submitted,

August 9, 2021

SOUTH CAROLINA APPLESEED
LEGAL JUSTICE CENTER

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Appendix A - Status of Pandemic Unemployment Benefits Litigation
August 9, 2021

State	Relevant Statutory Language	Disposition of Motion for Preliminary Injunction	Case Status
AR	"[i]n the administration of this chapter, the Director of the Division of Workforce Services shall cooperate with the United States Department of Labor to the fullest extent consistent with the provisions of this chapter and shall take such action, through the adoption of such appropriate rules, administrative methods, and standards as may be necessary to secure to this state and its citizens all advantages available under the provisions of the Social Security Act that relate to unemployment compensation[.]" Ark. Code Ann. § 11-10-312.	Granted	Stay of PI granted on appeal. Statute amended.
IN	"[i]t is declared to be the purpose of this article to secure to the state of Indiana and to employers and employees in Indiana all the rights and benefits which are conferred under the provisions of . . . [Sections 901 through 909 of the Social Security Act, 42 U.S.C. §§ 1101 – 1109]. . . and the amendments to those statutes." Ind. Code § 22-4-37-1	Granted	Stay of PI denied on appeal.
MD	In the administration of this title, the [Maryland] Secretary [of Labor] shall cooperate with the United States Secretary of Labor to the fullest extent that this title allows. Md. Code, Lab. & Empl. § 8-310(a)(1)	Granted	No appeal filed.
OH	The director shall cooperate with the United States department of labor to the fullest extent consistent with this chapter, and shall take such action, through the adoption of appropriate rules, regulations, and administrative methods and standards, as may be necessary to secure to this state and its citizens all advantages available under the provisions of the 'Social Security Act' that relate to unemployment compensation . . . . Ohio Rev. Code Ann. § 4141.43(I)	Denied	Appeal pending. Hearing scheduled 8/18/2021.
OK	In the administration of this act the Oklahoma Employment Security Commission shall cooperate to the fullest extent consistent with the provisions of this act, with the Social Security Act, as amended, and is authorized and directed to take such action, through the adoption of appropriate rules, administrative methods and standards, as may be necessary to secure to this state and its citizens all advantages available under the provisions of such act (the Social Security Act) . . . . Okla. Stat. tit. 40, § 4-313	Granted	
SC	In the administration of Chapters 27 through 41 of this title, the department must cooperate with the United States Secretary of Labor to the fullest extent consistent with the provisions of these chapters, and act, through the promulgation of appropriate rules, regulations, administrative methods and standards, as necessary to secure to this State and its citizens all advantages available under the provisions of the Social Security Act that relate to unemployment compensation . . . S.C. Code Ann. §41-29-230(1).	Pending	

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PLAINTIFF'S EXHIBIT
M

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IN THE

COURT OF APPEALS OF INDIANA

Eric Holcomb, Governor of the State of Indiana, et al.,

Appellants,

v.

T.L., et al.,

Appellees.

Court of Appeals Case No. 21A-PL-1268

FILED
Jul 12 2021, 2:02 pm
CLERK
Indiana Supreme Court
Court of Appeals
and Tax Court

Order

[1] Appellants have filed an Emergency Motion to Stay Preliminary Injunction Pending Appeal, and Appellees have filed a Response in Opposition to State's Motion for an Emergency Stay. Appellants have filed a Motion for Leave to File Reply in Support of Emergency Motion to Stay. Appellees have filed a Response to Appellants' Motion for Leave to File Reply in Support of Emergency Motion to Stay in which they request permission to file a surreply if Appellants are granted permission to file a reply.

[2] Having reviewed the matter, the Court finds and orders as follows:

1. Appellants' Motion for Leave to File Reply in Support of Emergency Motion to Stay is granted.
2. The Clerk of the Court is ordered to file Appellants' Reply in Support of Emergency Motion to Stay Preliminary Injunction Pending Appeal as of the date of this order.
3. Appellees' request to file a surreply is granted, and the Clerk of the Court is ordered to file Appellees' Surreply to Appellants' Reply in Support of Emergency Motion to Stay as of the date of this order.

4. Appellants' Emergency Motion to Stay Preliminary Injunction Pending Appeal is denied.
5. The Clerk of the Court is directed to send this order to the parties, Judges John Hanley and Marc Rothenberg of the Marion Superior Court, and the Marion Circuit and Superior Courts Clerk.
6. The Marion Circuit and Superior Courts Clerk is directed to file this order under Cause Numbers 49D11-2106-PL-20140 and 49D07-2106-PL-20140, and, pursuant to Indiana Trial Rule 77(D), the Clerk shall place the contents of this order in the Record of Judgments and Orders.

[3] Ordered 7/12/2021

[4] Crone, J., Sharpnack, Sr.J., concur.

[5] Friedlander, Sr.J., dissents from the denial of Appellants' Emergency Motion to Stay Preliminary Injunction Pending Appeal and would grant the motion. He concurs in granting Appellants' request to file a reply and Appellees' request to file a surreply.

For the Court,

Chief Judge

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PLAINTIFF'S EXHIBIT
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IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

LOGAN ARMSTRONG, EMILY BALL,
RONALD BATES, CYNTHIA EYIUCHE,
and KURT JOHNSEN PLAINTIFFS

VS. CV 2021-4507

ASA HUTCHINSON, IN HIS OFFICIAL CAPACITY
AS GOVERNOR OF ARKANSAS, AND
CHARISSE CHILDERS, IN HER OFFICIAL
CAPACITY AS DIRECTOR, ARKANSAS DIVISION
OF WORKFORCE SERVICES DEFENDANTS

ORDER

Comes now before the Court the Matter of the Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, and based on the files and records of the case, the arguments made at the hearing held July 28, 2021, and all other matters considered, the Court DOTH FIND:

Plaintiffs have sued the Defendants by way of a Complaint filed with the Pulaski County Circuit Clerk on July 23, 2021. Both Defendants were served with a copy of the Complaint on July 26, 2021. The Complaint is styled as a plea for declaratory and injunctive relief against the Governor of the State of Arkansas and the Director of the Department of Workforce Services owing to the Governor's decision to terminate the extended pandemic-relief unemployment benefit plans funded by the federal government. On the same date as the filing of the Complaint, the Plaintiffs filed a Motion for Temporary Restraining Order and Preliminary Injunction, alleging that the Governor's decision will subject the Plaintiffs to irreparable harm and that they have a reasonable probability of success on the merits. An emergency hearing was held the morning of July 28, 2021.

These programs are clearly voluntary, and a state may decide whether to participate in them or not. This Court is faced with the question of who gets to determine whether to participate – the executive branch or the legislative.

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Arkansas Code Annotated § 11-10-312 mandates that "[i]n the administration of this chapter, the Director of the Division of Workforce Services shall cooperate with the United States Department of Labor to the fullest extent consistent with the provisions of this chapter and shall take such action, through the adoption of such appropriate rules, administrative methods, and standards as may be necessary to secure to this state and its citizens all advantages available under the provisions of the Social Security Act that relate to unemployment compensation[.]" This provision, as well as others in Subchapter 3 of the Arkansas Code Chapter on Department of Workforce Services Law, indicates to the Court that the State legislature has clearly stated its public policy. The clear meaning of Arkansas law in this regard is that the State is to participate in these types of programs for the benefit of its citizens.

Ark. Code Ann. § 11-10-102 speaks directly to the public policy of this issue. "Involuntary unemployment is a subject of general interest and concern which requires appropriate action by the General Assembly to prevent its spread and to tighten its burden which may fall with crushing force upon the unemployed worker and his or her family…The General Assembly, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this state require the enactment of this measure, under the police power of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own."

The Court finds that the Plaintiffs have a reasonable likelihood of success on the merits and are likely to suffer harm in the absence of a preliminary injunction. The Court has serious doubts that the Governor and the Director of Workforce Services were acting within the scope of their duties, as these decisions would normally be the subject of legislation from the General Assembly.

The Motion for Preliminary Injunction should be granted. With an eye toward the plain meaning of the statutes above and the clear public policy of this State, the State is ordered to reengage these terminated programs if the United States Government will agree to permit the

State to do so. If the appropriate federal authorities reject such a reinstatement, the State will immediately provide proof of such communication to the Court.

IT IS SO ORDERED

_____
HERBERT T. WRIGHT, JR. – CIRCUIT JUDGE

_____
DATE

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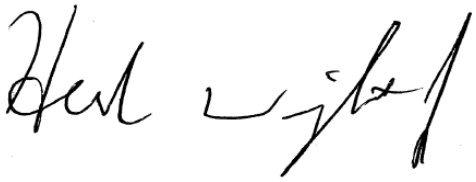
Arkansas Judiciary

Case Title: LOGAN ARMSTRONG ET AL V ASA HUTCHINSON ET AL

Case Number: 60CV-21-4507

Type: ORDER MOTION GRANTED

So Ordered



Honorable Herbert T Wright

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PLAINTIFF'S EXHIBIT O

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IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

Ronda Kay Owens, et al. Petitioners, vs. Shelley Zumwalt, in her capacity as Executive Director of the Oklahoma Employment Security Commission, Respondent.	)	Case No. CV-21-1703 Judge Anthony L. Bonner, Jr.

FILED IN DISTRICT COURT
OKLAHOMA COUNTY
AUG 09 2021
RICK WARREN
COURT CLERK
56

ORDER GRANTING
PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION

This matter came before the Court on August 5, 2021 for an emergency hearing on Petitioners' Motion for Preliminary Injunction. Having considered the briefs submitted, arguments of counsel and the applicable law, the Court issues the following decision.

FINDINGS OF FACTS

1. On March 27, 2020 Congress passed the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, codified as 15 U.S.C. §9001 et. seq. The CARES Act provided, in relevant part, enhanced unemployment insurance benefits for workers who would not otherwise be eligible for relief.

2. The CARES Act created three types of unemployment benefits: (1) Pandemic Unemployment Assistance ("PUA"), (2) Pandemic Emergency Unemployment Compensation ("PEUC"), and (3) Federal Pandemic Unemployment Compensation ("FPUC").

3. PUA is available for workers who were not eligible for regular unemployment benefits and whose unemployment, partial unemployment, unavailability or inability to work was caused by COVID-19. 15 U.S.C. §9021.

4. PEUC added additional weeks of benefits for workers who had exhausted the number of weeks they could draw unemployment insurance benefits. 15 U.S.C. §9025.

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5. FPUC increased the amount of unemployment insurance benefits by $600 per week from March 27, 2020 through July 31, 2020. On December 27, 2020 Congress passed the Continue Assistance Act ("CAA") and American Rescue Plan Act of 2021 ("ARPA") which extended the programs through September 6, 2021, but limited the FPUC insurance benefits to $300 per week.15 U.S.C. §9023 further amended by ARPA Pub L. No. 117-2, §§9011, 9013, 9016 (March 11, 2021).

6. On March 11, 2021, PUA, PEUC, and FPUC benefits were extended through September 6, 2021 by ARPA. Pub L. No. 117-2, §§9011, 9013, 9016.

7. The unemployment benefits under the CARES Act are funded by and through the federal unemployment programs established under 42 U.S.C. §§1101(a), 1104(a), and 1105(a).

8. All PUA benefits and administrative costs are funded by 42 U.S.C. §§1104(a) and 1105(a). 15 U.S.C. §9021(g)(2).

9. PEUC benefits (including FPUC) costs are funded by 42 U.S.C. §§1104(a) and 1105(a). PEUC administration costs are funded by 42 U.S.C. §§1101(a) 15 U.S.C. §9025(d).

10. The CARES Act provides in relevant part that "the assistance authorized under subsection (b) shall be available to a covered individual". 15 U.S.C. §9021(c)

11. The US Department of Labor office of the Solicitor acknowledged the non-discretionary nature of PUA in a June 5, 2020 memo to the US Department of Labor Office of Inspector General indicating that the Secretary of Labor must provide PUA benefits to an individual who is determined to be eligible.

12. The Oklahoma Employment Security Commission ("OESC") was created by the Oklahoma Legislature as an independent agency of the State of Oklahoma responsible for providing employment services to the citizens of Oklahoma. The Commission is a part of a national network of employment services agencies that are funded through the US Department of Labor.

13. The OESC consists of five Commissioners which are appointed by the Governor with the approval of the Senate. The Commissioners may hire an Executive Director. 40 O.S. §4-102

14. The OESC administers the Oklahoma Unemployment Compensation Fund and the adoption and promulgation of all rules of OESC shall be in accordance with the Administrative Procedures Act. 40 O.S. §§3-601 and 4-310.1

15. Respondent, Shelley Zumwalt, is the Executive Director of the OESC.

16. After the enactment of the CARES Act, the OESC entered into an agreement with the US Department of Labor regarding PUA, PEUC, and FPUC on behalf of the State of Oklahoma.

17. On March 15, 2020, Governor Kevin Stitt declared an emergency through the Oklahoma Emergency Management Act ("OEMA") in response to the COVID-19 pandemic.

18. Governor Kevin Stitt has emergency powers and authority conferred by the Oklahoma Legislature pursuant to 63 O.S. §683.3(A), which provides the Governor various policy, administrative, and enforcement authority. 63 O.S. §683.9 provides that the Governor's emergency powers exist only during the course of an emergency as declared by the Governor or Legislature.

19. On May 3, 2021, Governor Kevin Stitt officially withdrew the emergency declaration pursuant to OEMA.

20. On May 17, 2021 Governor Kevin Stitt issued an Executive Order advising, inter alia, that Oklahoma would no longer offer the COVID-related unemployment effective June 26, 2021.

21. On May 17, 2021, after Governor Kevin Stitt's Executive Order was issued, Respondent issued a letter to Suzan LeVine at the US Department of Labor, providing Oklahoma's 30-day written notice of termination of the agreement to participate in PUA, PEUC, and FPUC programs.

22. Respondent's notification to the US Department of Labor was in reliance on Governor Kevin Stitt's Executive Order and was done so without any official action by the OESC Board of Commissioners.

23. The OESC agenda for its quarterly meetings from April through June 2021 do not reflect any agenda items addressing the discontinuance of the federal unemployment benefits.

24. As of June 27, 2021, Oklahoma had officially withdrawn participation in the federal unemployment benefit programs and was no longer administering the federal unemployment benefits to the citizens of Oklahoma who otherwise qualified for the federal unemployment benefits.

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25. The OESC mailed notices regarding the discontinuance of the programs on June 19, 2021, advising that federal unemployment benefits would terminate June 26, 2021.

26. Petitioner Ronda Kay Owens filed a Petition for Declaratory Judgment and Injunctive Relief on July 7, 2021, which was later amended to add additional petitioners on July 20, 2021. Attached to the Amended Petition and as a supplement to the Motion for Preliminary Injunction were affidavits and summaries of each Petitioner describing their respective hardships due to unemployment as a result of COVID-19.

27. At least one of the Petitioners, Darryl Hubbard, appealed the decision to terminate the benefits with the OESC Appeals Tribunal within 10 days. The Appeals Tribunal denied his appeal advising "…you are not able to appeal the Governor's mandate to end the federal benefits early. If you disagree with that decision, you will need to contact the Governor's office directly."

28. Petitioners filed their Motion for Preliminary Injunction and sought an emergency hearing seeking to enjoin Respondent from withdrawing Oklahoma from participation in the federal unemployment benefits through the CARES Act and reinstatement of the federal unemployment benefits.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this action, and finds that the Petitioners have standing to bring this lawsuit as described herein.

2. The public policy of the State of Oklahoma is specified in 40 O.S. §1-103, which states:

   "…Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This objective can be furthered by operating free public employment offices in affiliation with nationwide system of employment services, by devising appropriate methods for reducing the volume of unemployment and by the systematic accumulation of funds during periods of employment, thus maintaining purchasing power and limiting the serious social consequences of unemployment. The Legislature, therefore, declares that in its considered judgment the public

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good, and the general welfare of the citizens of this state require the enactment of this measure, under the police power of the state for the establishment and maintenance of free public employment offices and for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own."

3. 40 O.S. §4-313 states:

"In the administration of this act the Oklahoma Employment Security Commission shall cooperate to the fullest extent consistent with the provisions of this act, with the Social Security Act, as amended, and is authorized and directed to take such action, through the adoption of appropriate rules, administrative methods and standards, as may be necessary to secure to this state and its citizens all advantages available under the provisions of such act, under the provisions of Sections 1602 and 1603 of the Federal Unemployment Tax Act and under the provisions of the Act of Congress entitled "An Act to provide for the establishment of a national employment system and for cooperation with States in the promotion of such system, and for other purposes", approved June 6, 1933, as amended. The Commission shall comply with the regulations of the Secretary of Labor relating to the receipt or expenditure by this state of monies granted under any of such acts and shall make such reports, in such form and containing such information as the Secretary of Labor may from time to time require, and shall comply with such provisions as the Secretary of Labor may from time to time find necessary to assure the correctness and verification of such reports.

The Commission may afford reasonable cooperation with every agency of the United States charged with the administration of any unemployment insurance law."

4. The Social Security Act referenced in 40 O.S. §4-313 is codified at 42 U.S.C. §301 et seq., which includes 42 U.S.C. §§1101, 1104, and 1105(a).

5. Petitioners seek a preliminary injunction pursuant to 12 O.S. §1382. The statute states:

"When it appears, by the petition, that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or when, during the litigation, it appears that the defendant is doing, or threatens, or is about to do or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. And when, during the

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pendency of an action, it shall appear, by affidavit, that the defendant threatens or is about to remove or dispose of his property with intent to defraud his creditors, or to render the judgment ineffectual, a temporary injunction may be granted to restrain such removal or disposition. It may, also, be granted in any case where it is specially authorized by statute."

6. The purpose of a temporary injunction is to preserve the status quo and prevent the perpetuation of a wrong or the doing of an act whereby the rights of the moving party may be materially invaded, injured, or endangered. Edwards v. Board of County Commissioners of Canadian County, 2015 OK 58, 378 P.3d 54.

7. "The status quo which will be preserved by preliminary injunction is the last actual, peaceable, noncontested status which preceded the pending controversy, and equity will not permit a wrongdoer to shelter himself behind a suddenly or secretly changed status, though he succeeded in making the change before the chancellor's hand actually reached him." Waveland Drilling Partners III-B, LP v. New Dominion, LLC, 2019 OK CIV APP 8, 435 p.3d 114.

8. To obtain a preliminary injunction, Petitioners must establish the following four factors weigh in their favor by clear and convincing evidence:

    A. The likelihood of success on the merits;
    B. Irreparable harm to the party seeking injunction relief if the injunction is denied;
    C. Applicants (Petitioners) threatened injury outweighs the injury the opposing party (Respondent) will suffer under the injunction;
    D. The injunction is in the public interest.

    See Dowell v. Pletcher, 2013 OK 50, 304 P.3d 457.

9. With regards to the first element (likelihood of success on the merits) for a preliminary injunction, it is not necessary that the moving party's right to final decision be without doubt, rather the burden is on the party seeking relief to make a prima facie showing of reasonable probability of prevailing on the merits. Roye Realty & Developing, Inc. v. Watson, 1990 OK CIV APP 21, 791 P.2d 821.

10. 40 O.S. §4-313 statutorily mandates that the OESC "**shall** cooperate to the **fullest extent** consistent with the provisions of this act, with the Social Security Act, as amended" and that the OESC "is authorized and **directed** to take such action, through the adoption of appropriate rules, administrative methods and standards, as may be necessary to secure to this state and its citizens **all advantages** available under the provisions of such act. (Emphasis added).

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11. The Social Security Act referenced in 40 O.S. §4-313 is codified at 42 U.S.C. §301 et seq., which includes 42 U.S.C. §§1101, 1104, and 1105(a). The federal unemployment benefits at issue, are conferred through 42 U.S.C. §1101 et seq.

12. The Oklahoma Legislature directed "under the police power of the state for the establishment and maintenance of free public employment offices and for the Oklahoma Employment Security Commission **compulsory setting aside of unemployment reserves** to be used for the benefits of persons unemployed through no fault of their own". 40 O.S. §1-103 (Emphasis added)

13. Respondent argues that she relied upon the Governor's Executive Order because the Governor had authority to withdraw Oklahoma's participation in the federal unemployment benefits programs. Respondent advances essentially three arguments. First, that the participation in the federal unemployment benefits programs required state governors approval or to delegate the governor's authority in writing. Second, that the Governor has Supreme Executive power pursuant to Oklahoma Constitution Article 6 §2 which grants such authority. And third, the Governor's authority under OEMA authorized and permitted the Governor to make such decisions.

14. While the power to determine the policy of the law is primarily legislative and cannot be delegated, the power to make rules of a subordinate character in order to carry out the policy legislatively determined and to apply that policy to varying factual conditions, although sharing the attributes of legislative exercise of power, is in its major sense an administrative duty which may be delegated properly to an administrative body by the Legislature. City of Sand Springs v. Dept. of Public Welfare, 1980 OK 36, 608 P.2d 1139. The legislative branch sets the public policy of the State by enacting law not in conflict with the Constitution. The Governor has a role in setting that policy through his function in the legislative process, but the Governor's primary role is in the faithful execution of the law. Treat v. Stitt, 2020 OK 64, 473 P.3d 43. Further, the Oklahoma Supreme Court has noted that the Governor cannot act without relevant statutory authority. Id. See also Oklahoma State Medical Association v. Corbett, 2021 OK 30, 489 P.3d 1005.

15. Respondent has not cited any authority that specifically allows for the Governor to determine the amount or length of payment of unemployment benefits. The Governor's authority pursuant to OEMA had ended May 3, 2021 when the Governor officially withdrew the emergency declaration. Article 6 §2 of the Oklahoma Constitution does not specifically authorize the Governor authority to make decisions regarding unemployment benefits. On the contrary, 40 O.S. §4-313 specifically grants the OESC authority to make such decisions, and the use of the language "shall cooperate to the fullest extent," "authorized and directed," and

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"compulsory setting aside of unemployment reserves" (40 O.S. §1-103) implies mandatory actions by the OESC.

16. The combination of such directives within these statutes in conjunction with the absence of any statutory authority granting the Governor authority to make such decisions, appears to be binding on the OESC regarding its duties on behalf of the State of Oklahoma and its citizens. Petitioners presented evidence that Respondent acted unilaterally to withdraw the State of Oklahoma from participating in the federal unemployment benefits and that Respondent did so without any authority or official action of the OESC Board of Commissioners. Thus, Petitioners have made a prima facie showing of reasonable probability of prevailing on the merits for their action for declaratory judgment.

17. With regards to the second element (Irreparable harm to the party seeking injunction relief if the injunction is denied) for a preliminary injunction, a loss of or inability to secure appropriate housing, medical care, food, etc., would amount to irreparable harm. Such harm could never be adequately compensated for by an award of damages, and would render any judgment meaningless, should the Petitioners prevail on the merits. The Petitioners affidavits and summaries highlight their respective harms.

18. With regards to the third element (whether Petitioners' threatened injury outweighs the injury the opposing party will suffer under the injunction) for a preliminary injunction, all of the costs associated with providing and/or administering the federal unemployment benefits is funded by federal funding under the CARES Act. Therefore, it will not cost the State of Oklahoma any money to continue participation in these programs. Furthermore, the OESC has processed and administered these federal unemployment benefits for over a year, thus it already has processing systems in place to administer these benefits. As such, neither the Respondent, nor the OESC and State of Oklahoma is harmed in any meaningful way with the continued participation in the federal unemployment benefits program. Conversely, the aforementioned irreparable harms of the Petitioners substantially outweighs the injury, if any, of Respondent. Additionally, Petitioners' harms are the very harms that the Oklahoma Legislature seeks to remedy as specified in 40 O.S. §1-103.

19. The fourth and final element for a preliminary injunction is a determination as to whether the injunction is in the public interest. Oklahoma public policy is specified in 40 O.S. §1-103 which explicitly and specifically states "…economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing

force upon the unemployed worker and his family." The federal unemployment benefits available through the CARES Act are "advantages" available to help remedy economic insecurity due to unemployment upon which COVID-19 had a significant impact.

20. As such, Petitioners have met the requirements to obtain a preliminary injunction, and it is necessary to reinstate the federal unemployment benefits provided through the CARES Act and enjoin Respondent from withdrawing participation in these programs during the pendency of this action in order to prevent irreparable harm to Petitioners.

21. The granting of this preliminary injunction does not necessarily mean that Petitioners have succeeded on the merits or that it is a guarantee that Petitioners will succeed on the merits, rather for purposes of a preliminary injunction, it is only necessary that Petitioners make a prima facie showing of reasonable probability of prevailing on the merits and satisfy the aforementioned elements for a preliminary injunction.

THEREFORE IT IS ORDERED, ADJUDGED AND DECREED that Petitioners' Motion for Preliminary Injunction is granted and Respondent is ordered to reinstate the federal unemployment benefit programs through the CARES Act. Further, Respondent, on behalf of OESC, is enjoined from withdrawing the State of Oklahoma from the unemployment benefits offered through the CARES Act until this Court renders final judgment on the merits or until the expiration of the program, which is currently set to expire on September 6, 2021, whichever occurs first. Oklahoma shall notify the US Department of Labor immediately to reinstate and administer the federal unemployment benefit programs.

Dated August 9, 2021.

HON. ANTHONY L. BONNER, JR.
JUDGE OF THE DISTRICT COURT

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PLAINTIFF'S
EXHIBIT
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IN THE FRANKLIN COUNTY, OHIO COURT OF COMMON PLEAS
CIVIL DIVISION

STATE ex rel CANDY BOWLING, et al	:	
Plaintiffs,	:	Case No. 21 CVH07-4469
v.	:	JUDGE HOLBROOK
MICHAEL DEWINE, et al	:	
Defendants.	:	

DECISION AND ENTRY DENYING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

This matter came before the Court on July 23, 2021, for a hearing on plaintiffs' motion for temporary restraining order and preliminary injunction. The hearing was recorded on the Court's JAVS system in Courtroom 5B. At the culmination of the hearing, the Court invited the parties to submit any supplemental briefs on or before 5:00 p.m. July 26, 2021.

Having considered the briefs submitted, arguments of counsel, affidavits in support of the motion, and the salient law, the Court issues the following decision.

Background

On March 27, 2020, in response to the COVID-19 Pandemic, Congress passed the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, which, inter alia, provided enhanced unemployment insurance benefits for workers who would not otherwise be eligible for relief. 15 U.S.C. § 9001 et seq. Three types of benefits are created by the CARES Act: (1) Pandemic Unemployment Assistance ("PUA"); (2) Pandemic Emergency Unemployment Compensation ("PEUC"); and (3) Federal Pandemic Unemployment Compensation ("FPUC"), which increased the amount of unemployment

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insurance benefit payments a worker could receive by $300 a week from December 27, 2020 to September 6, 2021. See 15 U.S.C. § 9023, further amended by the American Rescue Plan Act of 2021 ("ARPA"), Pub L. No. 117-2, §§ 9011, 9013, 9016 (March 11, 2021). The CARES Act requires the U.S. Secretary of Labor to provide CARES Act Benefits through agreements with the States and specifically provides that agreements regarding the receipt of PEUC and FPUC benefits may be terminated by a state upon 30 days' written notice. 15 U.S.C. §§ 9023(a), 9025(a).

On May 13, 2021, Governor Mike DeWine announced that Ohio will end its participation in the FPUC program effective June 26, 2021.[1] As a result of this announcement, plaintiffs, who allege they are all recipients of FPUC benefits filed the instant action for Declaratory Judgment, Injunctive Relief and a Writ of Mandamus against Governor DeWine and Matt Damschroder, in his official capacity as Director of the Ohio Department of Job and Family Services. Simultaneous to the filing of the complaint, plaintiffs moved the court for a temporary restraining order and preliminary injunction. Within the motion, plaintiffs argue they are entitled to a preliminary injunction enjoining the State of Ohio from prematurely terminating their FPUC benefits.

Law and Analysis

The party requesting the preliminary injunction must show that "(1) there is a substantial likelihood that the plaintiff will prevail on the merits, (2) the plaintiff will suffer irreparable injury if the injunction is not granted, (3) no third parties will be unjustifiably harmed if the injunction is granted, and (4) the public interest will be served

[1] It is the Court's understanding that the State of Ohio is continuing to participate in PUA and PEUC benefits through the expiration of the same on or about September 6, 2021.

by the injunction." *Procter & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267 (1st Dist.2000). Each of the forgoing elements must be established by a showing of clear and convincing evidence. *Vanguard Transp. Sys. Inc. v. Edwards Transfer & Storage Co.*, 109 Ohio App.3d 486, 790 (10th Dist.1996). Clear and convincing evidence is a degree of proof that "will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *DHSC, LLC v. Ohio Dep't of Job and Family Servs.*, 2012-Ohio-1014, ¶40 (10th Dist.).

Substantial Likelihood of Success on the Merits – R.C. Chapter 4141

The bulk of the parties' argument addresses the first element of an injunction – there is a substantial likelihood that the plaintiffs will prevail on the merits. Accordingly, the Court will start there. Pursuant to the complaint and motion, R.C. 4141.43(I) and R.C. 4141.45 provide the basis for the injunctive relief plaintiffs seek. R.C. 4141.43(I) provides in its entirety:

> The director shall cooperate with the United States department of labor to the fullest extent consistent with this chapter, and shall take such action, through the adoption of appropriate rules, regulations, and administrative methods and standards, as may be necessary to secure to this state and its citizens all advantages available under the provisions of the 'Social Security Act' that relate to unemployment compensation, the 'Federal Unemployment Tax Act,' (1970) 84 Stat. 713, 26 U.S.C.A. 3301 to 3311, the 'Wagner-Peyser Act,' (1933) 48 Stat. 113, 29 U.S.C.A. 49, the 'Federal-State Extended Unemployment Compensation Act of 1970,' 84 Stat. 596, 26 U.S.C.A. 3306, and the 'Workforce Innovation and Opportunity Act,' 29 U.S.C.A. 3101 et seq.

R.C. 4141.45 states, "[a]ll the rights, privileges, or immunities conferred by sections 4141.01 to 4141.46, inclusive, of the Revised Code, or by acts done pursuant thereto, shall exist subject to the power of the general assembly to amend or repeal such sections at any time."

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In reliance on this language, plaintiffs contend the statutes mandate that defendants continue the State's participation in the FPUC program. Defendants, on the other hand, submit that the terms of the statutes do not support plaintiffs' position.

When the Court considers the meaning of a statute, the first step is to determine whether the statute is "plain and unambiguous." *State v. Hurd*, 89 Ohio St.3d 616, 618, 2000-Ohio-2 (2000). If "the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation," because "an unambiguous statute is to be applied, not interpreted." *Sears v. Weimer*, 143 Ohio St. 312 (1944), paragraph five of the syllabus. Ambiguity means that a statutory provision is "capable of bearing more than one meaning." *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, ¶ 16. Without "an initial finding" of ambiguity, "inquiry into legislative intent, legislative history, public policy, the consequences of an interpretation, or any other factors identified in R.C. 1.49 is inappropriate." Id.; *State v. Brown*, 142 Ohio St.3d 92, 2015-Ohio-486¶ 10. The Court "do[es] not have the authority" to dig deeper than the plain meaning of an unambiguous statute "under the guise of either statutory interpretation or liberal construction." *Morgan v. Ohio Adult Parole Auth.*, 68 Ohio St.3d 344, 347, 1994-Ohio-380 (1994). Indeed, were the Court to ignore the unambiguous language of a statute, or if find a statute to be ambiguous only after delving deeply into the history and background of the law's enactment, it would "invade the role of the legislature: to write the laws." *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, ¶ 8

Applying these principles, the Court finds that plaintiffs have not met their burden of establishing a substantial likelihood of success on the merits by clear and convincing

evidence. R.C. 4141.45 simply gives the General Assembly the power to amend or repeal the provisions of R.C. 4141.01 to R.C. 4141.46 at any time. And R.C. 4141.43(I), by its plain and unambiguous terms, is limited to:

> all advantages available under the provisions of the 'Social Security Act' that relate to unemployment compensation, the 'Federal Unemployment Tax Act,' (1970) 84 Stat. 713, 26 U.S.C.A. 3301 to 3311, the 'Wagner-Peyser Act,' (1933) 48 Stat. 113, 29 U.S.C.A. 49, the 'Federal-State Extended Unemployment Compensation Act of 1970,' 84 Stat. 596, 26 U.S.C.A. 3306, and the 'Workforce Innovation and Opportunity Act,' 29 U.S.C.A. 3101 et seq.

The wording chosen by the Ohio General Assembly clearly does not include the CARES Act. Moreover, the Court finds that the provisions of the Social Security Act that relate to unemployment compensation are not applicable. Such provisions are not what afford the advantage that Ohio's citizens are seeking here; rather, the FPUC extended benefits were undeniably created by the CARES Act. Moreover, the FPUC benefits are funded by the general fund of the Treasury as opposed to accounts established under the Social Security Act. See 15 U.S.C. § 9023(d)(3) (There are appropriated from the general fund of the Treasury, without fiscal year limitation, such sums as may be necessary for purposes of this subsection.) Accordingly, the FPUC benefits are wholly created and administered outside of the Social Security Act thereby abrogating any application of R.C. 4141.43(I).

Beyond the forgoing, the Court also notes that the mandate of R.C. 4141.43(I) sought to be enforced by plaintiffs is limited to the director of the Ohio Department of Job and Family Services, and specifically, his adoption of appropriate rules, regulations, and administrative methods and standards. The actions taken by Governor DeWine to terminate the State's agreement with the Secretary of Labor with respect to FPUC benefits

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do not qualify as the adoption of appropriate rules, regulations, and administrative methods and standards. In other words, the statute does not contemplate the Court's enforcement of voluntary agreements like the one at issue here.

Simply put, because the clear and unambiguous language of R.C. 4141.45 and R.C. 4141.43(I) do not place an obligation on Governor DeWine to continue participation in the FPUC program, the Court finds plaintiffs cannot meet their burden of proving a substantial likelihood of success on the merits by clear and convincing evidence. Therefore, the Court further finds that plaintiffs are not entitled to a preliminary injunction or temporary restraining order.

Finally, plaintiffs' citation to the decisions out of Arkansas, Indiana and Maryland do not operate to alter this Court's findings. Such decisions are neither binding nor persuasive. The statutes at issue in Indiana and Maryland are broader than R.C. 4141.43(I). The burden of proof for a preliminary injunction is greater in Ohio. See *Ind. High Sch. Athletic Ass'n, Inc. v. Martin,* 731 N.E.2d 1, 7 (Ind. App. 2000) (elements of preliminary injunction must be proven by more than a scintilla and less than preponderance); *Air Lift, Ltd. v. Board of County Comm'rs*, 262 Md. 368, 394 (1971) (applicant for a preliminary injunction must present strong prima facie evidence of the facts and must prove material allegations by a preponderance of the evidence*); Custom Microsystems Inc. v. Blake*, 344 Ark. 536, (2001) (the test for determining the likelihood of success is whether there is a reasonable probability of success in the litigation). And finally, the benefits being terminated are different. Accordingly, the Court declines to follow these distinguishable cases.

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Substantial Likelihood of Success on the Merits – Defendants' Authority to Act

Plaintiffs additionally argue that they have a substantial likelihood of success on the merits because Governor DeWine acted outside the authority granted to him under the Ohio Constitution. Conversely, defendants argue that Governor DeWine had constitutional authority to so act.

Section 5, Article III of the Ohio Constitution says: "The supreme executive power of this State shall be vested in the governor." Although the phrase "executive power" has not been specifically defined, it appears to be well established in Ohio law that the Governor not only has the powers necessary to perform the duties specifically required of him by the Constitution and statutes, but he is also empowered to act in the interest of the state and in ways not specified, so long as his actions do not contravene the Constitution or violate laws passed by the legislature within its constitutional authority. *State ex rel. S. Monroe & Son Co. v. Baker* (1925), 112 Ohio St. 356, 371 (1925).

As discussed above, Governor DeWine's actions to terminate the State's participation in FPUC benefits are not in conflict with R.C. 4141.43(I) or R.C. 4141.45. In point of fact, R.C. 4141.45 clearly contemplates the General Assembly's authority to amend R.C. 4141.43(I). Had the General Assembly taken it upon itself to exercise such power, and amended the statute to include the CARES Act, this would be a very different decision. Without a provision in the law which would preclude Governor DeWine from terminating an agreement for FPUC benefits, this Court cannot find that plaintiffs have established by clear and convincing evidence that Governor DeWine acted outside the scope of his authority by doing so here. Therefore, the Court further finds that plaintiffs are not entitled to a preliminary injunction or temporary restraining order.

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Plaintiffs' Irreparable Injury

Though the inquiry could end here, the Court would be remiss not to address the element that plaintiffs did prove by clear and convincing evidence – plaintiffs' irreparable injuries.

Plaintiff Candy Bowling used the weekly $300.00 FPUC benefit to pay for household and medical expenses including the necessary expenses of a service animal. Bowling Aff. at ¶8. Without the FPUC compensation, Plaintiff Bowling is unable to meet these basic living expenses. Id. at ¶10. The same is true for Plaintiff David Willis and countless other Ohioans. And as aptly stated in plaintiffs' reply brief, any delay in the issuance FPUC benefits months or years down the road were plaintiffs to ultimately prevail does not pay for rent and food today. To be sure, this Court finds plaintiffs' loss of benefits as a result of Governor DeWine's actions to terminate the State's participation in FPUC to be a significant and irreparable injury. To argue otherwise is disingenuous.

Even with such a significant and irreparable loss, the Court is bound by the laws of the State of Ohio. In this case, said laws mandate that plaintiffs not only establish their irreparable injuries, but also the substantial likelihood of success by clear and convincing evidence. That has not occurred here.

Conclusion

As with all decisions to be made during the pandemic, this is not one that can be taken lightly. The Court is aware of, and sympathetic to, the thousands of Ohioans without work and in desperate need of any assistance available; however, the injuries suffered by said Ohioans, including plaintiffs here, are but one element for the Court's consideration on a motion for a preliminary injunction. Indeed, the Court simply cannot

legislate from the bench and overlook the clear terms of R.C. 4141.45 and R.C. 4141.43(I). Accordingly, for the reasons set forth herein, the Court finds plaintiffs' motion for a temporary restraining order and preliminary injunction is not well-taken, and hereby **DENIES** the same**.**

Though plaintiffs' claims for declaratory judgment and a writ of mandamus remain pending, the Court finds that pursuant to R.C. 2505.02 and Civ.R. 54(B) **this is a final appealable order; there is no just reason for delay.**

IT IS SO ORDERED.

Electronic notification to counsel of record

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Franklin County Court of Common Pleas

Date: 07-29-2021

Case Title: THE STATE OF OHIO ET AL -VS- MICHAEL DEWINE ET AL

Case Number: 21CV004469

Type: DECISION/ENTRY

It Is So Ordered.

/s/ Judge Michael J. Holbrook

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Stricken language would be deleted from and underlined language would be added to present law.

State of Arkansas
93rd General Assembly
First Extraordinary Session, 2021

A Bill

Call Item 2 and 3

SENATE BILL 1

By: Senator J. Dismang
By: Representative Wardlaw

For An Act To Be Entitled

AN ACT CONCERNING UNEMPLOYMENT COMPENSATION; TO MODIFY THE DIVISION OF WORKFORCE SERVICES LAW; TO CLARIFY THE LAW CONCERNING THE STATE'S PARTICIPATION IN FEDERALLY FUNDED UNEMPLOYMENT PROGRAMS OFFERED ON A VOLUNTARY OR OPTIONAL BASIS; TO TERMINATE THE STATE'S PARTICIPATION IN CERTAIN FEDERAL UNEMPLOYMENT PROGRAMS; TO DECLARE AN EMERGENCY; AND FOR OTHER PURPOSES.

Subtitle

TO CLARIFY THE LAW CONCERNING THE STATE'S PARTICIPATION IN CERTAIN FEDERALLY FUNDED UNEMPLOYMENT PROGRAMS; TO TERMINATE THE STATE'S PARTICIPATION IN CERTAIN FEDERAL UNEMPLOYMENT PROGRAMS; AND TO DECLARE AN EMERGENCY.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. DO NOT CODIFY. Termination of participation — Legislative intent.

It is the intent of the General Assembly to:

(1) Concur with and approve the Governor's decision stated in his letter dated May 7, 2021, to the Director of the Division of Workforce Services terminating the State of Arkansas's participation in:

(A) The Federal Pandemic Unemployment Compensation

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program, 15 U.S.C. § 9023;

(B) The Pandemic Unemployment Assistance program, 15 U.S.C. § 9021;

(C) The Pandemic Emergency Unemployment Compensation program, 15 U.S.C. § 9025;

(D) The Mixed Earner Unemployment Compensation program, 15 U.S.C. § 9023;

(E) The Emergency Unemployment Relief for Governmental Entities and Nonprofit Organizations program, 42 U.S.C. § 1103; and

(F) The Temporary Full Federal Funding of the First Week of Compensable Regular Unemployment for States with No Waiting Week program, 15 U.S.C. § 9024; and

(2) Concur with and approve the notice of intent to terminate the Agreement Implementing the Relief for Workers Affected by Coronavirus Act between the United States Department of Labor and the State of Arkansas transmitted by the Director of the Division of Workforce Services to the United States Department of Labor on May 19, 2021, with such termination to be effective as provided for therein.

SECTION 2. Arkansas Code § 11-10-311 is amended to read as follows:

11-10-311. Employment stabilization.

(a) The Director of the Division of Workforce Services shall take all appropriate steps to reduce and prevent unemployment, to encourage and assist in the adoption of practical methods of vocational training, retraining, and vocational guidance, to investigate, recommend, advise, and assist in the establishment and operation by municipalities, counties, planning districts, school districts, and the state of programs for public works to be used in times and places of economic downturn and high unemployment for the purpose of promoting the employment of unemployed and underemployed workers throughout the state, and to these ends, to carry on research and such investigations as he or she shall deem necessary and to publish the results thereof.

(b) Subsection (a) of this section shall be construed as taking precedence over other provisions of this chapter.

SECTION 3. Arkansas Code § 11-10-312 is amended to read as follows:

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11-10-312. Federal-state cooperation.

(a) In the administration of this chapter, the Director of the Division of Workforce Services shall cooperate with the United States Department of Labor to the fullest extent consistent with ~~the provisions of~~ this chapter and ~~shall~~ may take such action, through the adoption of such appropriate rules, administrative methods, and standards as may be necessary to secure to this state and its citizens all advantages available under ~~the provisions of~~ the Social Security Act that relate to unemployment compensation, the Federal Unemployment Tax Act, the Wagner-Peyser Act, and the Federal-State Extended Unemployment Compensation Act of 1970.

(b) In the administration of ~~the provisions in~~ §§ 11-10-534 — 11-10-543, which are enacted to conform with the requirements of the Federal-State Extended Unemployment Compensation Act of 1970, the director ~~shall~~ may take such action as may be necessary to:

(1) Ensure that the provisions are so interpreted and applied as to meet the requirements of the federal act referred to in this subsection as interpreted by the United States Department of Labor; and

(2) ~~Secure~~ To the extent benefits do not conflict with § 11-10-311 and to the extent the director in his or her discretion deems it necessary, secure to this state the full reimbursement of the federal share of extended benefits paid under this chapter that are reimbursable under the federal act referred to in this subsection.

(c) This section does not:

(1) Require the director to participate in, nor preclude the director from ceasing to participate in, any voluntary, optional, special, or emergency program offered by the United States Government, including without limitation programs offered under the Social Security Act, the Federal Unemployment Tax Act, the Wagner-Peyser Act, the Federal-State Extended Unemployment Compensation Act of 1970, the Coronavirus Aid, Relief, and Economic Security Act, or any other federal program enacted to address exceptional unemployment conditions; or

(2) Conflict with § 11-10-105 or § 11-10-311.

SECTION 4. DO NOT CODIFY. Retroactivity. This act is retroactive to May 19, 2021.

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SECTION 5. EMERGENCY CLAUSE. It is found and determined by the General Assembly of the State of Arkansas that the coronavirus 2019 (COVID-19) pandemic negatively affected the economic health of the state in part because it led to higher unemployment rates; that the United States Government instituted extraordinary federal unemployment programs to assist states with their economic recovery, and Arkansas voluntarily participated in those federally funded programs; that Arkansas's economy is recovering, and the state's unemployment rate has decreased; that employers in this state have tens of thousands of job vacancies that need to be filled; that the continuation of these extraordinary federal unemployment programs could interfere with the ability of employers to fill job vacancies and complete the state's economic recovery; and that this act is immediately necessary because the state needs to return its unemployment compensation system to normal functioning to safeguard the progress the state has made and to complete the state's economic recovery, which is in the best interest of all Arkansans. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on:

(1) The date of its approval by the Governor;

(2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or

(3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND S.B., S.S., T.S., and B.B. Plaintiffs vs. Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina, and G. Daniel Ellzey, in his official capacity as Director of the South Carolina Department of Employment and Workforce; Defendants	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT **PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO REQUIRE PLAINTIFFS TO IDENTIFY THEMSELVES AND TO STRIKE ANONYMOUS CERTIFICATIONS**

Plaintiffs respectfully submit the following response to Defendants' motion to require Plaintiffs to identify themselves and to strike anonymous certifications:

Plaintiffs filed this action along with their motion for preliminary injunction on July 28, 2021. Defendants were served with both the same day. The complaint and all other filings identified Plaintiffs by first and last initials only. Attached to Plaintiffs' memorandum of law in support of their motion for preliminary injunction were four certifications, given pursuant to *In Re: Operation of the Trial Courts During the Coronavirus Emergency*, Appellate Case No. 2020-000447 (as amended June 15, 2021). These certifications were redacted to remove Plaintiffs' names with the exception of their first and last initial based on Plaintiffs' concerns, as stated in their declarations, that they could face harassment, retaliation, or loss of job opportunities if it became public knowledge that they were involved in this lawsuit.

On the morning of August 3, 2021, at a scheduling conference called by this Court and nearly a week after Defendants were served in this action, Defendants raised for the first time the possibility that they would move to strike Plaintiffs' certifications. In response, as Defendants acknowledge in their motion, Plaintiffs' counsel offered to provide Defendants' with unredacted copies of Plaintiffs' certifications subject to a reasonable confidentiality order. Defendants' counsel indicated they would consider this proposal.

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Shortly before noon on Friday, August 6, 2021, Defendants for the first time responded to Plaintiffs' proposal by filing the instant motion. At 3:44 pm the same day, after consulting with Plaintiffs, Plaintiffs' counsel emailed Defendants' counsel unredacted copies of Plaintiffs' certifications with a request that no disclosure of Plaintiffs' names be made beyond those necessary to review their certifications against DEW records and otherwise examine the truthfulness of the statements in their certifications.[1]

Defendants first argue that Plaintiffs do not meet the standard to proceed anonymously under *Doe v. Howe*, 362 S.C. 212, 607 S.E.2d 354 (Ct. App. 2004). However, given the highly politicized environment and politically charged issues at stake in this litigation, Plaintiffs have a reasonable fear that they will be subject to harassment, retaliation, or the loss of job opportunities if their names are made public.

Defendants next argue that they will be prejudiced if Plaintiffs are allowed to proceed anonymously because they will not be able to determine whether the statements in Plaintiffs' certifications are true. If this is the case, it is a self-inflicted wound. Defendants took nearly a week after being served to raise any concerns about Plaintiffs' use of anonymous certifications, spent approximately 36 hours considering Plaintiffs offer to provide unredacted certifications, ultimately rejected that offer, and still received the unredacted certifications within hours of the time they filed the instant motion. Had Defendants engaged earlier, they could have had these certifications far sooner. Regardless, by the time Plaintiffs' motion for preliminary injunction is heard, Defendants will have had Plaintiffs' unredacted certifications for more than four days. It would strain credulity to argue that Defendnats' five lawyers could not manage to examine four affidavits that run to barely two pages each against DEW's records in that time.

Ultimately, Plaintiffs would prefer to reserve the Court's and the parties' time for what this case is actually about – whether Defendants can prematurely end South Carolina's participation in Pandemic Unemployment Benefits. Should the Court not be inclined to allow the Plaintiffs to proceed anonymously, we ask that this ruling not delay hearing or consideration of Plaintiffs' motion for preliminary injunction.

[1] See Exhibit R attached hereto

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Respectfully Submitted,

August 9, 2021

SOUTH CAROLINA APPLESEED
LEGAL JUSTICE CENTER

s/ *Adam Protheroe*
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Counsel for Plaintiffs

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Adam Protheroe

From: Adam Protheroe
Sent: Friday, August 6, 2021 3:44 PM
To: Lambert, Grayson
Cc: lmcintoshlc@scourts.org; Limehouse, Thomas; ttimmons@dew.sc.gov; Jordan, Steven; Lisle Traywick; Rob Tyson; blaffitte@robinsongray.com; jkassel@kassellaw.com; Sue Berkowitz
Subject: S.B. v. McMaster - Unredacted Certifications
Attachments: Decl_of_S[redacted].pdf; Decl_of_S[redacted].pdf; Decl_of_T[redacted].pdf; Decl_of_B[redacted].pdf

Counsel,

I hope this finds you well. Please find attached the plaintiffs' unredacted certifications. As we discussed at the scheduling conference on August 3rd, we understand your interest in being able to review these against DEW records and otherwise examine the truthfulness of these statements. We ask that you keep plaintiffs' names confidential beyond any disclosures necessary to accomplish those ends until the court rules on our request for a confidentiality order, which will be made in response to your motion.

Feel free to contact me if you have any questions.

Have a good weekend,
Adam

Adam Protheroe
Litigation Attorney
S.C. Appleseed Legal Justice Center
P.O. Box 7187
Columbia, S.C. 29202
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From: Lambert, Grayson <GLambert@governor.sc.gov>
Sent: Friday, August 6, 2021 12:34 PM
To: Lawton McIntosh <lmcintoshj@sccourts.org>
Cc: lmcintoshlc@scourts.org; Limehouse, Thomas <TLimehouse@governor.sc.gov>; ttimmons@dew.sc.gov; Jordan, Steven <SJordan@dew.sc.gov>; Lisle Traywick <ltraywick@robinsongray.com>; Rob Tyson <rtyson@robinsongray.com>; blaffitte@robinsongray.com; jkassel@kassellaw.com; Adam Protheroe <adam@scjustice.org>; Sue Berkowitz <SBerk@scjustice.org>
Subject: S.B. v. McMaster - Defendants' Filings

Judge McIntosh,

Attached please find file-stamped copies of Defendants' (1) Motion to Require Plaintiffs to Identify Themselves and to Strike Anonymous Certifications, (2) Motion to Dismiss, and (3) Memorandum in Support of Motion to Dismiss and in Opposition to Motion for Preliminary Injunction (with the exhibits).

If you have any questions, please don't hesitate to let us know.

Respectfully,
Grayson

Wm. Grayson Lambert
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IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

S.B., S.S., T.S., and B.B.,

Plaintiffs,

v.

HENRY DARGAN MCMASTER, in his official capacity as Governor of the State of South Carolina, and G. DANIEL ELLZEY, in his official capacity as Director of the South Carolina Department of Employment and Workforce,

Defendants.

Civil Action No. 2021-CP-4003774

MOTION OF SOUTH CAROLINA CHAMBER OF COMMERCE AND SOUTH CAROLINA RESTAURANT AND LODGING ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS

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Counsel for Amici

South Carolina Chamber of Commerce and South Carolina Restaurant and Lodging Association ("*Amici*") seek the Court's leave to file an *amicus* brief in support of the defendants in this case. A copy of the proposed brief is attached to this motion. After consultation, the defendants have consented to this motion, and the plaintiffs have not yet taken a position. The Chamber is the state's largest business trade and commerce organization and regularly provides the perspective of businesses as an *amicus* in South Carolina courts. And the SCRLA is a statewide trade organization of over 1,300 members whose mission is to promote, protect, and educate the foodservice and lodging industries of the State and to ensure positive business growth for its members. Each has a significant interest in this action.

"[T]he filing of an amicus curiae brief in a court of common pleas is a matter wholly within the discretion of the court, and is usually granted in cases involving the public interest." 16 S.C. Jur. Brief of Amicus Curiae § 3; *see* SCRCP 7(b)(1). The plaintiffs' lawsuit raises public policy questions of great importance to *amici*, their members, and the State as a whole. The action seeks judicial intervention in an important matter of economic policy that directly affects *amici* and thousands of their members. Therefore, because of their concern about the chilling impact the plaintiffs' action could have on the preservation and development of business and industry in South Carolina, *amici* respectfully request permission to file the attached brief.

The proposed brief provides a unique perspective on the issues before the Court, as *amici* provide both statistical data and on-the-ground insights relevant to the plaintiffs' claims. *Amici* also present several important legal arguments. And this brief will not prejudice the plaintiffs, who have ample opportunities to respond to the brief's arguments given the case's early stage.

For these reasons, this motion should be granted and the attached *amicus* brief filed.

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Respectfully submitted,

/s Christopher Mills

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August 9, 2021

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IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

S.B., S.S., T.S., and B.B.,

Plaintiffs,

v.

HENRY DARGAN MCMASTER, in his official capacity as Governor of the State of South Carolina, and G. DANIEL ELLZEY, in his official capacity as Director of the South Carolina Department of Employment and Workforce,

Defendants.

Civil Action No. 2021-CP-4003774

BRIEF OF SOUTH CAROLINA CHAMBER OF COMMERCE AND SOUTH CAROLINA RESTAURANT AND LODGING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS

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INTRODUCTION

South Carolina businesses face an unprecedented crisis. An ongoing pandemic squelched consumer demand, disrupted supply chains, and interrupted work arrangements for much of the past 18 months. Now, as consumers return to the marketplace in droves, businesses have confronted drastic labor shortages. In large part, these shortages can be traced to expanded federal payments that make it more lucrative for many workers to remain unemployed than to return to the workforce. These federal payments, originally intended to provide short-term help to the vulnerable, now threaten the economic well-being of all South Carolinians. Consumers are hurt when businesses cannot timely supply critical goods and services, from building materials to food. Workers are hurt by the loss of skills, training, and initiative that attends extended periods out of the workforce. Businesses up and down the supply chain are hurt by labor shortages and the concomitant disruption to operations. Many businesses have been forced to close. All suffer—businesses, consumers, workers, and communities.

Recognizing these imminent dangers to the State's economy, Governor McMaster took appropriate action by terminating the State's participation in the expanded federal benefit programs. Already, the State and its citizens have seen the fruits of this action. The unemployment rate in South Carolina and other states that stopped participating in the federal programs has quickly fallen, along with jobless claims. Labor market participation, on the other hand, has risen. Though labor shortages remain an issue, ending disincentives to work has already played a positive role in the State's economic recovery.

The plaintiffs seek to undo all this positive momentum in stabilizing the State's labor market. The plaintiffs' remedy would entail a massive disruption to the State's economy just as it emerges from the depths of the pandemic. Based on public data and *amici*'s members' on-the-

ground experience, businesses, consumers, and workers would all be harmed if injunctive relief is granted.

Not only are the plaintiffs' claims contrary to the public interest, they lack any legal merit. *First*, the only statute that the plaintiffs invoke does not provide a private right of action. It is the very definition of a statutory provision that protects the general public and not any specific individuals, as it gives discretion to the executive branch to determine the best way to help "this State and its citizens." S.C. Code Ann. § 41-29-230(1). Unsurprisingly, the plaintiffs do not identify—and *amici* could not find—any other lawsuit based on South Carolina's statute. The provision does not give individuals any right to sue.

Second, even if the statute provided a private right, it confers complete discretion on the executive branch to determine what "advantages" particular programs provide the State's citizens, *id.*, and this Court does not have any judicially manageable standard to second-guess that determination. Put another way, this lawsuit presents a classic political question, appropriately left to resolution by the elected branches, not the courts.

Third, even if the Court were to somehow adjudicate whether the expanded payments here "advantage" the State, it would have to defer to Governor McMaster's reasonable (and correct) explanation that the payments cause the State significant economic problems—problems that far outweigh the temporary promise of federal dollars. Nothing in the law requires the State to pursue supposed short-term gain that would lead to long-term ruin.

The plaintiffs' motion for an injunction should be denied and their action dismissed.

INTEREST OF *AMICI CURIAE*

The South Carolina Chamber of Commerce is the State's largest business trade and commerce organization. It represents businesses, industries, professions, and associations of all

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sizes and types with a unified voice, and promotes the development and expansion of new and existing businesses and industries in the State. Its efforts, in turn, benefit the public, raising the standard of living for South Carolina's citizens. The Chamber aims to protect the interests of South Carolina's business community by identifying and addressing issues that may impair economic development. It routinely participates in state litigation as an *amicus*. *See, e.g.*, *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharms., Inc.*, 414 S.C. 33, 89 (2015); *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 318 n.3 (2010).

Formed in 2012, the South Carolina Restaurant and Lodging Association is a statewide, non-partisan trade organization whose mission is to promote, protect, and educate the foodservice and lodging industries of the State and to ensure positive business growth for its members. The SCRLA represents over 1,300 restaurant and lodging companies and industry-related services providers. It strives to advance the best interests of its members on small business issues, on hospitality and tourism concerns, and towards the protection of South Carolina's quality of life.

ARGUMENT

I. The plaintiffs cannot succeed on the merits.

A. The statute does not confer a private right of action.

The plaintiffs' action falters from the starting block, for they do not have a right to sue. Their complaint alleges a violation of only one statutory provision, Compl. ¶¶ 73–89, but that provision does not give private litigants a right of action. Revealingly, it appears that South Carolina's provision has never been relied on to provide a cause of action.

The statute provides:

> In the administration of Chapters 27 through 41 of this title, the department must cooperate with the United States Secretary of Labor to the fullest extent consistent with the provisions of these chapters, and act, through the promulgation of appropriate rules, regulations, administrative methods and standards, as necessary to secure to this State and its citizens all advantages available under the provisions

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> of the Social Security Act that relate to unemployment compensation, the Federal Unemployment Tax Act, the Wagner-Peyser Act, and the Federal-State Extended Unemployment Compensation Act of 1970.

S.C. Code Ann. § 41-29-230(1).

"In determining whether a statute creates a private cause of action, the main factor is legislative intent." *Georgetown Cnty. League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 353 (2011) (cleaned up). "Legislative intent to grant or withhold a private right of action for a violation of the statute is determined primarily from the language of the statute." *Id.*

Here, the statute includes no express right of action. Instead, it merely says that "the department must cooperate with the United States Secretary of Labor to the fullest extent consistent with the provisions of these chapters," "as necessary to secure to this State and its citizens all advantages available under" various provisions of the federal Social Security Act. S.C. Code Ann. § 41-29-230(1). The statute does not explicitly provide for any private party to bring suit.

Where a private right of action is "not expressly provided," it may still "be created by implication"—but only "if the legislation was enacted for the special benefit of the private party." *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 121 (2009); *see also Adkins v. S.C. Dep't of Corr.*, 360 S.C. 413, 418 (2004). "If the overall purpose of the statute is to aid society and the public in general, the statute is not enacted for the special benefit of a private party." *Dema*, 383 S.C. at 121.

The statute here is the definition of a statute "to aid society and the public in general." *Id.* It speaks in the broadest of generalities, directing a state department to act "as necessary to secure to this State and its citizens all advantages." S.C. Code Ann. § 41-29-230(1). It is intended to benefit the State and citizens generally, not any particular person, and thus it does not give rise to

a private cause of action. Similar cases have refused to find private rights of action. *See, e.g.*, *Dema*, 383 S.C. at 122 (no private right where the statute's language "clearly indicates" an intent "to advance the quality of healthcare provided in this State for all people receiving the care, not for a particular individual"); *Adkins*, 360 S.C. at 418 ("Given that the overall purpose of the prevailing wage statute is to prevent unfair competition, and to aid society and the public in general, we cannot conclude that the statutes in question were enacted for the special benefit of Inmates.").

The plaintiffs' request for a declaratory judgment (Compl. ¶ 73) cannot rescue their complaint. "The Uniform Declaratory Judgments Act is not an independent grant of jurisdiction." *Tourism Expenditure Rev. Comm'n v. City of Myrtle Beach*, 403 S.C. 76, 81 (2013) (cleaned up). "The Act creates a new remedy, not a new source of legal rights and obligations." 23 S.C. Jur. Declaratory Judgments § 3. Thus, because the plaintiffs have no legal right under the statute, they are not entitled to a declaratory judgment: "Where adjudication of a question would settle no legal rights of the parties, it would be only advisory and, therefore, beyond the intended purpose and scope of a declaratory judgment." *Tourism Expenditure*, 403 S.C. at 81 (cleaned up); *see also Kubic v. MERSCORP Holdings, Inc.*, 416 S.C. 161, 170 n.4 (2016) (refusing declaratory judgment where "none of Respondents' legal rights are being or will be abridged"). If the Court "were to recognize a general right to seek a declaratory judgment that the [statute] has been violated, [it] would be creating something the General Assembly did not create and might not create if it considered the issue"—and the Court is "not at liberty to add to the statutory law or subtract from it." *Ballard v. Newberry Cnty.*, 432 S.C. 526, 532 (Ct. App. 2021).

Because "[n]othing in the statute[] indicates a legislative intent to create civil liability for a violation," it does "not give rise to a private right of action." *Adkins*, 360 S.C. at 419. The

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plaintiffs' suit cannot succeed, injunctive relief should be denied, and their suit should be dismissed.

This conclusion is bolstered by the public duty rule, "a rule of statutory construction which aids the court in determining whether the legislature intended to create a private right of action for a statute's breach." *Edwards v. Lexington Cnty. Sheriff's Dep't*, 386 S.C. 285, 292 (2010) (cleaned up). This rule "presumes statutes which create or define the duties of a public office have the essential purpose of providing for the structure and operation of government or for securing the general welfare and safety of the public." *Arthurs ex rel. Est. of Munn v. Aiken Cnty.*, 346 S.C. 97, 104 (2001) (quoting *Summers v. Harrison Const.*, 298 S.C. 451, 455 (Ct. App. 1989)). Such statutes do not create obligations "towards individual members of the general public." *Id.* (cleaned up).

Again, this is a classic public-duty statute, instructing a state agency to act in general ways to help the State and its citizens. The statute does not give rise to a private right of action, and the plaintiffs' action should be dismissed.

B. The statute does not involve a justiciable question.

Even if the statute created a private cause of action, the plaintiffs' suit faces another justiciability hurdle: The statute creates no judicially administrable standard. Put another way, the statute involves a political question, the nonjusticiability of which "is primarily a function of the separation of powers." *Segars-Andrews v. Jud. Merit Selection Comm'n*, 387 S.C. 109, 121 (2010) (cleaned up). No judicially manageable standard exists to adjudicate the plaintiffs' claims, so the political question doctrine bars review.

"The fundamental characteristic of a nonjusticiable political question is that its adjudication would place a court in conflict with a coequal branch of government." *Id.* at 121–22 (cleaned up). "[C]ourts will not rule on questions that are exclusively or predominantly political in nature rather

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than judicial." *Id.* at 122. The questions in such cases are whether "the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Id.* (cleaned up). "[T]he appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." *Id.*

These considerations doom the plaintiffs' claims. First, no satisfactory criteria exists for judicial resolution of their lawsuit. This Court has no way to determine as a legal matter whether paying individuals not to work provides "advantages" to the "State and its citizens," much less to determine what state executive actions are "necessary to secure" any such advantages. S.C. Code Ann. § 41-29-230(1). These questions "revolve around policy choices and value determinations," which are "constitutionally committed for resolution to the halls of state legislatures or to the confines of the executive branch"—not the courts. *Segars-Andrews*, 387 S.C. at 123 (cleaned up).

Second, adjudicating the case inevitably places this Court in the position of passing on the wisdom of particular actions by the elected branches of government. Not only would this suit require the Court to consider policy rather than legal questions, it would bring the Court into certain conflict with co-equal branches of government. "There is no way for this Court to grant the plaintiffs the relief they seek without disagreeing with the [Executive] on this political question." *Bailey v. S.C. State Election Comm'n*, 430 S.C. 268, 276 (2020). And adjudicating this suit would lock the elected branches into court-ordered policy decisions, when the separation of powers requires that they be free to adjust policies and procedures as economic and public health conditions change. The courts "may not under some thinly veiled guise of law assert judicial power to an action taken by another branch that lies within its exclusive constitutional authority." *Segars-Andrews*, 387 S.C. at 130.

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Similar actions are routinely dismissed as involving political questions beyond the ken of the courts. *See, e.g.*, *Beaufort Cnty. v. S.C. State Election Comm'n*, 395 S.C. 366, 376–77 (2011) ("Petitioners' argument that the funds appropriated for conducting a 2012 Presidential Preference Primary are insufficient presents a nonjusticiable political question."); *cf. Gilstrap v. S.C. Budget & Control Bd.*, 310 S.C. 210 (1992) (holding that the appropriation of public funds is a legislative function); *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427 (1935) (noting that the General Assembly has full authority to make appropriations as it deems wise in absence of any specific prohibition against the appropriation).

Because the plaintiffs' claims have no "legal foundation," *Segars-Andrews*, 387 S.C. at 130, but instead present forbidden questions of policy, they are not justiciable and should be dismissed. Once again, the fact that South Carolina's statute has apparently never been enforced in court confirms that this lawsuit would involve an unprecedented, improper expansion of judicial power over co-equal branches of government.

C. Even if the case were justiciable, the Court should defer to the political branches' understanding of "advantages" to the State's citizens.

The plaintiffs' claims also fail on the merits. As the defendants correctly explain, the plain text of the statute does not apply to CARES Act funds or to the Governor's actions. Memorandum in Support of Motion to Dismiss, at 8–15. But if the Court ventures down the path of deciding what policy choices "advantage" the State and its citizens, the Court should defer to the Governor's reasonable explanation.

Before the government can be enjoined "in the performance of actions or duties provided by statute," a plaintiff must "show[] that the public department . . . has exercised its power in an arbitrary, oppressive or capricious manner." *Richland Cnty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 310 (2018) (cleaned up). When an executive official "is charged with the execution of a

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statute" and makes an informed "policy determination[]," "the role of a court reviewing such decisions is very limited." *Friends of Earth v. Pub. Serv. Comm'n of S.C.*, 387 S.C. 360, 371 (2010). The official's decision is "presumptively correct." *S.C. Energy Users Comm'n v. S.C. Elec. & Gas*, 410 S.C. 348, 354 (2014); *see also Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 33 (2014) ("The construction given to a statute by those charged with the duty of exercising it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons." (cleaned up)).

The State's decision here as to which federal benefits are actually "advantages" was, at a minimum, reasonable. As the Governor explained, "What was intended to be short-term financial assistance for the vulnerable and displaced during the height of the pandemic has turned into a dangerous federal entitlement, incentivizing and paying workers to stay at home rather than encouraging them to return to the workplace." Compl. Ex. E. This entitlement created "an unprecedented labor shortage" that "pose[s] a clear and present danger to the health of our State's businesses and to our economy." *Id.*

As shown next, the Governor's explanation was spot-on. But no matter if the Court agrees, it should defer to the executive's reasonable understanding about which benefit programs help the State and its citizens. The State balanced various factors in coming to this understanding, recognizing that "involuntary unemployment" "is a serious menace to health, morals and welfare of the people of this State," S.C. Code Ann. § 41-27-20, and that "the reemployment of unemployed workers throughout the State" must be encouraged in every "way that is feasible," *id.* § 41-29-120(A)(1)(d). Deference to the Governor and the Department of Employment and Workforce's decision is required, "both because they have been entrusted with administering" this law and "because they have unique skill and expertise in administering" it. *Kiawah Dev. Partners,*

II, 411 S.C. at 34. And because they provided a reasoned explanation of their decision, the Court's task is at an end. Again, the plaintiffs' claims cannot succeed, and no relief is appropriate.

II. Governor McMaster's action serves the public interest.

The evidence shows that Governor McMaster's decision to withdraw South Carolina from the expanded benefits programs will help the State and its citizens by encouraging workforce participation. This evidence is relevant in multiple respects to the issues before the Court. First, as a statutory matter, the evidence makes it clear that the Governor's determination about whether the extra federal benefits would "advantage" the State was both reasonable and correct. *See supra* Part I.C. Second, because injunctions—especially mandatory injunctions that alter the status quo—are "drastic" remedies granted in equity, 12 S.C. Jur. Equity § 19, the Court exercises its discretion in evaluating the plaintiffs' demand for immediate relief. *See Cedar Cove Homeowners Ass'n, Inc. v. DiPietro*, 368 S.C. 254, 261 (Ct. App. 2006) (mandatory injunctions subject to "a balancing of the equities"); *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 274 (1987). Here, the public interest weighs against injunctive relief. Third, to the extent the plaintiffs seek a writ of mandamus, the public interest is relevant. *See McDowell v. Burnett*, 90 S.C. 400 (1912).

Before Governor McMaster took the challenged action, businesses faced severe labor shortages. These labor shortages had cascading effects, often preventing businesses from staying open and thereby worsening unemployment—and depriving consumers of crucial goods and services. Industries important in South Carolina—hospitality, healthcare, agribusiness, and manufacturing—were hit especially hard.

For instance, the workforce shortage has been especially pronounced in the food and beverage sector, with restaurants across the State facing staffing problems. Even as demand for dining soared, restaurants struggled to find enough employees to stay open. Not only did restaurants face employee shortages, their suppliers faced similar shortages, exacerbating the

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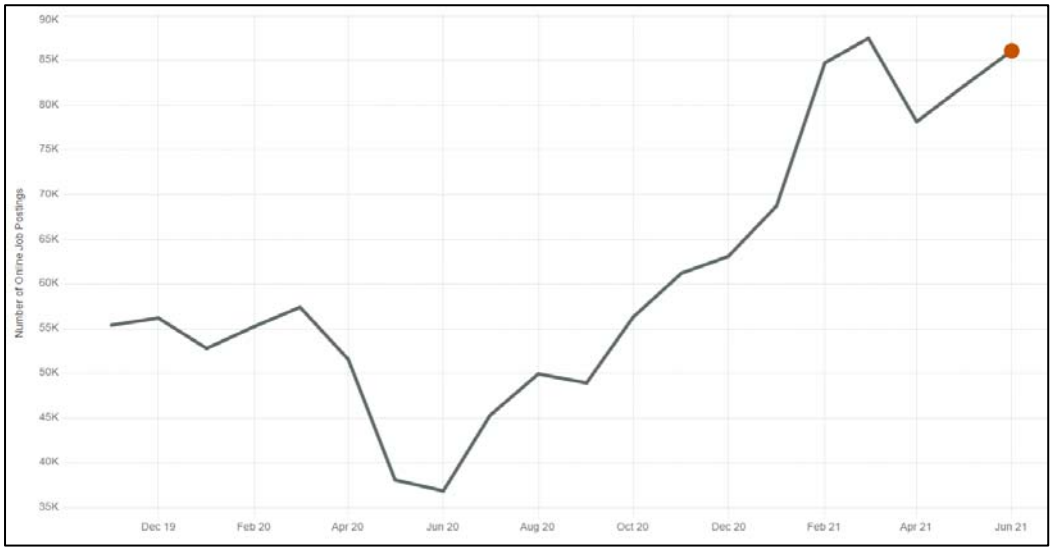
struggles of these businesses to stay open and serve the public. *See, e.g.*, Hanna Raskin, *Food-and-Beverage Staff Shortage Extends Past Restaurants, Snarling Pickups and Deliveries*, Post and Courier (Apr. 26, 2021), https://bit.ly/3yBTnZS; *see also* Emily Williams, *With Tourism Back, Charleston Hotels and Restaurants Face New Crisis: A Worker Shortage*, Post and Courier (Apr. 18, 2021), https://bit.ly/3lF81f9.

As the pandemic moved past its summer 2020 peak, it became clear that expanded federal unemployment benefits were exacerbating the crisis in the labor market, effectively paying people not to work. A University of Chicago study found that at least "42% of those on benefits receive more than they did [at] their prior jobs." *See* Eric Morath, *Millions Are Unemployed. Why Can't Companies Find Workers?*, Wall St. J. (last updated May 6, 2021), https://on.wsj.com/2U27kBn (discussing the study).

South Carolina's hospitality industry epitomizes this problem. As a University of South Carolina economist explained, "If you're an employer in the service sector you are in a sense competing with those unemployment benefits." Katherine Phillips, *Economist: Stopping Extra $300 Jobless Benefits Will Partially Solve S.C. Worker Shortage*, WMBF News (last updated June 7, 2021), https://bit.ly/3fIRPWr. And in April 2021, the average of total unemployment benefits for South Carolina hospitality workers was 125% of those workers' average salary. In other words, the average S.C. hospitality employee would have lost money by taking a job.

Many industries faced similar labor issues, with a majority of the S.C. Chamber's members identifying labor shortages as the most pressing issue facing their businesses at the start of summer 2021. In the week before South Carolina ceased participation in the expanded federal programs, the Department of Employment and Workforce received 87,000 unemployment claims, despite the 86,000 jobs that were posted in the State at that time. *See* Compl. ¶ 21. The shortages exacerbated

by the federal payments could easily be observed at many local businesses, as reflected by this chart of South Carolina job postings:



Number of Online Job Postings in South Carolina[1]

Recognizing all these problems, the State ended its participation in the expanded federal payment programs at the end of June. Even since then, the labor market situation has improved dramatically. Following the Governor's announcement in early May that the extra unemployment benefits would end on June 30, 2021, South Carolina's unemployment rate dropped from 5% in April to 4.6% in May to 4.5% in June, even as the nationwide unemployment rate increased from May to June. *See* Patrick Gleason, *Vindication for Governors Who Ended Enhanced Unemployment Payments*, Forbes (July 28, 2021), https://bit.ly/3fKmnHk. In May 2021, South Carolina's hospitality industry added 9,000 jobs. *See* Katherine Phillips, *Despite Drop in Unemployment Levels, Some Grand Strand Restaurants Still Feel Staffing Shortages*, WMBF News (June 24, 2021), https://bit.ly/3xvlZ5Q.

[1] *Employment Dashboard, Number of Online Job Postings*, accelerateSC, https://accelerate.sc.gov/ (last visited Aug. 8, 2021).

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As the unemployment rate has improved following Governor McMaster's decision to opt out of the extra benefits, so too has the number of people working in South Carolina. Between April 2021 and June 2021, the number of people working in the State has improved about 2.3%, nearly restoring South Carolina's workforce to pre-pandemic levels. *See Employment Dashboard, Number of Individuals Working*, accelerateSC, https://accelerate.sc.gov (last visited Aug. 6, 2021). Just a few days ago, South Carolina reported the lowest number of first-time unemployment claims since the pandemic began—the fourth consecutive drop in weekly claims. *See* Patrick Phillips, *SC Reports Lowest Number of First-Time Unemployment Claims Since Pandemic Began*, Live 5 News (Aug. 5, 2021), https://bit.ly/3fKoWZY.

Data from other States that have ended the extra unemployment benefits show that these States' economies have likewise benefitted. When States began announcing that they were opting out of the extra benefits, those states saw four consecutive weeks of decreases in initial unemployment claims. *See FGA Statement on the U.S. Department of Labor Unemployment Insurance Trends*, Found. for Gov't Accountability (July 8, 2021), https://bit.ly/3fJFcul. Initial claims dropped ten percent in the states that had ended the extra unemployment benefits. *Id.* In the first week of July 2021 alone, while States with "continuing unemployment bonuses experienced" a "4.9 percent increase in claims," States that had "ended unemployment bonuses saw a 3.2 percent decrease in initial unemployment claims." *Id.*

Between June 5 and July 17, the unemployment level rose 16% in the States that kept the extra unemployment benefits. Jonathan Ingram et al., *Three Key Signs Opting Out of the Unemployment Bonus is Working* 5 (July 22, 2021), https://thefga.org/wp-content/uploads/2021/07/opting-out-unemployment-bonus-is-working.pdf. By contrast, between May 8 and July 17, unemployment levels in States that opted out of the extra benefits decreased

30%, reaching these States' lowest levels since the pandemic began. *Id.* at 6. As Winthrop economist Louis Pantuosco explained, "Those states have recovered really fast because the workers in that case they really don't have the incentives to stay home." *York County Business Leaders See Change in Worker Shortage After S.C. Federal Unemployment Benefits End*, CN2 News, https://bit.ly/37sEJrS (last visited Aug. 8, 2021).

Internet searches for job openings increased 68% in May and June 2021 in States that opted out of the extra benefits than in the States that maintained the extra benefits. Ingram et al., *supra*, at 5. In Florida, for example, companies have reported a surge in job applications since the State opted out of the expanded federal payments. Kurt Alexander, CFO for Omni Hotels & Resorts, reported that the company received an immediate 500% increase in job applications for its Florida hotels, and explained that the extra unemployment benefits were "absolutely a factor" in curtailing the labor market. Odd Lots, *The Labor Episode: How the Omni Hotel Chain is Dealing with Hiring Right Now*, Bloomberg, at 28:55 (July 12, 2021), https://bloom.bg/3lQnSYq.

The plaintiffs' action threatens all this progress. The extra federal payments were supposed to provide temporary assistance at the height of the pandemic, not a disincentive to remain unemployed. And the continued operation of these benefits in the State would discourage work and hurt both businesses and consumers. The Governor's decision to opt out of the extra benefits serves the public interest by promoting economic policies that foster full workforce participation. This will help ensure that South Carolina does not fall behind the growing number of States with similar hospitality industries whose economies have started to roar back after they opted out of the extra federal payments. The Governor's action will help the Palmetto State—and all its citizens—to return to and surpass pre-pandemic levels of economic prosperity.

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CONCLUSION

For these reasons, the plaintiffs' motion for a preliminary injunction should be denied, and the defendants' motion to dismiss should be granted.

Respectfully submitted,

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August 9, 2021

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STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
COUNTY OF RICHLAND	**FIFTH JUDICIAL CIRCUIT**
S.B., S.S., T.S., and B.B., *Plaintiffs*, v. HENRY DARGAN MCMASTER, in his official capacity as Governor of the State of South Carolina, and G. DANIEL ELLZEY, in his official capacity as the Director of the South Carolina Department of Employment and Workforce, *Defendants*.	Civil Action No. 2021-CP-40-03774

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER FOR LEAVE TO APPEAR AS *AMICI CURIAE*

The Chamber of Commerce of the United States of America and the National Federation of Independent Business Small Business Legal Center hereby seek leave to appear as *amici curia*e and file a brief in support of Defendants. After consultation, Plaintiffs oppose this motion, and Defendants consent to this motion. A copy of the proposed brief is attached to this motion.

"[T]he filing of an amicus curiae brief in a court of common pleas is a matter wholly within the discretion of the court, and is usually granted in cases involving the public interest." 16 S.C. Jur. Brief of Amicus Curiae § 3; *see also Cook v. S.C. Dep't of Highways & Pub. Transp.,* 309 S.C. 179, 184, 420 S.E.2d 847, 850 (1992) (finding no abuse of discretion by the trial court judge in allowing the South Carolina Budget and Control Board to appear as

amicus curiae before the trial court). *Amici* represent large and small businesses in virtually every economic sector across the United States, including in South Carolina. *Amici* support Governor McMaster's decision to end South Carolina's participation in temporary federally funded pandemic unemployment insurance programs. *Amici* believe that paying South Carolinians not to work is dampening what should be a stronger jobs market. Indeed, unfilled positions pose a very real threat to South Carolina's economic recovery from the COVID-19 pandemic. Based on *amici*'s analysis, unemployment insurance benefits from the Coronavirus Aid, Relief, and Economic Security Act result in approximately one in four recipients taking home *more* in unemployment than they could earn working.

Amici's brief will assist the Court by explaining that the Governor's decision was lawful and serves the public interest, and will demonstrate why a preliminary injunction would hurt small and large businesses by worsening the labor shortage in South Carolina and impeding the State's economic recovery. *Amici*'s brief will also explain that Governor McMaster's decision serves the public interest by encouraging South Carolinians to return to work, which will ease the labor shortage and stimulate South Carolina's economic recovery. For these reasons, this motion should be granted, and *Amici*'s attached brief should be filed.

Dated: August 9, 2021

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STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
COUNTY OF RICHLAND	**FIFTH JUDICIAL CIRCUIT**
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BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER

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INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases, like this one, that raise issues of concern to the nation's business community.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm, established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

Amici support Governor McMaster's decision to end South Carolina's participation in temporary federally funded pandemic unemployment insurance programs. *Amici* believe that paying South Carolinians not to work is dampening what should be a stronger jobs market. Indeed, unfilled positions pose a real threat to South Carolina's economic recovery

from the COVID-19 pandemic. Based on *amici*'s analysis, unemployment insurance benefits from the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") result in approximately one in four recipients taking home *more* in unemployment than they could earn working. A preliminary injunction requiring the State to continue these benefits would hurt small and large businesses by worsening the labor shortage in South Carolina and impeding the State's economic recovery. *Amici* seek leave to file this brief to explain that the Governor's decision was lawful and serves the public interest by encouraging South Carolinians to return to work.

SUMMARY OF ARGUMENT

Federal and state policymakers face a delicate task of facilitating a recovery from the greatest economic crisis since the Great Depression. During the COVID-19 pandemic, policymakers adopted temporary emergency relief measures to help individuals and businesses weather the economic recession. These include pandemic unemployment insurance benefits made available through the CARES ACT, which *amici* supported at the outset of the pandemic in 2020. Although these and other measures avoided an economic catastrophe, some measures have now become drags on the very economic forces they were designed to save.

As public-health conditions have improved and restrictions have lifted, businesses across the country have begun reopening to meet a resurgence in consumer demand. There are a record number of job openings, but not enough workers to fill them. Generous pandemic-related unemployment benefits have suppressed the labor supply by making unemployment nearly as profitable—and in some cases more profitable—than work. This helps explain why employers hired fewer workers than expected in April 2021 even as

businesses could not find enough workers to fill open positions. *See* Olivia Rockeman, *U.S. Job Growth Disappoints in Challenge to Economic Recovery*, Bloomberg (May 7, 2021, 10:37 AM), https://tinyurl.com/ztuyzfhc. But without the ability to staff these open positions, businesses cannot meet existing demand—let alone grow and return the economy to pre-pandemic levels.

To address this labor shortage, Governor McMaster, like governors in twenty-five other states from Alaska to Louisiana, decided to target the biggest hurdle: federally funded pandemic unemployment insurance programs. To that end, Governor McMaster announced in May 2021 that South Carolina would end its participation in some of these federal programs. The Governor noted that South Carolina's businesses "face an unprecedented labor shortage," and further, that this labor shortage is "being created in large part by the supplemental unemployment payments that the federal government provides claimants on top of their state unemployment benefits." *See* Letter from Henry McMaster, Governor of South Carolina, to Daniel Ellzey, Director, Dep't of Emp. & Workforce (May 6, 2021). "What was intended to be short-term financial assistance," the Governor explained, "has turned into a dangerous federal entitlement." *Id.*

More than three months have passed since this announcement, yet Plaintiffs only recently sought an emergency order to block the Governor's decision. The Court should deny this request. Plaintiffs have not demonstrated a likelihood of success on the merits or that the public interest weighs in favor of continuing the State's participation in the federal pandemic unemployment insurance programs.

On the merits, no provision of the South Carolina Code of Laws imposes a duty on the State—let alone a specific, mandatory duty—to seek and obtain pandemic unemployment

insurance benefits under the CARES Act. To the contrary, South Carolina law leaves administration of the CARES Act programs to the Governor's discretion. The Governor properly exercised his discretion to terminate the State's participation in these federal programs, which the CARES Act and implementing agreement with the federal government expressly contemplated. While Plaintiffs might disagree with the Governor's public-policy judgment, that is no basis for this Court to second guess and overturn the Governor's decision.

Nor would a preliminary injunction serve the public interest. On the contrary, a preliminary injunction would impair the Governor's ability to address a government-created labor shortage that is hurting South Carolina businesses and hindering the State's economic recovery. In South Carolina, combined pandemic-era unemployment benefits amount to 79% of the average weekly private sector pay. In the leisure and hospitality industries, that number rises to 123%—or, in other words, the benefits exceed average weekly earnings by more than 23%. When jobless South Carolinians make through unemployment benefits most of (or more than) what they earn by working, it is no surprise that they stay home instead of filling one of the more than 80,000 job openings in the State that existed as of May 2020. As a result, small and large South Carolina businesses, hoping to bounce back after the pandemic, continue to experience a worker shortage crisis.

Governor McMaster's decision to end the State's reliance on federal pandemic unemployment insurance benefits thus serves the public interest of getting South Carolinians back to work. His decision is bolstered by evidence of low unemployment rates in states such as Missouri (4.2%) and Montana (3.7%) that also ended federal unemployment benefits. Equipped with information about the number of job openings in

South Carolina and the successes of those other states, the Governor continues to be the best positioned to make such policy decisions in the public interest of the State.

ARGUMENT

This Court should deny Plaintiffs' request to preliminarily enjoin the Governor's decision to end participation in federally funded pandemic unemployment insurance programs. Plaintiffs cannot demonstrate a likelihood of success on the merits because the Governor acted within his lawful authority under the CARES Act and South Carolina law by making a discretionary policy choice that advances the interests of the State. And a preliminary injunction would disserve the public interest by discouraging unemployed South Carolinians from filling over 80,000 available jobs, exacerbating a labor shortage that harms South Carolina businesses, and frustrating the State's economic recovery.

I. Governor McMaster Lawfully Ended the State's Participation in Federal Pandemic Unemployment Insurance Programs.

Plaintiffs' case depends on the premise that State law requires the State to accept all CARES Act funding, leaving no discretion over the matter to the Governor. Yet the sole provision cited for this supposed duty says nothing of the sort.

The provision Plaintiffs' stake their case on states, in relevant part, that the Department of Employment and Workforce "must cooperate with the United States Secretary of Labor to the fullest extent consistent with the provisions of these chapters" and "act, through the promulgation of appropriate rules, regulations, administrative methods and standards, as necessary to secure to this State and its citizens all advantages available under the provisions of the Social Security Act that relate to unemployment compensation" as well as other statutes listed. S.C. Code Ann. § 41-29-230(1). But nowhere does this language impose any duty on the State to seek and obtain unemployment insurance benefits

under the CARES Act, let alone a specific, mandatory duty that would be judicially enforceable. There is thus no basis to conclude that the Governor violated this provision. And because Plaintiffs cannot identify any other potential source of duty, Plaintiffs are not entitled to a preliminary injunction.

The statute's "fullest extent" language does not alter this analysis. That language does not direct the State to take any specific actions to "cooperate" with the federal government. Rather, other provisions of "these chapters" supply the specific actions that the State must take to "cooperate" with the federal government. Where, as here, the Governor has not violated a specific, mandatory duty in Section 41-29-230 the Governor has not violated his duty to "must cooperate with the United States Secretary of Labor to the fullest extent consistent with the provisions of these chapters." *Id.*

Nor has the Governor failed to adopt "appropriate rules, regulations, [and] administrative methods and standards" that are "necessary to secure to this State and its citizens all advantages available under the provisions of the Social Security Act that relate to unemployment compensation" and the other statutes listed. *Id*. This general mandate contrasts with other provisions that impose specific duties on the State. *Compare, e.g.*, *id.* § 41-29-230(2)(b) (requiring the State to "secure to this State the full reimbursement of the federal share of extended benefits paid pursuant to this title that are reimbursable"). The fact that the South Carolina legislature did not impose a duty on the State to adopt *specific* rules, but rather provided the State discretion to adopt rules it deems "appropriate," highlights the broad discretion the Governor has when administering unemployment insurance programs.

The propriety of the Governor's decision is reinforced by the terms of the CARES Act itself, including the Agreement between the State of South Carolina and the Secretary of Labor implementing it. The CARES Act expressly authorizes a state to "terminate" an agreement with the federal government for pandemic unemployment benefits "upon providing 30 days' written notice to the Secretary." 15 U.S.C. § 9023(a); *see also id.* §§ 9024(a), 9025(a). Consistent with this provision, the Agreement between South Carolina and the Secretary authorizes the State to terminate the Agreement on thirty day's written notice. The Governor complied with the terms of the CARES Act and the Agreement when he notified the Secretary on May 6 that the State would no longer participate in certain federal pandemic unemployment insurance programs effective June 30. The Governor therefore lawfully exercised his authority to terminate the Agreement consistent with federal law.

At bottom, Plaintiffs' real fight is with how the Governor exercised his lawful discretion under State law and the public-policy judgment his decision reflects. But absent a specific duty to act otherwise under South Carolina law, neither Plaintiffs nor this Court have the authority to second guess the Governor's decision and his judgment that ending federal pandemic aid will spur stable employment by ceasing to incentivize unemployment. While Plaintiffs might disagree with the Governor's policy judgment, it is for the politically accountable branches to make those calls. This Court should not substitute its judgment for the Governor's on this quintessential policy question.

II. Governor McMaster's Decision to End the State's Participation in Federal Pandemic Unemployment Insurance Programs Serves the Public Interest.

But even if the Court were authorized to second-guess the Governor's public-policy judgment, there is no basis to do so here. Overwhelming evidence confirms that CARES Act benefits have generated labor shortages by subsidizing unemployment, which in turn has

hurt small and large businesses throughout South Carolina and hindered the State's economic recovery. The Governor appropriately determined—based on data from South Carolina and other states—that scaling back those benefits would best stimulate the economic recovery in South Carolina and thereby advance the public interest.

A. Labor Shortages Are Hurting Businesses and Hindering the State's Economic Recovery.

As the United States emerges from a pandemic-induced recession, labor shortages are now the most serious problem frustrating the country's economic recovery. At the end of May, there were 9.2 million job openings nationwide. *See* U.S. Bureau of Lab. Stats., *Job Openings and Labor Turnover – May 2021* (July 7, 2021), https://www.bls.gov/news.release/pdf/jolts.pdf. In South Carolina, there are at least 81,684 open jobs as of May. *See South Carolina to Return to Pre-Pandemic Unemployment Program to Address Workforce Shortage*, South Carolina Office of the Governor Henry McMaster (May 6, 2021), https://tinyurl.com/4md9tjaa. This means that there are nearly as many jobs as there are unemployed South Carolinians—110,437 as of May. U.S. Bureau of Lab. Stats., *South Carolina* (last visited Aug. 9, 2021), https://www.bls.gov/regions/southeast/south_carolina.htm.

Despite the high number of open positions, however, jobs are not being filled. One survey estimates that 49% of business owners had job openings that they could not fill, a record high. Nat'l Fed'n of Indep. Bus., *Small Business Labor Shortage Hits New Record in July* (Aug. 2, 2021), https://tinyurl.com/dvnms59a. Another survey found that 61% of small employers were experiencing a staffing shortage. *See* Nat'l Fed'n of Indep. Bus., *Covid-19 Small Business Survey (18): Federal Small Business Programs, the Vaccine, Labor Shortage, and Supply Chain Disruptions* 4, 10 (June 2021), https://assets.nfib.com/nfibcom/Covid-19-18-

Questionnaire.pdf (question 20). And the Chamber found that "the number of workers quitting their jobs reached an all-time high of 2.7%, while layoffs and discharges reached an all-time low of 1%, another indication of the tightness of the labor market." U.S. Chamber of Com., *Number of Open Jobs Jumps by 1 Million—America's Worker Shortage Crisis is Worsening, Urgent Need for National Workforce Solutions* (June 8, 2021, 4:15 PM), https://tinyurl.com/r44ztved.

Such a tight labor market has consequences. As the Governor observed, the labor shortage "pose[s] a clear and present danger to the health of our State's businesses and to our economy." McMaster Letter, *supra*. Indeed, more than 90% of state and local chambers of commerce report that worker shortages are hindering local economic recoveries. *See* U.S. Chamber of Com., *The America Works Report: Quantifying the Nation's Workforce Crisis* (June. 1, 2021, 8:30 AM), https://tinyurl.com/5cp2w79c. As explained by the Chamber's Executive Vice President and Chief Policy Officer, Neil Bradley, "[w]e are seeing an increasing number of businesses turning down work and only partially reopening because they can't find enough workers." Chamber, *Number of Open Jobs*, *supra*. The inability of businesses to meet demand is a massive drag on economic growth and threatens the State's ability to recover from the pandemic.

B. Federal Pandemic Unemployment Insurance Benefits Are Contributing To Labor Shortages.

The biggest reason for this phenomenon is no mystery. Federal unemployment benefits are suppressing the labor supply by allowing many Americans to make more money by not working. As Governor McMaster explained, benefits available under the CARES Act are "incentivizing and paying workers to stay at home rather than encouraging them to return to the workplace." McMaster Letter, *supra*.

The data supports the Governor's conclusion. By most accounts, only a small percentage of unemployed Americans is actively looking for work. According to a recent poll, nearly half (49%) of Americans who became unemployed during the pandemic are not actively looking for work. *See* U.S. Chamber of Com., *Poll: The COVID-19 Unemployed* (June 3, 2021, 3:15 PM), https://tinyurl.com/w7h443ew. A separate survey found that approximately 30% of unemployed job applicants was passively looking for work while another 30% was not looking at all. Nick Bunker, *Indeed Job Search Seeker Survey June 2021: COVID Concerns and Financial Cushions Make Job Search Less Urgent*, Indeed Hiring Lab (June 29, 2021), https://tinyurl.com/xjymasck.

The availability of unemployment insurance benefits is a significant factor behind these statistics. *See id.* Sixteen percent of those who are not actively seeking employment admit that the amount of money they are receiving through government programs makes it "not worth looking" for work. *See* Chamber, *Poll*, *supra*. And 28% believe "[t]here are a lot of people who are not looking for work because they can do almost or just as well collecting unemployment benefits." *Id.* Another recent survey found that 1.8 million unemployed Americans have refused to return to work because of generous unemployment insurance benefits. *See* Sam Ro, *Poll: 1.8 million Americans have turned down jobs due to unemployment benefits*, Axios (July 14, 2021), https://tinyurl.com/8bdj6ute. The data thus confirm that many Americans believe they can make more money by not working—because of the availability of federal pandemic unemployment insurance benefits.

This belief is well-founded. Key voices have been warning that pandemic-related unemployment insurance benefits would often exceed earnings in many places. For example, when Congress was considering whether to extend the $600-per-week benefit

amount in June 2020, the Congressional Budget Office ("CBO") estimated that "[r]oughly five of every six recipients would receive benefits that exceeded the weekly amounts they could expect to earn from work during those six months." Letter from Cong. Budget Off. to Senator Charles Grassley, Chairman of the Senate Comm. on Fin. (June 4, 2020), https://tinyurl.com/ezznz96w. The CBO predicted that, "[i]n calendar year 2021, both output and employment would be lower than they would be if the increase in unemployment benefits was not extended." *Id.* A researcher affiliated with the Bipartisan Policy Center likewise recognized that many people "may be disincentivized from returning if the additional $600 in weekly benefits remains in place." G. William Hoagland et al., *It Doesn't Have to Be All or Nothing: How Unemployment Insurance Could Support Work and Continue to Provide Financial Relief*, Bipartisan Pol'y Ctr. (July 8, 2020), https://tinyurl.com/wparnsyj. Others described the benefits program as a "trap" and a "hindrance to getting people back to work with businesses now competing with unemployment benefits." Joe Horvath & Jonathan Ingram, *Refusing to Work: Handling Employee Work Rejections in Light of Expanded Unemployment Benefits*, FGA (June 24, 2020), https://tinyurl.com/d5w8p8vt.

The data in the chart below validate these predictions:

State	Average Weekly Private Service Earnings	Average UI Benefit Service Positions W/ $300 Federal	UI Benefits as % of Average Service Wage	Average Weekly Earnings Leisure and Hospitality	Average UI Benefit Leisure and Hospitality Positions W/ $300 Federal	UI Benefits as % of Average Leisure and Hospitality Wage
Alabama	$885	$696	79%	$360	$461	128%
Alaska	$1,003	$620	62%	$509	$462	91%
Arizona	$944	$647	69%	$480	$477	99%
Arkansas	$804	$617	77%	$378	$449	119%
California	$1,203	$787	65%	$576	$533	93%
Colorado	$988	$760	77%	$512	$539	105%
Connecticut	$1,101	$737	67%	$478	$490	102%
Delaware	$927	$663	72%	$417	$464	111%
Florida	$914	$670	73%	$481	$495	103%
Georgia	$905	$702	78%	$392	$474	121%
Hawaii	$1,002	$921	92%	$598	$671	112%
Idaho	$862	$728	85%	$352	$475	135%
Illinois	$1,019	$692	68%	$453	$474	105%
Indiana	$888	$613	69%	$375	$432	115%
Iowa	$864	$751	87%	$350	$483	138%
Kansas	$872	$720	82%	$346	$466	135%
Kentucky	$808	$654	81%	$372	$463	124%
Louisiana	$864	$586	68%	$369	$422	114%
Maine	$909	$729	80%	$477	$525	110%
Maryland	$1,127	$845	75%	$470	$528	112%
Massachusetts	$1,201	$826	69%	$539	$536	99%
Michigan	$904	$706	78%	$385	$473	123%
Minnesota	$1,071	$830	78%	$381	$489	128%
Mississippi	$714	$567	79%	$369	$438	119%
Missouri	$876	$651	74%	$412	$465	113%
Montana	$811	$701	86%	$367	$481	131%
Nebraska	$885	$712	80%	$361	$468	130%
Nevada	$836	$752	90%	$553	$599	108%
New Hampshire	$1,000	$721	72%	$467	$497	106%
New Jersey	$1,102	$877	80%	$494	$558	113%
New Mexico	$796	$720	90%	$388	$505	130%
New York	$1,137	$775	68%	$560	$534	95%
North Carolina	$928	$651	70%	$396	$450	114%
North Dakota	$869	$766	88%	$358	$492	137%
Ohio	$859	$699	81%	$360	$467	130%
Oklahoma	$812	$725	89%	$374	$495	133%
Oregon	$932	$751	81%	$454	$520	115%
Pennsylvania	$907	$757	83%	$372	$487	131%
Rhode Island	$948	$700	74%	$453	$491	108%
South Carolina	$860	$679	79%	$381	$468	123%
South Dakota	$818	$706	86%	$347	$472	136%
Tennessee	$885	$635	72%	$426	$462	108%
Texas	$957	$787	82%	$434	$521	120%
Utah	$947	$743	78%	$394	$485	123%
Vermont	$913	$835	91%	$469	$575	123%
Virginia	$1,028	$718	70%	$410	$467	114%
Washington	$1,133	$864	76%	$537	$567	106%
West Virginia	$835	$627	75%	$345	$435	126%
Wisconsin	$850	$654	77%	$350	$446	127%
Wyoming	$803	$701	87%	$408	$504	123%
District of Columbia	$1,844	$1,098	60%	$651	$582	89%
Average	$948	$727	77%	$430	$494	117%
Max	$1,844	$1,098	92%	$651	$671	138%
Min	$714	$567	60%	$345	$422	89%

Source: Ronald Bird, Senior Economist, U.S. Chamber of Com. (April 2021) (data from Dep't of Lab. Off. of Unemployment Ins., *UI Replacement Rates Report*, https://oui.doleta.gov/unemploy/ui_replacement_rates.asp, and U.S. Bureau of Lab. Stats., *Quarterly Census of Employment and Wages*, https://data.bls.gov/PDQWeb/en) ("Illustration 1"). The data in Illustration 1 demonstrate that unemployment benefits cover a substantial portion of—and, at times, more than—workers' wages. Combined state and federal unemployment benefits are 77% of the average weekly earnings for service positions. And for leisure and hospitality jobs, that number rises to 117%.

South Carolina's situation is similar to the national experience. The State offered an average of $679 in combined (state and federal) weekly unemployment benefits, which is 79% of the average weekly private sector pay ($860). *See* Illustration 1. In the leisure and hospitality industries, unemployment benefits exceeded average weekly earnings by 23%. *Id.*

These perverse incentives and labor shortages persist despite rapidly growing wages and employer-driven incentive programs. From March to April 2021, wages across the economy grew 0.7%—a surprising increase for just one month. *See* Sam Ro, *Employers are paying up to address labor shortages*, Axios (July 6, 2021), https://tinyurl.com/5et2bhm6. In some sectors, wages for entry-level jobs have risen by as much as 25% since the beginning of 2020. *See* Eric Morath, *New Jobless Claims Hold Near Pandemic Low, as Number on Benefits Falls*, Wall St. J. (July 8, 2021, 11:17 AM), https://tinyurl.com/5z77cvvj; *see also* Eric Morath, *Lower-Wage Workers See Biggest Gains From Easing of Covid-19 Pandemic*, Wall St. J. (July 4, 2021, 5:30 AM), https://tinyurl.com/2zv5ky57 (documenting wage increases across various sectors). The upshot is clear: as the State subsidizes joblessness, employees can delay job-

seeking, and employers will struggle to fill open positions—all of which is contributing to the number of unfilled jobs in the State.

C. Ending the State's Reliance on Federal Pandemic Unemployment Benefits Will Address the Labor Shortage and Stimulate Economic Recovery.

If federal pandemic unemployment benefits are suppressing the labor supply, then Governor McMaster's decision to end those benefits will reverse this trend by incentivizing people to return to work, which will in turn spur the State's post-pandemic economic recovery. Indeed, Governor McMaster's decision is supported by the low unemployment rates in other states that ended federal unemployment benefits. For example, the unemployment rate in Missouri, among the first to end federally-funded unemployment payments, was 4.2% in May—well below the 5.8% national average. *See* Eric Morath & Joe Barrett, *Americans Are Leaving Unemployment Rolls More Quickly in States Cutting Off Benefits*, Wall St. J. (June 27, 2021, 5:30 AM), https://tinyurl.com/9bwb8xb5. Another state, Montana, has an even lower unemployment rate—just 3.7% as of April. Governor's Off., *Montana's Unemployment Rate Continues Decline in April*, State of Mont. Newsroom (May 21, 2021), https://tinyurl.com/3tc6mems.

CONCLUSION

This Court should deny Plaintiffs' request for a preliminary injunction.

Dated: August 9, 2021

Respectfully submitted,

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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

Civil Action No. 2021-CP-40-03774

S.B., S.S., T.S. and B.B.,

Plaintiffs,

v.

HENRY DARGAN MCMASTER, in his official capacity as Governor of the State of South Carolina; and G. DANIEL ELLZEY, in his official capacity as the Director of the South Carolina Department of Employment and Workforce,

Defendants.

Defendants' Reply in Support of Motion to Dismiss and Sur-Reply in Opposition to Plaintiffs' Motion for Preliminary Injunction

Defendants Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina ("Governor McMaster") and G. Daniel Ellzey, in his official capacity as the Executive Director of the South Carolina Department of Employment and Workforce ("DEW") ("Director Ellzey") (collectively, "Defendants"), submit this reply in support of their Motion to Dismiss and sur-reply in opposition to Plaintiffs' Motion for Preliminary Injunction.

Introduction

Plaintiffs raise myriad arguments to which Defendants could (and, in an ideal world, would) respond. But given the time constraints of this case, Defendants focus primarily on only two issues in this brief: (1) Plaintiffs' mischaracterization of the CARES Act benefits as expansions of benefits supposedly already in the Social Security Act and (2) how Plaintiffs' delay in bringing this case bars their request for a mandatory preliminary injunction.

As to the first issue, Plaintiffs double down on their theory that Pandemic Unemployment Assistance ("PUA"), Pandemic Emergency Unemployment Compensation ("PEUC"), and Federal Pandemic Unemployment Compensation ("FPUC") are merely extensions of existing benefits under the Social Security Act. That theory is wrong on multiple levels. On one level, all three of these federal benefits are new, created solely because and after COVID-19 blindsided our economy. *See* Coronavirus Aid, Relief, and Economic Security ("CARES") Act, Pub. L. 116-136, 134 Stat. 281 (Mar. 27, 2020). DEW is not required to secure any advantages under the CARES Act, so South Carolina is not required to participate in PUA, PEUC, or FPUC. *See* S.C. Code Ann. § 41-29-230(1) (limiting DEW's obligation to act through rules, regulations, methods, and standards to four different federal acts).

On another level, this argument shows Plaintiffs' fundamental misunderstanding of how unemployment benefits work. Unemployment benefits to individuals are provided for by state law and funded by state unemployment taxes. *See id.* § 41-31-5 *et seq.* Administrative costs for running this unemployment-insurance program are provided by the Social Security Act. *See* 42 U.S.C. § 501. The Social Security Act does not provide any federal unemployment benefits to individuals.

As to the second issue, Plaintiffs briefly insist they have acted diligently. But they fail to engage with the specifics of Defendants' arguments. Most tellingly, they ignore the fact that they let two-thirds of the time between Governor McMaster's May 6 announcement and the September 6 end of the federal programs pass before bringing this lawsuit, by which point DEW was no longer set up to administer these federal programs. Such a delay precludes mandatory injunctive relief at this late stage.

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Argument

I. Plaintiffs have no response to the fact they belatedly seek a mandatory injunction to change the status quo.

Before turning to these two arguments, a threshold—and fatal—issue exists for Plaintiffs' Motion for Preliminary Injunction: They seek to change the status quo. Nowhere in their 17-page reply brief do Plaintiffs contest as much. For good reason. They are very open about the fact they want the Court to upset the status quo and order DEW to take the affirmative steps required to reenroll South Carolina in three federal programs.

Under South Carolina law, a "preliminary injunction should issue *only* if necessary to preserve the status quo." *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010) (emphasis added); *see also MailSource, LLC v. M.A. Bailey & Assocs.*, 356 S.C. 363, 368, 588 S.E.2d 635, 638 (Ct. App. 2003) ("The sole purpose of a temporary injunction is to preserve the status quo."). Here, an injunction would change—not preserve—the status quo. Thus, the Court cannot grant Plaintiffs a preliminary injunction.[1]

II. PUA, PEUC, and FPUC are not part of the Social Security Act.

A. Plaintiffs misapprehend what benefits the Social Security Act provides.

At the outset, it should be clear what Plaintiffs do not dispute: PUA, PEUC, and FPCU were enacted as part of the CARES Act. No surprise there. After all, Congress undoubtedly

[1] Two other quick observations about preliminary injunctions and standards. *First*, Plaintiffs implicitly recognize standards matter. That is how they try to distinguish the Ohio decision that goes against them. *See* Pls.' Reply 2. But that distinction is unavailing here, as the reasoning of the Ohio court does not turn on what bar a plaintiff must clear to proceed—that was just one of multiple distinctions the Ohio court drew with the more poorly reasoned cases from Maryland and Indiana. *Second*, Plaintiffs cite multiple cases from other states, essentially counting how many favor them and how many do not. *See* Pls.' Reply 2. This basic math exercise is, of course, no response to Defendants' argument that Plaintiffs have failed to meet the standard under South Carolina law for a mandatory injunction.

adopted all three programs in the CARES Act. *See* CARES Act, Div. A, Title II, § 2102, 134 Stat. at 313 (PUA, codified at 15 U.S.C. § 9021); *id.* Div. A, Title II, § 2107, 134 Stat. at 323 (PEUC, codified at 15 U.S.C. § 9025); *id.* Div. A, Title II, § 2107, 134 Stat. at 323 (FPUC, codified at 15 U.S.C. § 9023).

Without PUA, PEUC, and FPUC being expressly part of the Social Security Act, Plaintiffs are forced to rely on the fact that money for two of these federal benefits flows through accounts connected to the Social Security Act. *See* Pls.' Reply 4–6. This does not convert these three CARES Act benefits into ones under the Social Security Act for multiple reasons.

First, Plaintiffs' argument that these CARES Act programs are "temporary enhancements to benefits that have long been provided under the [Social Security Act]," Pls.' Reply 7, shows a fundamental misunderstanding of what the Social Security Act provides and what state law provides. The "advantages" the Social Security Act provides are federal funds to cover administrative costs for running the State's unemployment-insurance program. *See* 42 U.S.C. § 501 ("The amounts made available pursuant to section 1101(c)(1)(A) of this title for the purpose of assisting the States in the administration of their unemployment compensation laws shall be used as hereinafter provided."); *id.* § 1101(c)(1)(A) (providing funds for "the States in administration of their unemployment compensation laws"). At its simplest, the Social Security Act incentivizes states to create unemployment-insurance programs with the carrot of federal funding to administer those programs. In enacting 42 U.S.C. § 1101, Congress created the Unemployment Trust Fund to facilitate the transfer of administrative funding. But the simple fact that an account exists is not an advantage. In the context of the Social Security Act, the advantages flow from 42 U.S.C. §§ 501–506, which provide states with an entitlement to funding under certain conditions. These provisions have no connection to the CARES Act.

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In reference to the "extended unemployment compensation account" identified in 42 U.S.C. § 1105(a), that account was created in 1970 for the purpose of paying extended benefits under the Federal-State Extended Unemployment Compensation Act of 1970. *See* Pub. L. 91-373, Title II, § 305, 84 Stat. 695, 716 (Aug. 10, 1970). It has never been used to pay benefits under the Social Security Act. This account is instead used to pay extended benefits (which provides an extra 13 weeks of benefits for claimants during periods of high unemployment, with half of the benefits paid by the states and half by the federal government). *See* 42 U.S.C. § 1105(d) (authorizing appropriations "to carry out the purposes of the Federal-State Extended Unemployment Compensation Act of 1970"). As Defendants previously noted, the General Assembly amended section 41-29-230 to add the Federal-State Extended Unemployment Compensation Act of 1970. *See* 1971 S.C. Acts No. 516, § 11. Such an amendment to state law would have been unnecessary if, as Plaintiffs argue here, the advantage is the Unemployment Trust Fund (which was created by the Social Security Act), not the source of funds.

Meanwhile, benefits to individual claimants are established by state law and paid from state-imposed unemployment taxes on employers. *See* S.C. Code Ann. § 41-31-5 *et seq.* States must create their own programs and determine who qualifies for benefits and what those benefits are. *See Unemployment Compensation: Federal-State Partnership* 11, U.S. Dep't of Labor (May 2019), https://tinyurl.com/jf8prktf. Importantly, the Social Security Act does not provide any unemployment benefits (*i.e.*, a check) to any individual claimant.

In enacting PUA, PEUC, and FPUC, Congress did something with unemployment benefits entirely different from what it did in the Social Security Act. Rather than just funding the administrative costs of state-run programs, Congress provided direct unemployment benefits to individuals and established the specific eligibility criteria for claimants to receive those benefits.

Therefore, PUA, PEUC, and FPUC did not extend anything in the Social Security Act because there was nothing like them in the Social Security Act to extend. That Congress chose to use existing accounts connected to the Social Security Act to facilitate payment of these benefits does not change this analysis. Nor does Congress's decision to have state agencies administer PUA, PEUC, and FPUC affect that reasoning. These decisions simply reflected an efficient means to distribute new benefits to respond to a novel public health emergency.

Second, Plaintiffs again try to skirt the fact that only PUA and PEUC funds flow through these accounts connected to the Social Security Act. In their brief, Plaintiffs say FPUC funding is still "funded through the extended unemployment compensation account" connected to the Social Security Act. Pls.' Reply 5. This is wrong, as are the parentheticals in their chart. *See* Pls.' Reply 6. Nothing in the FPUC statute (15 U.S.C. § 9023) refers to this account (found in 42 U.S.C. § 1105), and Plaintiffs offer no citation to explain this contention. Notably, Plaintiffs cite 15 U.S.C. § 9023(d)(1)(B), *see* Pls.' Reply 4, but that provision says nothing about any account connected with the Social Security Act. Without an explanation showing any legal basis for FPUC being funded through the Social Security Act, Plaintiffs' contention that FPUC is part of the Social Security Act must be rejected.

Third, in addition to the legislative history cited in Defendants' opening brief, other decisions by Congress during this pandemic support the conclusion that PUA, PEUC, and FPUC are not part of the Social Security Act. Nine days before adopting the CARES Act, Congress enacted the Families First Coronavirus Response Act, Pub. L. 116-127, 134 Stat. 178 (Mar. 18, 2020). In that Act, Congress expressly amended "Section 903 of the Social Security Act" (found in 42 U.S.C. § 1103) to provide additional administrative funding for states' unemployment-insurance programs. *See* Pub. L. 116-127, § 4102, 134 Stat. at 192–93. Thus, just days before the

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CARES Act, Congress specifically amended the Social Security Act regarding funding for administrative expenses for unemployment benefits. Had Congress thought of PUA, PEUC, and FPUC as falling under the umbrella of the Social Security Act, Congress would have followed the same approach of amending the Social Security Act. It did not. Despite their mental gymnastics, Plaintiffs have no response to that simple fact.

B. PUA, PEUC, and FPUC are new benefits.

Having cleared up Plaintiffs' mistaken contention that PUA, PEUC, and FPUC are part of the Social Security Act, turn now to their contention that these benefits are not new. Nothing supports that contention.

First, the programs' names indicate they must be new. COVID-19 became a national crisis in March 2020. *See* Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, Proclamation 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020). Each program was a response to that pandemic: *Pandemic* Unemployment Assistance, *Pandemic* Emergency Unemployment Compensation, and Federal *Pandemic* Unemployment Compensation. Plaintiffs ask the Court simply to throw common sense to the wind here.

Second, although Congress itself does not codify the laws it enacts, where laws are codified is still relevant. As for the process, the Office of Law Revision Counsel that prepares the U.S. Code is within the House of Representatives. *See* 2 U.S.C. § 285. That is an "impartial[]" office that works "to develop and keep current an official and positive codification of the laws of the United States," *id.* § 285a, with staff appointed "solely on the basis of fitness to perform the duties of the position," *id.* § 285c. As for what guidance codification provides, the U.S. Supreme Court thinks where an act is codified is "probative of the legislature's intent." *Smith v. Doe*, 538 U.S. 84, 94 (2003). Naturally, PUA, PEUC, and FPUC are all in a new chapter (116) (and thus subchapter

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(II)) of Title 15 because they are new federal initiatives. These new programs were not added into the existing provisions of the Social Security Act in Title 42.

Third, Plaintiffs try to dismiss what the U.S. Department of Labor thought about PUA, PEUC, and FPUC, *see* Pls.' Reply 3 n.8, but they cannot avoid the Department of Labor's view so easily. For one, to the extent there is any ambiguity, the agency charged with administering the programs is entitled to deference in how it interprets the statute. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). For another, the Department of Labor issued six directives (or formal guidance) on PUA, four directives on PEUC, and six directives on FPUC. *See Unemployment Insurance Relief during COVID-19 Outbreak*, U.S. Dep't of Labor, https://tinyurl.com/3p9jcryy (last visited Aug. 9, 2021) (collecting formal Department of Labor guidance on COVID-19 issues). Such a deluge of guidance would be unnecessary for "old" programs. Plus, if issuing new guidance were not enough on its own, this guidance repeatedly referred to PUA, PEUC, and FPUC as "new" federal programs. *See, e.g.*, Unemployment Insurance Program Letter 16-20 at 7, U.S. Dep't of Labor (Apr. 5, 2020) (PUA is a "new federal program"), https://tinyurl.com/ymetcwvh; Unemployment Insurance Program Letter 17-20 at 7, U.S. Dep't of Labor (Apr. 10, 2020) (PEUC is a "new federal program"), https://tinyurl.com/82v2zfrp.[2]

C. Plaintiffs' other merits arguments are all built on the faulty conclusion that PUA, PEUC, and FPUC are extensions of existing benefits under the Social Security Act.

With a correct understanding of PUA, PEUC, and FPUC as new CARES Act programs, Plaintiffs' other arguments quickly fall by the wayside.

[2] Plaintiffs attach these documents to their Complaint, so they cannot now credibly claim that the Court should not consider what the Department of Labor thinks about PUA, PEUC, and FPUC. *See* Compl. Exs. B, C.

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Start with their contention that Congress did not have to amend the Social Security Act because it "already contained the funding, administrative, and guidance provisions for regular UI benefits." Pls.' Reply 7. As just discussed, the Social Security Act provided funding for DEW's administration of the State's unemployment-insurance program, but no actual unemployment benefits to individuals. Congress did something new and different with PUA, PEUC, and FPUC.

Look next to the General Assembly's decision not to amend section 41-29-230(1). Once deprived of their contention that PUA, PEUC, and FPUC are part of the Social Security Act, Plaintiffs are left with only two things. *See* Pls.' Reply 8–9. One, they say the General Assembly did not have much time to act after the Governor's May 6 announcement. But that misses the point that the Governor always had the discretion whether South Carolina should participate in the CARES Act program. The General Assembly was free at any point between March 27, 2020 (when the CARES Act was enacted) and May 6, 2021 (when Governor McMaster made the announcement) to take that discretion away. The General Assembly never did.[3] Two, Plaintiffs note that Arkansas has a statute similar to South Carolina's and that its legislature is in the process of amending the statute after the court's preliminary injunction there. This argument actually cuts against Plaintiffs: The Arkansas legislature thought the state court got the statute so wrong that it immediately sought to overturn that judicial decision by legislative act.[4]

[3] Nor has legislative leadership called the General Assembly back into session to take up the issue, as the *sine die* resolution would permit. *See* H. 4285 (124th Sess.). As for Plaintiffs' contention that a two-thirds vote of the General Assembly would be required, they are wrong. The *sine die* resolution expressly allows for "introduction, receipt, and consideration of . . . appropriation or authorization legislation concerning COVID-19 relief funding and related matters." *Id.* §§ (B)(1), (C)(1), (D)(1), (E)(1), (F)(1).

[4] On the subject of amending state law, Plaintiffs ignore that on the few occasions when the federal government has adopted new unemployment-related benefits for individuals, such as in the Federal-State Extended Unemployment Compensation Act of 1970 that also uses the accounts in 42 U.S.C. §§ 1104 and 1105, the General Assembly recognized the need to amend section 41-29-

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Turn last to the fact that section 41-29-230(1) never mentions the Governor. Plaintiffs argue this Court must substitute "the Governor" in place of the "department" for the statute to have any meaning. *See* Pls.' Reply 9–10. This contention, however, ignores that section 41-290-230(1) speaks to specific administrative duties that DEW must perform. If DEW were to fail in these tasks, the State might not be complying with the Social Security Act and might jeopardize the State's administrative funding to administer the unemployment-insurance program. *See* 42 U.S.C. § 503(b) (providing for the ending of administrative funding where a state workforce agency—not a governor—fails to meet its obligations). Therefore, contrary to Plaintiffs' argument, the Court does not have to read section 41-290-230(1) as binding the policy decisions of the Governor (or the General Assembly for that matter) for that section to have meaning.[5]

III. Plaintiffs never try to explain their delay in bringing this case.

Plaintiffs offer no explanation for why they waited 83 days after Governor McMaster's announcement that South Carolina would stop participating in PUA, PEUC, and FPUC to bring this lawsuit. Instead, they strain to cast their delay as a "short interval" that could not possibly be too long. Pls.' Reply 14. This interval, however, must be put in context. As our supreme court has

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230(1). That demonstrates that the mere use of those accounts to send money to the State does not necessarily mean that that money is an advantage under the Social Security Act.

[5] A final merits observation: Plaintiffs make a big fuss at the beginning of their brief that this case does not involve a policy question. *See* Pls.' Reply 1. Yet, for some reason, Plaintiffs proceed to spend three-and-a-half pages debating the wisdom of Governor McMaster's decision. *See* Pls.' Rep. 11–14. At best for Plaintiffs, this policy decision presented a debatable question on which reasonable minds could differ. (Just compare the arguments in the two amicus briefs from the business community laying out the competing argument for why the Governor's decision was the right one to Plaintiffs' brief.) Given this room for debate and the fact that nothing in this case involves a suspect class and heightened scrutiny, the Governor's decision easily passes rational basis review, if the Court determines that analyzing that decision is necessary or appropriate. *See Denene, Inc. v. City of Charleston*, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004) ("If the classification does not implicate a suspect class or abridge a fundamental right, the rational basis test is used.").

explained, a delay must be considered "under the circumstances." *Robinson v. Est. of Harris*, 389 S.C. 360, 372, 698 S.E.2d 801, 807 (2010). Here, Plaintiffs do not present any evidence of circumstances that would render their delay in seeking a preliminary injunction reasonable.

With no good answer or explanation for their delay, Plaintiffs also try to downplay the impact of their delay on Defendants. To be sure, as Plaintiffs note, the U.S. Department of Labor may let states reenroll in some or all of the CARES Act programs, *see* Unemployment Insurance Program Letter 14-21, Change 1 at 7, U.S. Dep't of Labor (July 12, 2021), https://tinyurl.com/2hedvchj, but that is irrelevant to the prejudice analysis. It merely means that South Carolina would not violate federal law by trying to reenroll. *See* 15 U.S.C. § 9023(a) (requiring an agreement from "[a]ny state which desires" to administer FPUC and providing for termination rights); 15 U.S.C. § 9025(a) (same for PEUC); 15 U.S.C. § 9021(f) (speaking to the need for agreements with states for PUA).

As for Plaintiffs' other argument, they fault DEW for not increasing its staffing because federal money was available. *See* Pls.' Reply 15. DEW did, in fact, increase staffing while PUA, PEUC, and FPUC were in effect. Had Plaintiffs brought this action then, the Court could have considered and decided the issue before these programs' termination in late June. In such a scenario, if the Courts had found the Governor wrongly withdrew, the programs could have continued without interruption and without changes to staffing levels and technology. But because Plaintiffs delayed, DEW has fully implemented the Governor's decision, including reduction of staff levels and changes to its benefit systems. Having to ramp up staffing and reverse programmatic changes in such a short window is a significant burden (no matter who ultimately foots the bill). Indeed, getting staffed up to run PUA, PEUC, and FPUC again between now and September 6 is likely not even possible. That would leave DEW's current staff having to administer

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the program. Plus, this will almost certainly lead to delays in claimants receiving both federal and state benefits. No amount of federal funding can alleviate this burden on the public servants currently at DEW to reinstate in a temporary federal program for three weeks (or less).

Conclusion

For the foregoing reasons, the Court should deny Plaintiffs' Motion for Preliminary Injunction and grant Defendants' Motion to Dismiss.

Respectfully submitted,

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August 10, 2021
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STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND**	**IN THE COURT OF COMMON PLEAS** **FIFTH JUDICIAL CIRCUIT** **Civil Action No. 2021-CP-40-03774**
S.B., S.S., T.S. and B.B., *Plaintiffs*, v. HENRY DARGAN MCMASTER, in his official capacity as Governor of the State of South Carolina; and G. DANIEL ELLZEY, in his official capacity as the Director of the South Carolina Department of Employment and Workforce, *Defendants*.	**Defendants' Reply in Support of Motion to Require Plaintiffs to Identify Themselves and to Strike Anonymous Certifications**

Defendants Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina ("Governor McMaster") and G. Daniel Ellzey, in his official capacity as the Executive Director of the South Carolina Department of Employment and Workforce ("DEW") ("Director Ellzey") (collectively, "Defendants") submit this reply in support of their motion (1) to require Plaintiffs to proceed under their names, rather than anonymously; and (2) if Plaintiffs do not identify themselves, to strike the unsworn, anonymous certifications submitted in connection with their Motion for Preliminary Injunction.

The people of South Carolina have spoken on this issue, and the South Carolina Constitution unequivocally mandates that "[a]ll courts shall be public." S.C. Const. art. I, § 9; *see also* S.C. Code Ann. § 14-5-10 (providing that circuit courts "shall be courts of record, and the books of record thereof shall, at all times, be subject to the inspection of any person interested therein"). Plaintiffs, however, ignore this constitutional command, as well as the relevant precedent and procedural rules designed to implement and enforce the guarantee that the judicial

system will remain open and accessible to the public. In doing so, Plaintiffs fail to acknowledge, much less carry, their burden for attempting to proceed anonymously. Plaintiffs do not address, at all, two of the elements on which they bear the burden for attempting to proceed anonymously, thereby conceding those points (whether they are minors and proceeding against a government entity). *See Doe v. Howe*, 326 S.C. 212, 217–18, 607 S.E.2d at 356–57 (Ct. App. 2004) (listing five factors courts consider when deciding a motion to proceed anonymously).

Nor did Plaintiffs file a proper motion to even put the issue before the Court. *Cf. Richard S. v. Sebelius*, No. CA 3:12-007-TMC, 2012 WL 1909344, at *1 (D.S.C. May 25, 2012) (stating courts "do[] not condone the filing of an action anonymously without permission"). Defendants had to bring it to the Court's attention. *Cf. id.* (noting "the burden should not fall on Defendants to request identification of Plaintiffs"). Yet, in response to Defendants' Motion, Plaintiffs neither ask for forgiveness nor permission to proceed in secret while seeking taxpayer funds. The Court should not excuse Plaintiffs' substantive and procedural mistakes, particularly where, as here, doing so would undermine the public's access to the proceedings and operate to Defendants' prejudice.

Instead of attempting to shoulder their burden, Plaintiffs chastise Defendants for waiting to file a motion in accordance with the briefing order agreed upon by the parties and this Court. For starters, any allegation of delay is curious coming from Plaintiffs. Indeed, they waited nearly four months to file this lawsuit after the Governor announced on May 6, 2021, that South Carolina's participation in new, pandemic-related federal supplemental unemployment benefit programs was coming to an end. Unlike Plaintiffs, Defendants did not have months to sit on this case. Also unlike Plaintiffs, Defendants filed a proper motion to put the issue of anonymity before the Court for consideration. Regardless, Defendants notified Plaintiffs of the forthcoming motion

at the status conference on August 4, 2021, and filed their Motion eight days after the lawsuit was filed. Defendants' Motion was timely. And while Defendants rejected Plaintiffs' offer to identify Plaintiffs subject to a confidentiality order, the parties were not required to reach an agreement on whether Plaintiffs could proceed in secret. Rule 11, SCRCP, requires consultation, not concession.

When Plaintiffs finally get around to the merits of those elements they do address, nothing they posit passes muster. First, as to whether the case involves sensitive or personal information, Plaintiffs say that, "given the highly politicized environment and politically charged issues at stake in this litigation, Plaintiffs have a reasonable fear that they will be subject to harassment, retaliation, or the loss of job opportunities if their names are made public." Pls.' Resp. in Opp. at 2. But "courts have generally been reluctant to provide anonymity based on a plaintiff's fear of embarrassment over the revelation of personal matters." *Richard S.*, 2012 WL 1909344, at *2. That happens in all litigation, including routine personal injury cases.

To think that Plaintiffs can just ask the judiciary to compel government officials to take action that affects both the state and federal treasury—all while proceeding anonymously—defies both law and logic. *Cf. Howe*, 362 S.C. at 218, 607 S.E.2d at 357 (stating "whether the action is against a governmental or private party" must be considered); *Pub. Citizen*, 749 F.3d at 273–74 ("Pseudonymous litigation undermines the public's right of access to judicial proceedings" and the public's "interest in knowing the names of the litigants."); *Doe v. Pittsylvania Cty., Va.*, 844 F. Supp. 2d 724, 730 (W.D. Va. 2012) (noting that "in only a very few cases challenging government activity can anonymity be justified").

Frankly, if Plaintiffs were so concerned about getting unwarranted public attention, presumably their counsel would not have initiated a media tour immediately after filing this lawsuit. *E.g.*, Jodi Shafto, *SC Gov. McMaster Sued Over Decision to End Federal Jobless Aid*,

POST & COURIER (July 29, 2021), https://tinyurl.com/ynese5n8; David Travis Bland, *Advocates Sue SC Governor, State Labor Agency Over Ending COVID Unemployment Benefits*, THE STATE (July 29, 2021), https://tinyurl.com/2472s9ds. Plaintiffs cannot make a splash in the press and then demand anonymity and ask the public to avert its eyes. The public attention on *this lawsuit* is a problem of Plaintiffs' own making. And it's too late for Plaintiffs to unring that bell.

Next, Plaintiffs' stock response for purported retaliation, *see* Cert. of S.B. ¶ 12; Cert. of S.S. ¶ 10; Cert. of T.S. ¶ 10; Cert. of B.B. ¶ 10, falls far short of the high bar to proceed anonymously. Such a speculative and naked assertion is insufficient. *See Richard S.*, 2012 WL 1909344, at *2. (refusing to allow a plaintiff to proceed anonymously when there was "no evidence of any retaliation"). Plaintiffs could have, in their certifications, offered evidence to back up their contention here. Their failure to do so is telling.

Finally, as for prejudice, Defendants, of course, acknowledged this potential scenario in their Motion. *See* Defs.' Mot to Strike at 5 n.1. Defendants also noted that simply having the names may not be sufficient due to DEW's reporting obligations. In any event, Plaintiffs still miss the point about open courts. As the District of South Carolina has recognized, "[i]t is the public, not the opposing party or the court, which has an interest in the disclosure of the parties' identities." *Richard S.*, 2012 WL 1909344, at *1. Put another way, "[i]t is well settled that the public and press have a qualified right of access to judicial documents and records filed in civil and criminal proceedings." *Doe v. Pub. Citizen*, 749 F.3d 246, 265 (4th Cir. 2014). After all, "public access promotes not only the public's interest in monitoring the functioning of the courts but also the integrity of the judiciary." *Id.* at 266. For that reason, even upon a proper motion, it is a "rare dispensation" for a plaintiff to be allowed to proceed anonymously. *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993). This is not a rare case.

The Court should therefore protect the constitutional right to open judicial proceedings and not permit Plaintiffs to proceed anonymously. And the Court should strike the anonymous certifications Plaintiffs filed in connection with their Motion for Preliminary Injunction.

(Signature page to follow)

Respectfully submitted,

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August 10, 2021
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Hon. R. Lawton McIntosh, Circuit Court Judge

Case No. 2021-CP-40-03774

Sheena Brannon, Shane Stencil, Tina Sullivan, and Brandon Beaty

Appellants

v.

Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina, and G. Daniel Ellzey, in his official capacity as Director of the South Carolina Department of Employment and Workforce

Respondents

NOTICE OF APPEAL

Sheena Brannon, Shane Stencil, Tina Sullivan, and Brandon Beaty appeal the order of the Honorable R. Lawton McIntosh dated August 13, 2021. Appellants received written notice of entry of this order on August 13, 2021.

August 16, 2021

SOUTH CAROLINA APPLESEED
LEGAL JUSTICE CENTER

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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

Civil Action No. 2021-CP-40-03774

S.B., S.S., T.S. and B.B.,

Plaintiffs,

v.

HENRY DARGAN MCMASTER, in his official capacity as Governor of the State of South Carolina; and G. DANIEL ELLZEY, in his official capacity as the Director of the South Carolina Department of Employment and Workforce,

Defendants.

[Proposed]
Order Granting Motion to Dismiss, Denying Motion for Preliminary Injunction, and Denying as Moot Motion to Require Plaintiffs to Identify Themselves

S.B., S.S., T.S., and B.B. filed this lawsuit challenging Governor Henry McMaster's decision to instruct S.C. Department of Employment and Workforce Executive Director G. Daniel Ellzey to terminate South Carolina's participation in three federal COVID-19-related unemployment-benefits programs: Pandemic Unemployment Assistance, Pandemic Emergency Unemployment Compensation, and Federal Pandemic Unemployment Compensation. Plaintiffs seek a preliminary injunction to require South Carolina to reenroll in these three programs. Defendants, meanwhile, have moved to dismiss and to require Plaintiffs to identify themselves.

Ultimately, this case is not about whether you agree with the Governor's decision and whether South Carolina should be participating in these three programs. Rather, it is a case concerning whether Defendants have the discretion to opt in—and, conversely, opt out—of these

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programs. For the reasons explained in this Order, the Court **GRANTS** the Motion to Dismiss, **DENIES** the Motion for Preliminary Injunction, and **DENIES AS MOOT** the Motion to Require Plaintiffs to Identify Themselves.

Background

When COVID-19 disrupted life in this country, Congress quickly enacted the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, Pub. L. 116-136, 134 Stat. 281 (Mar. 27, 2020), for the laudable purpose of providing safeguards to the unemployed. Among the many things Congress did in the CARES Act was enact three new benefits.

First, there was Pandemic Unemployment Assistance ("PUA"). *See* 15 U.S.C. § 9021. This provided unemployment benefits to people who were ineligible for them under existing state and federal unemployment programs, including the self-employed, the underemployed, and independent contractors.

Second, there was Pandemic Emergency Unemployment Compensation ("PEUC"). *See id.* § 9025. This provision provided up to 51 weeks of federal unemployment benefits for claimants who exhausted the traditional 20 weeks they can receive under state law. Thus, it allowed claimants to extend their time on unemployment by almost an entire year.

Third, there was Federal Pandemic Unemployment Compensation ("FPUC"). Here, Congress created a program to pay an additional $600 per week to claimants receiving benefits under state or federal law. *See* 15 U.S.C. § 9023. Congress initially allowed this benefit to lapse, before reinstating it at $300 per week starting December 27, 2020. *See* Consolidated Appropriations Act, 2021, Pub. L. 116-260, § 203, 134 Stat 1182, 1953 (Dec. 27, 2020); American Rescue Plan Act of 2021 ("ARPA"), Pub. L. 117-2, § 9013, 135 Stat. 4, 119 (Mar. 11, 2021).

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Like every other state in the country, South Carolina agreed to participate in these programs when they were first enacted, and Governor McMaster delegated to Director Ellzey his authority to enter into the necessary agreement with the U.S. Secretary of Labor. More than a year later, on May 6, 2021, Governor McMaster directed Director Ellzey and DEW to terminate South Carolina's participation in PUA, PEUC, and FPUC effective June 30, 2021. That termination took place as scheduled and consistent with the 30-day prior-notice requirement in the CARES Act.

Plaintiffs are four anonymous individuals who allege that they are South Carolina residents and that they began receiving unemployment, including the new federal benefits, after the COVID-19 pandemic began. Each also allege that they received notice in June 2021 that the extra federal unemployment benefits would not be continuing. On July 28, 2021, Plaintiffs sued Governor McMaster and Director Ellzey and challenged the decision to stop participating in PUA, PEUC, and FPUC.

Legal Standard

A motion to dismiss should be granted whenever a plaintiff fails "to state facts sufficient to constitute a cause of action." Rule 12(b)(6), SCRCP. A circuit court's "ruling on a 12(b)(6) motion must be based solely upon the allegations set forth on the face of a complaint." *Stiles v. Oranato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995). "Viewing the evidence in favor of the plaintiff, the motion must be granted if facts alleged in the complaint and inferences reasonably deducible therefrom do not entitle the plaintiff to relief on any theory of the case." *Brown v. Theos,* 338 S.C. 305, 309–10, 526 S.E.2d 232, 235 (Ct. App. 1999).

A plaintiff "must establish three elements" to obtain a preliminary injunction: (1) irreparable harm, (2) likelihood of success on the merits, and (3) no adequate remedy at law. *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011). Whether to grant

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a preliminary injunction is in a trial court's discretion. *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). A preliminary injunction "is a drastic remedy," *id.*, that should "preserve the status quo," *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010). It is more drastic when, like here, the movant seeks a mandatory injunction that changes the status quo. *See Wetzel v. Edwards*, 635 F.2d 283, 286 (4th Cir. 1980); *Gantt v. Clemson Agr. Coll. of S.C.*, 208 F. Supp. 416, 418 (W.D.S.C. 1962) ("at the preliminary stage of proceedings," a mandatory injunction should be granted only "in rare instances in which the facts and law are clearly in favor of the moving party").

Analysis

I. Motion to Dismiss

A. Plaintiffs do not have a private right of action.

As a threshold issue, Plaintiffs cannot bring any cause of action here. The General Assembly has specifically prohibited such an action against Director Ellzey. *See* S.C. Code Ann. § 41-29-25(D) ("Nothing in this section gives rise to a cause of action against the executive director or any decision made by the executive director concerning departmental operations or development.").

The fact that they also sued Governor McMaster and rely heavily on another provision—section 41-29-230—does not change the result. "In determining whether a statute creates a private cause of action, the main factor is legislative intent." *Georgetown Cty. League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 353, 713 S.E.2d 287, 289 (2011) (cleaned up). Where a private right of action is "not expressly provided," it may still "be created by implication"—but only "if the legislation was enacted for the special benefit of the private party." *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 121, 678 S.E.2d 430, 433 (2009). "If the overall purpose

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of the statute is to aid society and the public in general, the statute is not enacted for the special benefit of a private party." *Id.* Section 41-29-230(1) focuses on advantages for "this State and its citizens." Such a general command demonstrates that this statute is about society generally, not a particular individual.

Nor is the Uniform Declaratory Judgments Act of any help to Plaintiffs. That act "is not an independent grant of jurisdiction." *Tourism Expenditure Rev. Comm. v. City of Myrtle Beach*, 403 S.C. 76, 81, 742 S.E.2d 371, 374 (2013). In other words, the act provides a remedy, not a right.

B. PUA, PEUC, and FPUC are not part of the Social Security Act.

Even if Plaintiffs could bring a private right of action, their claims fail. Section 41-29-230(1) of the South Carolina Code of Laws provides:

> In the administration of Chapters 27 through 41 of this title, the department must cooperate with the United States Secretary of Labor to the fullest extent consistent with the provisions of these chapters, and act, through the promulgation of appropriate rules, regulations, administrative methods and standards, as necessary to secure to this State and its citizens all advantages available under the provisions of the Social Security Act that relate to unemployment compensation, the Federal Unemployment Tax Act, the Wagner-Peyser Act, and the Federal-State Extended Unemployment Compensation Act of 1970.

S.C. Code Ann. § 41-29-230(1). Plaintiffs insist that PUA, PEUC, and FPUC are advantages under the Social Security Act. Defendants, on the other hand, contend that PUA, PEUC, and FPUC are actually provisions under the CARES Act—not the Social Security Act—and, thus, section 41-29-230(1) has no relevance to PUA, PEUC, or FPUC. The Court agrees with Defendants.

As an initial matter, the historical structure of unemployment insurance supports Defendants' position. The Social Security Act provides federal funds to cover administrative costs for running the State's unemployment-insurance program. *See* 42 U.S.C. § 501; *id.*

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§ 1101(c)(1)(A). At its simplest, the Social Security Act incentivizes states to create unemployment-insurance programs with the carrot of federal funding to administer those programs. Importantly, the Social Security Act does not provide any unemployment benefits (*i.e.*, a check) to any individual claimant. Those benefits to individual claimants are established by state law and paid from state-imposed unemployment taxes on employers. *See* S.C. Code Ann. § 41-31-5 *et seq.*

Plaintiffs, however, claim that benefits under the CARES Act—PUA, PEUC, and FPUC—are advantages under the provisions of the Social Security Act that relate to unemployment compensation. The Court disagrees. The benefits provided under the CARES Act are new benefits, never previously available to unemployed workers, and are provided by legislation separate and apart from the Social Security Act. Although the federal government chose to use the funding mechanisms available through the Social Security Administration, that does not mean these new benefits fall under the Social Security Act. It simply shows Congress used an existing mechanism to put PUA, PEUC, and FPCU into place quickly.

Additionally, the way Congress enacted various provisions related to unemployment benefits during the COVID-19 pandemic supports Defendants' position. Congress adopted all three programs in the CARES Act, without amending the Social Security Act. *See* CARES Act, Div. A, Title II, § 2102, 134 Stat. at 313 (PUA, codified at 15 U.S.C. § 9021); *id.* Div. A, Title II, § 2107, 134 Stat. at 323 (PEUC, codified at 15 U.S.C. § 9025); *id.* Div. A, Title II, § 2107, 134 Stat. at 323 (FPUC, codified at 15 U.S.C. § 9023).

In contrast with Congress's decision not to amend the Social Security Act for PUA, PEUC, and FPUC, Congress expressly amended the Social Security Act to make changes regarding unemployment benefits for employees of governmental entities and nonprofits. *See* CARES Act,

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Div. A, Title II, § 2103, 134 Stat. at 317. Likewise, Congress amended the Social Security Act regarding funding for administrative costs of running unemployment-insurance programs just days before the CARES Act. These distinctions show Congress knew how to and very well could have amended the Social Security Act to provide that PUA, PEUC, and FPUC were part of the Social Security Act. *See* Families First Coronavirus Response Act, Pub. L. 116-127, § 4102, 134 Stat. 178, 192–93 (Mar. 18, 2020). But Congress decided not to do so.

Because PUA, PEUC, and FPUC are not provisions of the Social Security Act, section 41-29-230(1) does not require Defendants to do anything related to those three programs.

C. Defendants have discretion to determine what is an "advantage."

Even if PUA, PEUC, and FPUC were part of the Social Security Act and section 41-29-230(1) had some application, Plaintiffs' claims nevertheless fail because Governor McMaster[1] and Director Ellzey have discretion in determining whether these programs are an "advantage" for the State and its citizens.

The General Assembly has given DEW multiple purposes and goals, which require Director Ellzey to balance the competing goals and exercise his discretion. One purpose (and the one on which Plaintiffs focus) is paying unemployment benefits to individuals unemployed through no fault of their own. But other coequal purposes include "reduc[ing] and prevent[ing] unemployment" and "promot[ing] the reemployment of unemployed workers throughout the State in every other way that is feasible." S.C. Code Ann. § 41-29-120(A)(1)(a), (d). Director Ellzey is

[1] Section 41-29-230 actually never refers to the Governor, so the statute cannot possibly limit the Governor's discretion. Contrary to Plaintiffs' contention, the statute still serves a logical purpose because it ensures DEW enacts the necessary rules and regulations for the State to obtain administrative funding under the Social Security Act and other enumerated federal statutes.

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charged with acting "in good faith" and "in a manner he reasonably believes to be in the best interests of the department." *Id.* § 41-29-25(A)(1), (3).

All of these statutes must be construed together to produce a harmonious result. *See Beaufort Cty. v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011) (discussing the *in pari materia* doctrine). Director Ellzey (and to the extent the statute applies to him, Governor McMaster as well) has discretion to determine what benefits from the federal government actually put the State and its citizens in a "superiority of position or condition." *Advantage*, Merriam-Webster (2021), https://tinyurl.com/9a2ph5cy (last visited Aug. 11, 2021). Plaintiffs 'assertion that the Director and Governor have no discretion under section 41-29-230(1) therefore is misplaced and ignores basic tenets of statutory construction. To the extent Plaintiffs ' claims boil down to a disagreement over whether terminating the State's participation in PUA, PEUC, and FPUC is an advantage for the State and its citizens, that determination is a policy decision that belongs to the executive and legislative branches, not the judiciary.

* * *

Dismissals under Rule 12(b)(6) are typically without prejudice. *See Skydive Myrtle Beach, Inc. v. Horry Cty.*, 426 S.C. 175, 189, 826 S.E.2d 585, 592 (2019). But when an amendment clearly would be futile, allowing such an amendment is not appropriate. *See id.* Here, any amendment would be futile. The defects in the Complaint are legal ones that cannot possibly be cured. Therefore, Plaintiffs shall not be given the opportunity to amend their pleadings. This dismissal is therefore with prejudice.

II. Motion for Preliminary Injunction

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Even if dismissal were not appropriate, Plaintiffs are not entitled to a preliminary injunction. The Court finds that Plaintiffs have likely met their burden to show irreparable harm and the lack of an adequate remedy at law, even assuming there is a private right of action. But Plaintiffs have not shown a likelihood of success on the merits. *Cf. Scratch Golf Co.*, 361 S.C. at 121–22, 603 S.E.2d at 908 (stating "an injunction was not appropriate remedy" because "[a]lthough [the plaintiff] may be able to satisfy" two elements, it could not satisfy the third); *Gantt*, 208 F. Supp. at 417 (stating an injunction "has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff").

As an additional note, preliminary injunctions generally "should issue only if necessary to preserve the status quo." *Poynter Invs., Inc.*, 387 S.C. at 586, 694 S.E.2d at 17. Plaintiffs here seek a mandatory injunction to change the status quo. South Carolina is no longer participating in PUA, PEUC, and FPUC, and Plaintiffs want the Court to order the State to reenroll in those programs. Plaintiffs' action was not filed until 83 days after Governor McMaster's announcement that South Carolina would terminate its participation in the CARES Act programs and 28 days after that termination took effect. Accordingly, Plaintiffs are not seeking to preserve the status quo, and the Court denies their Motion for Preliminary Injunction.

III. Motion to Require Plaintiffs to Identify Themselves

In light of the Court's decision to grant Defendants' Motion to Dismiss, the Court denies their Motion to Require Plaintiffs to Identify Themselves as moot.

That said, if this case were to proceed, the Court would grant this motion. It is a "rare dispensation" for a plaintiff to be allowed to proceed anonymously. *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993); *see also* S.C. Const. art. I, § 9. ("All courts shall be public"); Rule 10(a), SCRCP (providing that the summons and complaint "shall include the names of all parties").

Plaintiffs bear the burden of showing they warrant such exceptional treatment. *CTH 1 Caregiver v. Owens*, No. CA 8:11-2215-TMC, 2012 WL 2572044, at *3 (D.S.C. July 2, 2012). None of the factors in *Doe v. Howe*, 362 S.C. 212, 217–18, 607 S.E.2d 354, 356–57 (Ct. App. 2004), support Plaintiffs' attempt to proceed anonymously, and the Court finds their identical, generic assertions that they are "concerned that if it becomes public that [they were] part of this lawsuit, [they] could face harassment, retaliation, or the loss of job opportunities" are insufficient to carry their heavy burden.

Conclusion

For the forgoing reasons, the Court **GRANTS** Defendants' Motion to Dismiss, **DENIES** Plaintiffs' Motion for Preliminary Injunction, and **DENIES AS MOOT** Defendants' Motion to Require Plaintiffs to Identify Themselves.

[Electronic signature of the Honorable R. Lawton McIntosh to follow.]

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Richland Common Pleas

Case Caption: S B , plaintiff, et al vs Henry Dargan Mcmaster , defendant, et al

Case Number: 2021CP4003774

Type: Order/Dismissal

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Hon. R. Lawton McIntosh, Circuit Court Judge

Case No. 2021-CP-40-03774

Sheena Brannon, Shane Stencil, Tina Sullivan, and Brandon Beaty

Appellants

v.

Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina, and G. Daniel Ellzey, in his official capacity as Director of the South Carolina Department of Employment and Workforce

Respondents

CERTIFICATE OF SERVICE

I certify that I have served Appellants' NOTICE OF APPEAL on Henry Dargan McMaster and G. Daniel Ellzey by E-mail to their counsel of pursuant to *In Re; Operation of the Appellate Courts During the Coronavirus Emergency (as Amended May 29, 2020)*, Appellate Case No. 2020-000447 on August 16, 2021.

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August 16, 2021

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Subject: Brannon v. McMaster - Notice of Appeal and Motion for Certification
Attachments: Notice of Appeal_FINAL.pdf; Mot for emerg review and cert_FINAL.pdf

Counsel,

I hope all of you are well. Please find attached and served upon you pursuant to *In Re; Operation of the Appellate Courts During the Coronavirus Emergency (as Amended May 29, 2020)* a notice of appeal and motion for emergency review and expedited certification in this case.

Kind regards,
Adam Protheroe

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Hon. R. Lawton McIntosh, Circuit Court Judge

Case No. 2021-CP-40-03774

Sheena Brannon, Shane Stencil, Tina Sullivan, and Brandon Beaty

Appellants,

v.

Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina, and G. Daniel Ellzey, in his official capacity as Director of the South Carolina Department of Employment and Workforce

Respondents

MOTION FOR EMERGENCY REVIEW AND EXPEDITED CERTIFICATION

PANDEMIC UNEMPLOYMENT BENEFIT PROGRAMS EXPIRE SEPTEMBER 6, 2021

August 16, 2021
Columbia, South Carolina

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On June 26, 2021, at the direction of Governor McMaster, the South Carolina Department of Employment and Workforce prematurely ended the State's participation in several enhanced unemployment benefits which were a part of the Congressional response to the COVID-19 pandemic. These benefits were scheduled to continue through September 6, 2021. The week after this action took effect, more than 71,000 South Carolinians stopped receiving unemployment benefits of any kind, a decrease of more than 82%. The effect of this action will be to forfeit somewhere between $600 million and $900 million in federal funds that would otherwise flow into the South Carolina economy and allow those unemployed, through no fault of their own, to meet critical needs. This loss is occurring, and will continue to occur , at a rate of tens of millions of dollars per week until these benefits ultimately expire on September 6, 2021.

On July 28, 2021, Appellants' filed suit seeking declaratory and injunctive relief along with a writ of mandamus requiring Respondents to immediately reinstate South Carolina's participation in these benefit programs. Appellants argue that S.C. Code § 41-29-230(1) requires Respondents to seek and obtain all unemployment benefits available under the Social Security Act, including the enhanced unemployment benefits at issue here. By order dated August 13, 2021, the Circuit Court denied Appellants' motion for preliminary injunction and dismissed this action with prejudice.

Appellants seek emergency review and certification to the South Carolina Supreme Court pursuant to Rule 204(b), SCACR, for two main reasons. First, Appellants along with tens of thousands of South Carolinians who have been deprived of pandemic unemployment relief are suffering irreparable harm and need relief now. Second, each week that goes by with South

Carolina withdrawn from these unemployment benefit programs may result in the permanent loss of benefits at a rate of tens of millions of dollars per week. Appellants cannot wait for the usual appellate process to run its course and, instead, ask that this matter be immediately certified to the South Carolina Supreme Court to resolve a question of statutory interpretation which will be dispositive of this action.

Counsel for Appellants have conferred with Counsel for respondents and are informed that Respondents do not anticipate opposing certification of this appeal for review under Rule 204(b), SCACR, but that Respondents reserve the right to respond to the motion if necessary.

FACTUAL BACKGROUND

Congress Provides Pandemic Unemployment Benefits to Alleviate the Economic Hardship Caused by the COVID-19 Pandemic

To alleviate some of the economic hardship that the COVID-19 pandemic caused, Congress enacted the Coronavirus Aid, Relief, and Economic Security ("CARES") Act. Signed into law on March 27, 2020, the CARES Act provides for a variety of pandemic relief programs including several types of enhanced unemployment benefits (collectively "Pandemic Unemployment Benefits"). 15 U.S.C. § 9001 *et seq*.

Pandemic Unemployment Assistance ("PUA") is one type of Pandemic Unemployment Benefit and is available to workers who would not otherwise be eligible for regular Unemployment Insurance ("UI") benefits including the self-employed, underemployed, independent contractors, and others whose unavailability or inability to work was caused by COVID-19. 15 U.S.C. § 9021.

Pandemic Emergency Unemployment Compensation ("PEUC") is a second type of Pandemic Unemployment Benefit and provides additional weeks of benefits for workers who have exhausted their regular UI benefits. 15 U.S.C. § 9025. Federal Pandemic Unemployment Compensation ("FPUC") is a third type of Pandemic Unemployment Benefit which increases the weekly benefit amount available to an individual who receives any other type of unemployment benefit, including regular UI, PUA, or PEUC. FPUC increased benefits by $600 per week from March 27, 2020, through July 31, 2020. 15 U.S.C. § 9023. From July 31, 2020, to December 27, 2020, FPUC benefits lapsed. They were reinstated beginning December 27, 2020, at $300 per week and are currently scheduled to continue through September 6, 2021. Continued Assistance for Unemployed Workers Act of 2020 ("CAUWA"). Pub. L. No. 116-260, § 200–01, 206; American Rescue Plan Act of 2021 ("ARPA"). Pub. L. No. 117-2, § 9013 (March 11, 2021).

Funds have been appropriated by congress for Pandemic Unemployment Benefits and are available in the Unemployment Trust Fund to be distributed to eligible South Carolinians through September 6, 2021. ARPA §§ 9011, 9013, and 9016.[1] The costs of Pandemic Unemployment Benefits and the costs to states of administering these programs, including startup costs and ongoing administration costs, are 100% federally funded. 15 U.S.C. §§ 9021(f)(2), 9023(d)(1)(A), 9025(d)(2)(A).[2] Pandemic Unemployment Benefits and administration costs are funded through Sections 901, 904, and 905 of the Social Security Act, 42 U.S.C. § §§ 1101(a), 1104(a), and 1105(a). 15 U.S.C. §§ 9021(g), 9025(d).

[1] The CARES Act provided for three additional types of enhanced unemployment benefits which are not at issue in this case.

Pandemic Unemployment Benefits and regular UI benefits both operate under the same SSA infrastructure. The state agency that processes claims, determines eligibility, and pays regular UI benefits, DEW in this case, does the same for the Pandemic Unemployment Benefits. The features of state law which apply to key aspects of regular UI, and which are mandated by the SSA – like appeal procedures, overpayments, fraud determinations, and work availability or search requirements – also apply to the Pandemic Unemployment Benefits. *See, e.g.*, 15 U.S.C. §§ 9021(c)(5)(B)(ii), 9023(f)(4), 9025(a)(4)(B), (e)(4).

Respondents Prematurely End South Carolina's Participation in Pandemic Unemployment Benefits.

On May 6, 2021, Director Ellzey issued a memorandum to Governor McMaster purporting to assess the impact should South Carolina decide to "opt-out" of Pandemic Unemployment Benefits effective June 27, 2021, rather than participate through the currently scheduled end of those programs in early September 2021.[3] In his memorandum, Director Ellzey estimated that such action would result in the loss of the following amounts of federal funding between June 27, 2021, and September 4, 2021:

[3] Exhibit App. 1 attached hereto.

Program	Anticipated 10-Week Funding Loss (June 27, 2021 – September 4, 2021)
FPUC	$370.0 million
PEUC	$146.0 million
PUA	$62.0 million
Total	**$578 million[4]**

Other sources indicate that closer to $900 million in federal funds would be lost because of Respondents' actions.[5] The same day Director Ellzey issued his memorandum, Governor McMaster directed DEW to terminate South Carolina's participation in the Pandemic Unemployment Benefits effective June 30, 2021.[6]

The effects of Respondents' actions on vulnerable South Carolinians were swift and dramatic. In the first week after Respondents opted out of Pandemic Unemployment Benefits, the number of South Carolinians receiving unemployment benefits of any kind fell by more 71,000, a reduction of more than 82%.[7]

[4] DEW estimates that an additional $7.3 million in benefits will be lost during this time under the three Pandemic UI Programs that are not at issue in this case.
[5] Stettner, Andrew, *Fact Sheet: What's at Stake As States Cancel Federal Unemployment Benefits*, The Century Foundation, May 13, 2021 (available at https://tcf.org/content/commentary/fact-sheet-whats-stake-states-cancel-federal-unemployment-benefits/).
[6] Exhibit App. 2 attached hereto.
[7] https://www.dew.sc.gov/data-and-statistics/data-dashboard (accessed July 14, 2021, for June 27-July 3 data and accessed July 15, 2021, for July 4-July 10 data)

	June 27 – July 3	**July 4 – July 10**	**Change**
Individuals receiving Unemployment Benefits of any kind	87,018	15,414	(71,604)

South Carolinians received over $39,000,000 less in Pandemic Unemployment Benefits between July 4, 2021, and July 10, 2021, than they did the week before Respondents' decision to opt out of those benefits took effect.[8] This weekly loss will most likely increase as Respondents' decision takes full effect.

	June 27 – July 3	**July 4 – July 10**	**Change**
FPUC Benefits Paid	$29,311,525.00	$3,479,806.00	($25,831,719.00)
PEUC Benefits Paid	$10,583,318.00	$1,062,149.00	($9,521,169.00)
PUA Benefits Paid	$4,276,299.00	$445,028.00	($3,831,271.00)
Total	**$44,171,142.00**	**$4,986,983**	**($39,184,159.00)**

[8] https://www.dew.sc.gov/data-and-statistics/data-dashboard (accessed July 14, 2021, for June 27-July 3 data and accessed July 15, 2021, for July 4-July 10 data)

While Respondents' decision to opt out of Pandemic Unemployment Benefits has taken effect, that action is revocable. On July 12, 2021, the United States Department of Labor ("DOL") issued guidance to state workforce agencies which clarified that "[a]ny state that has provided notice to [DOL] of its intent to terminate any of the Pandemic Unemployment Benefits prior to the September 6, 2021, end date may reinstitute participation in any or all programs it previously indicated it would be terminating."[9]

DOL's July 12 guidance indicates that if the date on which a state has indicated it will terminate participation in Pandemic Unemployment Benefit programs has passed, as it has in South Carolina, those programs may still be restarted, but the state may need to enter into a new agreement with DOL to reinstitute operations. Doing so may result in a lapse in FPUC and PEUC benefits because the new agreement would become effective the week of unemployment after that agreement is signed.[10] Thus, every week that passes without an agreement between DEW and DOL to administer Pandemic Unemployment Benefits may result in the permanent loss of tens of millions in federal unemployment benefits for South Carolinians unemployed through no fault of their own, including Appellants. DOL has indicated that PUA benefits will not lapse if a state enters into a new agreement to administer these benefits because the state would be required to provide individuals receiving PUA an opportunity to certify for the missing weeks.[11]

[9] Unemployment Insurance Program Letter No. 14-21, Change 1 (available at https://wdr.doleta.gov/directives/corr_doc.cfm?docn=9502)
[10] *Id.* at 7
[11] *Id.*

Tens of thousands of South Carolina families have faced, and continue to face, significant hardships because of Respondents' actions. Appellants' stories provide a few examples of these hardships, which include the risk of homelessness, loss of utility service, food insecurity, and lack of needed medical treatment.

This action was initially filed in the Court of Common Pleas for Richland County as *S.B. v. McMaster*, Case No. 2021-CP-40-03774 (filed July 28, 2021). Appellants moved for a preliminary injunction and Respondents moved to dismiss.[12] The Circuit Court denied Appellants' motion for preliminary injunction and granted Respondents' motion to dismiss with prejudice.[13] Appellants now seek appellate review and certification to the South Carolina Supreme Court because of the public interest involved and the need for prompt and final resolution.

REQUEST FOR CERTIFICATION TO THE SOUTH CAROLINA SUPREME COURT

Appellants request that this matter be immediately certified to the South Carolina Supreme Court relief pursuant to Rule 204(b), SCACR, which provides that "[c]ertification is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance."

[12] Respondents also moved to strike Appellants' certifications, which had been filed identifying Appellants by initials only, or required that Appellants publicly identify themselves. Appellants provided Respondents with unredacted certifications, and the Circuit Court subsequently denied Respondents' motion as moot because the Court granted Respondents' motion to dismiss. However, the Circuit Court indicated that it would have granted Respondent's motion to require Appellants to identify themselves had it not been rendered moot. Appellants have identified themselves here in an effort to avoid further dispute on this question and to reach the merits of this action as quickly as possible.

[13] A copy of this order is attached to Appellants' Notice of Appeal.

I. This case presents an issue of significant public interest and legal principles of major importance.

This case turns on a simple question, the answer to which will have profound and immediate effects on tens of thousands of South Carolina workers and this State's economy. The question is this: Are temporary enhancements to unemployment benefits which are funded, administered, and governed by provisions of the Social Security Act "advantages available under the provisions of the Social Security Act that relate to unemployment compensation" as that phrase is used in S.C. Code Ann. § 41-29-230(1)? If the answer is yes, as Appellants submit, then Respondents acted unlawfully and in violation of their statutory obligations when they prematurely ended South Carolina's participation in these temporary enhancements. And Respondents should be directed to immediately reinstate these programs, including retroactive benefits to the greatest extent possible. If the answer is no, then Respondents' decision to end these programs early was a discretionary act which Appellants have no grounds to challenge here. A final answer to this question is urgently needed for two reasons.

First, the number of South Carolinians affected by Respondents' decision to opt out of Pandemic Unemployment Benefits and the magnitude of those effects are enormous. As noted above, immediately after Respondents withdrew from these programs more than 71,000 South Carolinians stopped receiving unemployment benefits of any kind. And somewhere between $600 million and $900 million in federal funds will be lost to this State between June 27, 2021, and September 6, 2021. In short, Respondents actions have caused tens of thousands of South Carolinians, unemployed through no fault of their own, to lose access to hundreds of millions of

dollars in unemployment benefits that would otherwise enable them to meet critical needs like shelter, food, utilities, and medical care.

While other pandemic relief measures exist that may be able to help mitigate the harm that South Carolina workers are facing, some of the most significant are temporary or have fallen short in critical ways. For example, the CDC eviction moratorium protects individuals who have been impacted by the pandemic from being evicted for nonpayment of rent. However, that moratorium is currently set to expire on October 3, 2021.[14] That moratorium has also been the subject of numerous legal challenges and the United States Supreme Court has warned that extending that moratorium beyond July 31, 2021, would require "clear and specific congressional authorization."[15] Such authorization has not been obtained. In addition, federally funded rent assistance programs have, to date, largely distributed funds at a glacial pace leaving thousands of families at risk of eviction.[16] Until Respondents ended the State's participation in Pandemic Unemployment Benefits, they served the critical needs of tens of thousands of South Carolina

[14] https://www.cdc.gov/coronavirus/2019-ncov/communication/Signed-CDC-Eviction-Order.pdf
[15] *Alabama Ass'n. of Realtors v. Dep't. of Health and Human Svcs.*, No. 20A169, June 29, 2021 (Kavanaugh, J. concurring)
[16] *See e.g.* Moore, Thad, *SC Supreme Court urges lawyers to help tenants facing eviction as CDC moratorium ends*, The Post and Courier, July 30, 2021, https://www.postandcourier.com/news/sc-supreme-court-urges-lawyers-to-help-tenants-facing-eviction-as-cdc-moratorium-ends/article_badde6ca-f15e-11eb-a3b9-c73c75616ce5.html (noting that the SC Stay Plus program had approved funding for only 393 households of the more than 12,000 that had applied as of July 30, 2021); Garrison, Joey and Michael Collins, *'An epidemic in itself': Why billions of federal aid isn't making it to renters, landlords during pandemic*. USA Today, August 15, 2021, https://www.usatoday.com/in-depth/news/politics/2021/08/15/covid-pandemic-federal-aid-renters-landlords/5552227001/ (noting that South Carolina had distributed just 1.1% of the $272 million in emergency rent assistance funds that the state received in February 2021).

families. The harm that Appellants and others like them are facing because of Respondents' decision is immediate, substantial, and irreparable.

Second, most of benefits that would have been paid to unemployed South Carolinians but for Respondents' decision to opt out may be permanently lost even if the programs are ultimately reinstated in South Carolina. As noted above, DOL's July 12 guidance indicates that there may be a lapse in PEUC and FPUC benefits for any weeks in which a state did not have an agreement with DOL to administer those benefits. FPUC and PEUC account for approximately 89% of all Pandemic Unemployment Benefits paid from March 15, 2020, through August 9, 2021. It appears that the state of Indiana may have been able to reinstate all Pandemic Unemployment Benefits retroactively after that state's governor prematurely withdrew from those programs and his withdrawal was declared unlawful under a statute very similar to our Section 41-29-230(1).[17] However, DOL has not issued guidance which indicates that this result would be replicable or whether it is permanent. Thus, the possibility of permanent benefit loss remains.

II. This case is appropriate for prompt resolution by the South Carolina Supreme Court.

The South Carolina Supreme Court has often granted petitions for original jurisdiction to resolve similar questions of executive power as those presented here, signaling that those questions are sufficiently important to warrant intervention by the Supreme Court at an early stage. *See e.g. Senate v. McMaster*, 425 S.C. 315, 821 S.E.2d 908 (2018) (original jurisdiction granted to

[17] See Exhibit App. 3, p. 29 attached hereto (indicating that all Pandemic Unemployment Benefits will be paid retroactively in Indiana).

determine whether a governor had power to make recess appointments); *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000) (same regarding governor's authority to remove a board member from a public utility); *Edwards v. State*, 383 S.C. 82, 678 S.E.2d 412 (2009) (same regarding a governor's authority to refuse to apply for federal funds after the legislature appropriated them). Just such a question is posed here, namely, whether the statutory scheme governing unemployment benefits permits Governor McMaster to reject federal funding for those benefits.

CONCLUSION

For the reasons stated herein, Appellants respectfully request (1) that this case be immediately certified to the South Carolina Supreme Court, (2) that this case be briefed and heard on an expedited basis, (3) a declaration that Respondents' actions in prematurely withdrawing the State from Pandemic Unemployment Benefits programs was unlawful, (3) an injunction directing Respondents to take such action as is necessary to reinstate South Carolina's participation in Pandemic Unemployment Benefits without delay and to pay retroactive Pandemic Unemployment Benefits to the greatest extent possible, (4) in the alternative, issue a writ of mandamus directing the same, and (5) grant Appellants such other and further relief as the Court deems just and proper.

Respectfully submitted,

August 16, 2021

SOUTH CAROLINA APPLESEED
LEGAL JUSTICE CENTER

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Henry McMaster
Governor

G. Daniel Ellzey
Executive Director

TO: HENRY MCMASTER, GOVERNOR OF SOUTH CAROLINA

FROM: G. DANIEL ELLZEY, EXECUTIVE DIRECTOR

SUBJECT: OPTING OUT OF "AGREEMENT IMPLEMENTING THE RELIEF FOR WORKERS AFFECTED BY CORONAVIRUS ACT"

DATE: MAY 6, 2021

I. Background

On May 4, 2021, Montana announced it was using federal funds authorized by the American Rescue Plan Act to issue "return-to-work bonuses" to individuals on unemployment who rejoin the labor force and maintain employment for at least one month. At the same time, Montana also announced that it was fully opting out of the federal unemployment programs enacted in response to the COVID-19 pandemic. This "opt-out" is effective June 27, 2021. Montana cited a low unemployment rate (3.8%), a shrinking labor force (-10,000 people), and high number of job postings as the reasons for its decision.

This memorandum explains the implications in the event South Carolina follows a similar course of action.

II. Federal Programs

South Carolina elected to participate in the six unemployment-related programs in connection with the Coronavirus Aid, Relief, and Economic Security Act and Continued Assistance to Unemployed Workers Act of 2020. The agreement South Carolina signed to initiate these programs allows South Carolina or the United States Department of Labor to terminate the programs upon thirty days' written notice to the other party.

1. Pandemic Unemployment Assistance (PUA) – Section 2102

What It Is: benefits to the self-employed, the underemployed, independent contractors, and individuals who have been unable to work as a direct result of COVID-19. This includes individuals diagnosed with COVID-19 or instructed to quarantine.

How It Would Change: Beginning no sooner than 30 days from the date South Carolina provides written notice to USDOL, South Carolina would stop paying PUA benefits to

existing claimants and not process any new PUA claims filed after the expiration of the notice period.

What is the impact: For claim week ending May 1, 2021, 37,284 claimants received PUA benefits for a weekly cost of $6.2 million.

2. Pandemic Emergency Unemployment Compensation (PEUC) – Section 2107

What It Is: Extension of unemployment benefits for claimants beyond the traditional 20 weeks by an additional 51 weeks. PEUC allowed claimants to extend their time on unemployment where they normally would have expired.

How It Would Change: Beginning no sooner than 30 days from the date South Carolina provides written notice to USDOL, South Carolina claimants who have exhausted their regular UI benefits would no longer be eligible for payments.

What is the impact: For claim week ending May 1, 2021, 56,318 claimants received PEUC benefits for a weekly cost of $14.6 million; however, approximately 9,300 PEUC would be eligible to move to regular unemployment insurance compensation.

3. Federal Pandemic Unemployment Compensation (FPUC) – Section 2104

What It Is: $300 weekly add-on benefit for all types of unemployment assistance.

How It Would Change: Beginning no sooner than 30 days from the date South Carolina provides written notice to USDOL, South Carolina would stop issuing the $300 weekly FPUC benefit payments for weeks after the expiration of the notice period.

What is the impact: For claim week ending May 1, 2021, 108,483 claimants received FPUC benefits for a weekly cost of $37.0 million.

4. Mixed Earners Unemployment Compensation (MEUC)

What It Is: $100 weekly add-on benefit for those who are eligible for regular UI benefits, but also earned self-employment income.

How It Would Change: Beginning no sooner than 30 days from the date South Carolina provides written notice to USDOL, South Carolina would stop paying MEUC benefits to existing claimants and stops processing any MEUC claims received after the notice period.

What is the Impact: For claim week ending May 1, 2021, 21 claimants received MEUC benefits for a weekly cost of $34,400.

5. Emergency Unemployment Relief for Governmental Entities and Nonprofit Organizations – Section 2103

What It Is: Funding for 75% of UI benefits paid to employees of governmental entities and non-profits. These entities are known as "reimbursable employers" because they reimburse the UI trust fund dollar-for-dollar for any benefits paid to their employees instead of paying UI taxes. The rationale for the program was to lessen the financial burden of COVID-19 shutdowns because these employers would not benefit from capping tax rates and non-charging like other employers would.

How It Would Change: Beginning no sooner than 30 days from the date South Carolina provides written notice to USDOL, South Carolina would stop receiving funding for this program. Reimbursable employers go back to being charged 100% of the benefits DEW pays out to their employees after the expiration of the notice period.

What is the Impact: The funding of benefits for employees of reimbursable employers returns to normal. Reimbursable employers do not have the benefit of federal funding if they still experience a layoff connected to COVID-19. While this provision provided millions of dollars in relief to the reimbursable employers in 2020, the benefit charges of these entities have declined significantly.

6. Temporary Federal Funding of the First Week of Compensable Regular Unemployment for States with No Waiting Week – Section 2105

What It Is: Funding for one week of benefits for states that waive the one-week waiting period claimants must typically serve prior to receiving UI benefits. South Carolina waived its statutory waiting week via Executive Order. In South Carolina, the analysis of whether to waive this statutory provision is not tied to federal funding, but to whether the labor market is such that claimants could pursue other employment during that first week of unemployment.

How It Would Change: The Governor rescinds/amends the Executive Order waiving the waiting week. Then, beginning no sooner than 30 days from the date South Carolina provides written notice to USDOL, South Carolina stops receiving funding for this program. The first week of unemployment for claimants who file after the expiration of the notice period would not be compensable.

What is the Impact: New claimants who (1) file after the expiration of the notice period and (2) do not exhaust all benefits receive one less week of benefits than they currently would. Between May 2020 and the end of March 2021, this provision resulted in approximately $88.7 million in funding. However, as state UI claim levels have declined,

so too has the benefit of this provision. The state is averaging roughly $400,000 per week in first week waiting reimbursements.

III. Return-to-Work Bonus

In addition to opting out of the federal programs, Montana also decided to pay a return-to-work bonus. Described as an incentive for individuals to reenter the workforce, the bonus is a $1,200 payment to the first 12,500 Montanans with an active unemployment claim as of May 4, 2021, who:

- Discontinue receiving unemployment benefits
- Accept an offer of employment in the state of Montana
- Complete at least four full weeks of paid employment

These equates to a maximum payout of $15 million. Montana plans to use federal stimulus funds authorized by the American Rescue Plan Act to fund this bonus. As we understand it, Montana has reached out to the United States Treasury Department for confirmation that federal funds can be used for this purpose.

IV. Total Financial Impact

Assuming an end to the federal programs as of week ending June 26, 2021, the maximum amount of expected losses in federal funding to the state would be between $600 and $650 million, or around $63 million for each week of lost program time. Most of this would be the result of the end of the FPUC and PEUC programs.

Program	Anticipated 10-Week Funding Loss
PUA	$62.0 million
PEUC	$146.0 million
FPUC	$370.0 million
MEUC	$0.3 million
Reimbursable	$3.0 million
Waiting Week	$4.0 million
Total	**$585.3 million**

The current estimates are based on individuals currently filing and receiving payments. There may also be additional payments owed to individuals who are in pending status or have a future appeal reversal. Thus, the $600 million is the maximum expected loss from ending the program as of June 26, 2021.

These potential losses will be offset, to some extent, by individuals returning to work. There are currently more than 80,000 open jobs in the state. It is not possible to predict which individuals will go back, how quickly, or at what wage levels. But assuming that between 30 and 50 percent of the current unemployment claimants return to work at an average weekly wage of $500, between $223 and $372 million in wages could be earned over the ten week period between June 27th and September 4th. These earnings do not take into account any additional fringe benefits, which could include health benefits, retirement benefits, etc. Additionally, as the economy continues to recover, it is expected that more job openings will become available and be filled.

V. Other Considerations

1. *Declining claimant numbers:* The number of individuals drawing benefits will be decreasing rapidly regardless of whether South Carolina opts out of federal programs. 28,000 PUA claimants were required to provide documentation and did not. Therefore, they have disqualified themselves from benefits. We are also enforcing the requirement to search for work more aggressively. Lastly, we are engaging in broad reemployment efforts that will have an effect on the number of individuals drawing benefits each week. **See Attachment A.**

2. *Program-specific opt-out:* The agreement does not necessarily require a complete opt out of all federal programs, although that is what Montana did. Conceptually, South Carolina could opt out of one program such as FPUC and elect to remain in other programs. For this reason, we have provided separate analysis for each of the programs.

3. *Notice Period:* The agreement requires 30 days-notice from a state to effect a termination. However, there does not appear to be a limitation on providing more than 30-days notice. For example, Montana provided notice on May 4, 2021, but is continuing in the program for 53 days (through June 26, 2021).

4. *No ability to modify programs:* The agreement only allows for South Carolina to terminate participation in a program, i.e., we do not have authority to limit or modify a program. For example, we could not say to end benefits once a claimant receives a certain number of weeks or dollar amount.

HENRY MCMASTER
GOVERNOR

May 6, 2021

Mr. Daniel Ellzey
Director
Department of Employment and Workforce
1550 Gadsden Street
Columbia, SC 29202

Dear Director Ellzey,

South Carolina's businesses have borne the brunt of the financial impact of the COVID-19 pandemic. Those businesses that have survived—both large and small, and including those in the hospitality, tourism, manufacturing, and healthcare sectors—now face an unprecedented labor shortage.

This labor shortage is being created in large part by the supplemental unemployment payments that the federal government provides claimants on top of their state unemployment benefits. In many instances, these payments are greater than the worker's previous pay checks. What was intended to be short-term financial assistance for the vulnerable and displaced during the height of the pandemic has turned into a dangerous federal entitlement, incentivizing and paying workers to stay at home rather than encouraging them to return to the workplace.

These federal entitlements pose a clear and present danger to the health of our State's businesses and to our economy. Since the Biden administration and Congress appear to have little to no comprehension of the damage being done and no appetite to terminate the federal payments, the State of South Carolina must take action.

Accordingly, I hereby direct the Department of Employment and Workforce (DEW) to terminate the State of South Carolina's participation in the Federal Pandemic Unemployment Compensation (FPUC) program, the Pandemic Unemployment Assistance (PUA) program, the Pandemic Emergency Unemployment Compensation (PEUC) program, the Mixed Earner Unemployment Compensation (MEUC) program, the Emergency Unemployment Relief for Governmental Entities and Non-profit Organizations program, and the Temporary Federal Funding of the First Week of Compensable Regular Unemployment for States with No Waiting Week program, effective June 30, 2021.

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Following termination of participation in these federal programs, DEW shall return to normal operation of the State's unemployment insurance program, including enforcing the requirement that claimants demonstrate active efforts to seek employment in order to remain eligible for benefits.

Thank you for your continued leadership and attention to these important issues. Please keep me informed of your progress.

Yours very truly,

Henry McMaster

Indiana Unemployment Insurance

CLAIMANT FREQUENTLY ASKED QUESTIONS for COVID-19 work-related issues

Updated August 6, 2021

(updates noted in red)

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Indiana Unemployment Insurance

CLAIMANT FREQUENTLY ASKED QUESTIONS for COVID-19 work-related issues

The below questions and answers are based on the CARES Act, the Continued Assistance Act and the President's and Governor's Executive Orders.

SECTION A

HOW DO I FILE?

Q1. How do I file for unemployment insurance (UI) benefits?

A1. Online, using a computer or smart phone. Go to **www.Unemployment.IN.gov** to file, and to see Frequently Asked Questions, the Claimant Handbook, and video tutorials. If you **do not** have access to a computer or smart phone to file for UI, you can use our file by phone number. If you use this service, you will not have access to a UI account in the Uplink system and all UI information must be obtained through the file by phone system: 1-800-298-6650.

Q2. What information do I need when I apply for unemployment insurance (UI) benefits online?

A2. You will need the following information to file:

- A valid email account – your email address will become your Username;
- Your personal information, including your:
  - Indiana Driver's license or Indiana ID card;
  - Address;
  - Social security number (SSN);
  - Date of birth; and
  - Phone number.
- Information about your last employer, including:
  - Employer's name/company name;
  - Employer's mailing address; and
  - Employer's phone number.
- Information about your employment, including your:
  - Dates of employment; and
  - The reason you are unemployed.
- Your bank routing number and account number if you chose direct deposit as your payment option *(NOTE: a debit card - Key2Benefits prepaid MasterCard® - is also available).*

Q3: I have an Uplink Claimant Self-Service account, but I cannot log-in to file my claim or voucher because I forgot my username or password or have too many failed attempts to log in. What should I do?

A3: Visit the Uplink Claimant Self-Service home page and choose "Forgot Username" or "Forgot Password" to reset it yourself. You will be prompted to enter your SSN, date of birth, and other information to confirm your identity. You will then be able to create a new username or password. If you attempted to log in and reach 5 failed attempts, you will get a message that requires you to click on "forgot password" to reset their account. You should not continue to enter your password. You should instead follow the on-

screen instructions. If you do continue to enter your password, your account will be revoked. The account will automatically reset in 24 hours and you will then need to follow the forgot passwords instructions.

Q4. What do I do if the system freezes and will not let me to proceed through filing my initial claim or voucher?

A4. Please try these recommended tips before reaching out to the DWD Contact Center for assistance:

1) Be sure you do not have the Uplink CSS application open on any other Web Browsers or Tabs
2) Refresh the page (ctrl + F5)
3) Clear the cache on your internet browser (click link below for instructions)
    - How to clear Cache
4) Use Chrome or Microsoft Edge browsers

Q5. I am a New User to Uplink Claimant Self-Service and completed the registration process. What do I do next?

A5. As part of the registration process, DWD will send you an "Email Account Verification" link to the email address you provided. This can take several hours to receive depending on the number of other new users also registering. Once you receive the email, you will be able to complete the registration process and file a claim after clicking on the "Confirm Email" provided in the email. If you enter an invalid email address, you will need to wait 24 hours to re-enter your correct email address and finish the registration process.

Q6. If I live in one state but work in another or work in multiple states, which state do I file in?

A6. Generally, you should file your claim with the state where you worked. If you work in more than one state, you should file where your employer filed your wages. If you worked for more than one employer in different states, file where you primarily worked. If you file in the other state, it could take longer to obtain your wages to fully review the claim. If you did not work in Indiana at all, you should not file in Indiana.

AM I ELIGIBLE FOR REGULAR UNEMPLOYMENT INSURANCE?

Q1. If my employer temporarily shuts down or lays me off because of COVID-19, will I be eligible for unemployment insurance (UI) benefits?

A1. Yes, if an employer must lay off employees due to COVID-19, the employees will be eligible for unemployment insurance (UI) benefits if they have earned enough wages to set up a claim and meet the weekly eligibility criteria. Employees **must** stay in contact with your employer and be available to work when called back by your employer.

Q2. If I am in quarantine based on a directive from my medical professional or my employer due to COVID-19, will I be eligible for unemployment insurance (UI) benefits?

A2. Effective week ending June 6, 2021, you will no longer be eligible if you must quarantine due to COVID-19. You may be eligible for Pandemic Unemployment Assistance (PUA). See below for more information.

Q3. If I cannot continue to work because I am caring for my child (or children) while their school or daycare is closed due to COVID-19, am I still eligible for benefits?

A3. No, but you may be eligible for Pandemic Unemployment Assistance (PUA). See below for more information.

Q4. If I am compensated partially by tips, such as in the restaurant industry, will I be eligible for unemployment insurance (UI) benefits?

A4. If you are laid-off or have lost work related to COVID-19 and you meet the minimum amount of wages, then yes, you will be eligible. However, whether you meet the minimum amount of wages will probably depend upon how your employer reported your earnings to DWD in their quarterly reports. If your employer reported tips as part of your wages, then those tips are included in your base period wages. If your employer did not report tips as part of your wages, it is possible you will not meet the minimum. If you receive a DWD determination that you do not meet the minimum amount, you can appeal that determination and request that DWD include your records of your tipped wages. If you have sufficient documentation, then your base period wages can be recalculated. Documents that will be considered include pay stubs, W2, or any other type of documentation of payment from your employer. Sometimes a record of cash deposits to a bank account may be considered if no other evidence is available. If you do not have wages to set up an unemployment insurance claim, then you may be eligible for Pandemic Unemployment Assistance (PUA). See below for more information.

Q5. If my hours are reduced but I am still employed, can I apply?

A5: Yes, you may be eligible for benefits, but part-time employment during the week claimed will reduce the amount of benefits paid for that week. To find out if you are eligible, start your application for benefits as soon as you know that your hours are being reduced. If you do work while receiving benefits, you **must** report any money you earned on the voucher **for the week you worked** (not the week you ultimately get paid for the work). Failure to report money you earned is fraud and can result in denial of benefits, collections actions, and criminal prosecution. If you earned wages from a Base Period Employer (see your Monetary Determination of Eligibility), then a dollar-for-dollar deduction will be taken from your Weekly Benefit Amount (WBA). If you earned wages from an employer who is NOT on your Monetary Determination of Eligibility or in your Base Period, then the following calculation applies. If you earn 20% or less of your WBA from an employer that is not listed on your Monetary Determination of Eligibility, no deduction will be made from your benefit payment. If you earn more than 20% of your WBA from an employer that is not listed on your Monetary Determination of Eligibility, a dollar-for-dollar deduction will be made from your benefit payment for all wages earned in excess of 20% of your WBA. If you work odd jobs for anyone other than your base period employer(s), a dollar-for-dollar deduction will be made after an amount equal to 20% of your weekly benefit amount has been earned.

Q6: If I decide to remain at home because of a fear of COVID-19 with no directive from a medical professional or from my employer to do so, will I be eligible for unemployment insurance (UI) benefits?

A6: No.

Q7: If I am not working due to COVID-19 and am receiving sick pay or other leave pay from my employer, will I be eligible for unemployment insurance (UI) benefits?

A7: Individuals receiving sick pay or other leave pay are not eligible for regular unemployment insurance (UI) benefits. However, the facts of each circumstance are important. You can file and DWD will evaluate your claim. If you are no longer receiving sick pay or other leave pay, you may be eligible for Pandemic Unemployment Assistance (PUA).

Q8. If I am paid a bonus during the period of separation, will I be eligible for UI benefits?

A8. Maybe. If you receive payments from your employees while you are collecting UI, you may have to declare the payment as deductible income. Sick pay, vacation pay, severance pay, payment in lieu of notice, and holiday pay are all deductible income, and you must report it. Bonuses are wages for your employer's tax purposes, but bonuses are not deductible income for UI benefits, thus it does not impact your UI benefits.

Q9. If I am self-employed, part of the "gig" economy or do not have sufficient work history to qualify for unemployment insurance benefits but am not able to work due to COVID-19, will I be eligible for unemployment insurance benefits?

A9. No, you will not be eligible for regular unemployment insurance benefits but may be eligible for PUA. See below for more information.

Q10. What is the amount of wages I must earn to meet the minimum eligibility for unemployment insurance (UI) benefits?

A10. If you have not earned enough wages to meet the minimum eligibility, then you will not be eligible. This is determined by how much money you earned while working during your *base period*. Your base period includes the first four of the last five completed calendar quarters before the week you file an initial claim application for UI benefits.

Quarter 2 of 2020	Quarter 3 of 2020	Quarter 4 of 2020	Quarter 1 of 2021	Quarter 2 of 2021	File Date:
Base Period Wages	Base Period Wages	Base Period Wages	Base Period Wages	Lag Quarter	Between 07/04/2021 and 10/02/2021

The wages you earned during your base period are used to determine if you qualify for benefits and to calculate how much you can be paid. The last quarter you worked is called the lag quarter, and no wages from that quarter count in your base period.

To meet the minimum eligibility for UI, your total wages during your base period must be equal to at least one and one-half (1.5) multiplied by your wages in the highest quarter of your base period. Your base period wages must also total at least $4,200, with at least $2,500 of those wages earned in the last six (6) months of the base period. For an example of this calculation, review pages 7-8 of the Claimant Handbook, found at https://www.in.gov/dwd/files/Claimant_Handbook.pdf

We understand this is a complicated calculation, so the easiest way to find out if you meet the minimum eligibility is to file your claim immediately upon being laid-off and we will complete a wage calculation as part of your application process and notify you whether you met the minimum amount.

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SECTION B

PANDEMIC UNEMPLOYMENT ASSISTANCE (PUA)

Q1. What is Pandemic Unemployment Assistance (PUA)?

A1. PUA is a temporary federal unemployment insurance program for individuals not otherwise eligible for UI benefits, including the self-employed, those seeking part-time employment, individuals lacking sufficient work history (i.e., they do not have sufficient wages to establish a regular UI claim), and those who otherwise do not qualify for regular UI. PUA is not payable to individuals who can telework with pay or who are receiving paid sick leave or other paid leave benefits. Under the Continued Assistance Act, you must submit proof of employment to be eligible for payments of PUA made after Dec. 27, 2020. This applies regardless of the week being paid. For example, if you are being paid on January 10, 2021, for a week of PUA in late November, you will be required to submit proof of employment. More information on what documents are acceptable and the penalty for not submitting documentation is in a below FAQ.

Q2. What makes someone eligible for PUA?

A2. Individuals must provide self-certification that the individual is otherwise able and available to work except that the individual is unable to work because of the following circumstances which all relate to COVID-19:

- The individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and is seeking a medical diagnosis; or
- A member of the individual's household has been diagnosed with COVID-19; or
- The individual is providing care for a family member or a member of the individual's household who has been diagnosed with COVID-19; or
- A child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work; or
- The individual is unable to reach the place of employment because of a quarantine imposed as a result of the COVID-19 public health emergency; or
- The individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- The individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency; or
- The individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19; or
- The individual must quit their job because of COVID-19; or
- The individual's place of employment is closed because of COVID-19; or the individual is self-employed, seeking part-time employment, does not otherwise qualify for benefits, and fits one of the above.

- The individual was denied continued unemployment benefits because the individual refused to return to work or accept an offer of work at a worksite that, in either instance, is not in compliance with local, state, or national health and safety standards directly related to COVID-19. This includes but is not limited to, those related to facial mask wearing, physical distancing measures, or the provision of personal protective equipment consistent with public health guidelines.
- The individual provided services to an educational institution or educational service agency and is unemployed or partially unemployed because of volatility in the work schedule that is directly caused by the COVID-19 public health emergency. This includes, but is not limited to, changes in schedules and partial closures.
- The individual is an employee and the individual's hours have been reduced or the individual was laid off as a direct result of the COVID-19 public health emergency.

Q3. How do I apply for PUA?

A3. To apply for PUA benefits, you must first file a regular claim for unemployment insurance benefits. Instructions on how to add your employer can be **found here**. If you are denied, the PUA application will then appear on your claimant home page as a "To-Do" at the top of the screen for you to submit you PUA application. You must submit this application and answer all questions accurately in order to be eligible for PUA benefits. NOTE: UI is evaluated each quarter. We need to ensure you are not eligible for regular UI in the most recent quarter.

Q4. Do I need to file something each week to get paid under the PUA program?

A4. Yes, just like a regular unemployment insurance claim, you need to file a weekly voucher in order to receive benefits for the week. You must answer all questions honestly. Those answers will be evaluated to determine if you continue to have eligibility for PUA.

Q5. What documentation do I need to provide to have my weekly benefit amount increased above $149?

A5. When you file your PUA application, you will be asked if you filed your taxes with the State of Indiana. If you have, you will need to enter your federally adjusted gross income from your tax return, even if you have filed your taxes jointly with another person. If you have not filed your state taxes, you will need to enter your earnings. To do so, you will need to collect all W-2's, 1099's, and pay stubs. You will need to add them together to determine the amount that you should enter as earnings on your PUA application. If you filed as a single tax filer, DWD will use your tax return to calculate your benefit amount. If you filed as married filing jointly or did not file your taxes, you will receive the minimum weekly benefit amount of $149. Once you receive your PUA Monetary Determination form, you will be

able to submit documentation of your income via the Uplink system. You only need to submit this documentation if you disagree with the wage amounts, have missing wages in the chart of wages, or would like to provide other proof of your earnings. On your claimant homepage, go to the Claims section, click on the BYE date next to the open PUA claim. You can then click on "DWD Secure File Exchange" and then "Add File" to upload your documents." Acceptable documentation of wages earned or paid includes, but is not limited to, state tax return (line 1 of your state return titled Federal AGI) or federal tax return (Form 1040), pay check stubs, bank receipts, business records, ledgers, contracts, invoices, and billing statements. We can accurately calculate your weekly benefit amount if you provide them as soon as possible. NOTE that for self-employed, DWD must use your NET wages per the US Department of Labor when deciding your Weekly Benefit Amount (WBA). Others who are not self-employed must report GROSS wages.

Q6. I have not been able to work for months, how do I get paid under PUA for all the time I have been unemployed due to COVID-19?

A6. When you apply for PUA, you should answer all questions honestly and enter the date in which COVID-19 first affected your ability to work. Under the CARES Act, the first payable week of PUA was February 2, 2020. That program ended December 26, 2020. For new PUA applications on or after December 27, 2020, PUA is payable as of December 6, 2020. All PUA payments will be audited to prevent identity theft and prevent fraud in the PUA program. A "Job Attachment" issue may be generated if you request to backdate your unemployment claim and more information is needed to verify employment at the date of impact. To resolve a Job Attachment issue, claimant should visit www.unemployment.in.gov, click on "Forms and downloads," and download State Form 57024 (PUA Job Attachment Documentation). This form must be filled out completely with the requested supporting documentation and mailed or faxed to the department. Failure to return the form and the supporting documentation to the department could result in an investigation of you claim and/or suspension of benefits that results in an overpayment on you claim.

Q7. How do I apply for PUA under the Continued Assistance Act or under the American Rescue Plan Act if I was receiving PUA under the CARES Act?

A7. If you were filing for PUA on or before Dec. 26, 2020, there was no new PUA application to continue benefits under the Continued Assistance Act. If you were filing for PUA on or before March 13, 2021, there is also no new PUA application to continue benefits under the American Rescue Plan. Continue to file your weekly voucher for the PUA program if you remain unemployed. You will also need to complete the To-Do on your Claimant Homepage to File a New UI Claim as this is required at each quarter change. The new PUA benefits under the Continued Assistance Act were only available for weeks ending on or after December 27, 2020. The new PUA benefits under the American Rescue Plan Act are only available for weeks ending on or after March 20, 2021.

Q8. If I am eligible, how many weeks of payments can I receive?

A8. Through the CARES Act, the PUA program initially ended on December 26, 2020. With the Continued Assistance Act, PUA was extended with new requirements for 11 weeks or a total of 50 weeks, ending on March 13, 2021. With the American Rescue Plan Act, PUA was further extended 25 weeks. Any weeks in which you received regular unemployment insurance or Extended Benefits (EB) since January 27, 2020 will be subtracted from this amount.

Q9. Does the PUA program expire?

A9. Yes. The PUA program expired on Dec. 26, 2020. The Continued Assistance Act made changes to the program, including a new expiration date of March 14, 2021. The American Rescue Plan Act restarted PUA effective week ending March 20, 2021, with an expiration date of Sept. 6, 2021.

Q10. What if I am working some, but my hours are reduced?

A10. You will need to report any income earned each week you file, but if it's below a certain amount (specific to your individual claim), then you may still be eligible for some payment of PUA during the weeks you worked and earned wages. All individuals, self-employed and others, must report GROSS earnings on the weekly PUA vouchers.

Q11. What are next steps after I file my PUA application?

A11. FIRST STEP: Within the next few weeks, you will receive a document called the PUA Monetary Determination in your Claimant Correspondence in Uplink. This document will show the weekly benefit amount. Receiving the PUA Monetary Determination does not mean that you are eligible for PUA payments. Your weekly benefit amount is calculated based on the earnings you entered on your PUA application and tax information from the Indiana Department of Revenue. If you are married filing jointly or have not yet filed your tax return with the Indiana Department of Revenue, you will receive the minimum weekly benefit amount of $149. Once you receive your PUA Monetary Determination form, you will be able to submit documentation of your income via the Uplink system to have the $149 reconsidered. You only need to submit this documentation if you disagree with the wage amounts, have missing wages in the chart of wages, or would like to provide other proof of your earnings. On your claimant homepage, go to the Claims section, click on the BYE date next to the open PUA claim. You can then click on "DWD Secure File Exchange" and then "Add File" to upload your documents." Acceptable documentation of wages earned or paid includes, but is not limited to, state tax return (line 1 of your state return titled Federal AGI) or federal tax return (Form 1040), paycheck stubs, bank receipts, business records, ledgers, contracts, invoices, and billing statements. You have until 09/04/2021 to provide proof of earnings, but we can accurately calculate your weekly benefit amount if you provide them as soon as possible.

SECOND STEP: Under the Continued Assistance Act, you must submit proof of employment to be eligible for payments of PUA made after Dec. 27, 2020. This applies regardless of the week being paid. For example, if you are being paid on January 10, 2021, for a week of PUA in late November, you will be required to submit proof of employment. You will receive a notice on your claimant correspondence page if you are required to submit this documentation. More information on this new requirement, including what documents are acceptable and the penalty for not submitting documentation is in a below FAQ.

THIRD STEP: If needed, you may be contacted by a DWD Claims Investigator for additional information to determine your eligibility for PUA benefits. If you are found eligible, you will start receiving payments of your weekly vouchers. If you are not eligible, you will receive a PUA Eligibility Determination. If you disagree with that decision, you must follow the appeal instructions included on the determination.

Q12. What if I entered something incorrectly on my PUA application?

A12. When you receive your PUA Monetary Determination, follow the instructions on that document if you entered incorrect information on your PUA application.

Q13: I have a Job Attachment issue on my PUA claim. What does this mean and how do I resolve it?

A13. A job attachment issue is generated when a claimant has requested to backdate his/her PUA claim and more information is needed to verify employment at the date of impact.

To resolve this issue, claimants should visit **www.unemployment.in.gov**, click on "Forms and Downloads," and download State Form 57024 (PUA Job Attachment Documentation). This form must be filled out completely with the requested supporting documentation and mailed or faxed to the department. Failure to return the form and the supporting documentation to the department could result in an investigation of your claim and/or suspension of benefits that results in an overpayment on your claim.

Q14. I believe I am eligible for PUA. I am not self-employed or an independent contractor and have enough wages to set up a regular UI claim, but I have been denied regular UI for other reasons. Will I be able to apply for PUA?

A14. You can apply for PUA. DWD will review your application to determine if you are eligible.

Q15. Am I eligible for Pandemic Unemployment Assistance (PUA) after I exhaust UI, PEUC and EB (if EB is applicable)?

A15. An individual who moved through the **progression chart** (from regular UI to PEUC to EB) and continues to be unemployed has demonstrated a recent attachment to the labor force and may be eligible for PUA. Eligibility for PUA is based on the reason the individual is unemployed, partially unemployed, or unable or unavailable for the week in question. **It is important to note that one of the PUA eligibility reasons (discussed in the PUA Section above) must apply each week.** A general statement of not being able to find work is not one of the listed reasons.

Q16. Am I required to provide proof of employment or self-employment to be eligible for PUA?

A16. Yes. The Continued Assistance Act requires that you must submit proof of employment or self-employment or planned commencement of employment or self-employment for any PUA payments made on or after Dec. 27, 2020. If you do not submit the required documentation by the required date, you will not be eligible for PUA. An overpayment will be set up for any weeks paid for weeks ending after December 27, 2020.

Q17. What are the acceptable forms of proof of employment or self-employment?

A17. See below for the types of acceptable documentation. The documentation must be dated at some point between the start of the applicable taxable year and the date of filing. For example:

- An individual filing a claim effective December 27, 2020, must submit documentation that substantiates employment or self-employment which occurred between January 1, 2019 (the start of the applicable tax year) and December 27, 2020.

An individual filing a claim effective January 3, 2021, must submit documentation that substantiates employment or self-employment which occurred between January 1, 2020 (the start of the applicable tax year) and January 3, 2021.

Proof of employment can include:

- paycheck stubs,
- earnings and leave statements showing the employer's name and address, and
- W-2 forms when available.

Proof of self-employment can include:

- State or Federal employer identification numbers,
- business licenses,
- tax returns,
- business receipts, and
- signed affidavits from persons verifying the individual's self-employment.

Proof of the planned commencement of employment can include:

- letters offering employment, and
- statements/affidavits by individuals (with name and contact information) verifying an offer of employment.

Proof of the planned commencement of self-employment can include:

- state or Federal employer identification numbers,
- written business plans, or
- a lease agreement.

Q18. How do I submit my documentation for proof of employment or self-employment?

A18. You **must** submit the required documentation through your Uplink Claimant Self-Service homepage. You should have a "TO DO" to upload the information through the Secure File Exchange. The "TO DO" will remain on your homepage until DWD resolves the issue. This will allow you to upload additional documents if needed. Do not upload multiple versions of the same documentation. If you do not have a "TO DO", then click on your **PUA claim** on your homepage, which will take you to details regarding your PUA claim and you will see the Secure File Exchange link. The only exception to using the Secure File Exchange is if you file by phone. If you file by phone, you can fax or mail the required documentation to DWD at the below address. You **must** attach the Notice of Requirement to Submit Proof of Employment or Self-Employment that can be found on your Uplink Correspondence page.

Q19. What if I do not submit the documentation timely or if the documentation does not prove employment or self-employment?

A19. You will not be eligible for PUA. An overpayment will be set up for any weeks paid for weeks ending after December 27, 2020.

Q20. What if I cannot submit the documentation timely?

A20. If you cannot submit the documentation by the deadline, you can request an extension. You must have good cause. The request MUST be received before the deadline. **If you do not request an extension before the deadline or the request does not show good cause, you will not be eligible for PUA.** To request an extension, send an email to PUA@dwd.in.gov with this information:

- First and Last name
- Last 4 digits of your SSN
- Reason why you will not be able to provide documentation by the date above

You will be sent an email within 10 days informing you if your deadline has been extended. If you are granted an extension, the email will provide a new deadline.

Q21. What are the timeframes to submit my proof of employment?

A21. You will receive a notice on your Uplink correspondence page with the due date. Under the Continued Assistance Act, the documentation is due based on these guidelines:

- Individuals filing a new PUA claim on or after Jan. 31, 2021 (regardless of whether claim is backdated) must provide documentation substantiating employment or self-employment **within 21 days** of application or when instructed by the state (whichever is later), or show good cause to have such deadline extended; and
- Individuals with an existing PUA claim who receive a payment of PUA on or after Dec. 27, 2020 (regardless of which week ending date is being paid) must provide documentation substantiating employment or self-employment **within 90 days** of application or when instructed by the state (whichever is later), or show good cause to have such deadline extended.

Q22: I was receiving Pandemic Unemployment Assistance (PUA) benefits, but now have a Pandemic Emergency Unemployment Compensation (PEUC) claim. My vouchers moved from the PUA claim to the PEUC claim and I now have an overpayment. Is there anything I can do about the overpayment?

A22: Based on federal guidance, DWD must pay benefits from claims in a particular order. If eligible, PEUC benefits must be paid before PUA benefits. You may qualify for the overpayment to be waived. Claimants must submit an Overpayment Waiver Request application for consideration. The Department will evaluate the request and issue a determination to the claimant. The application can be found at www.unemployment.in.gov under "Forms and Downloads." Certain exclusions apply. Please see DWD Policy 2020-04 for more information about the waiver process. More FAQs on overpayments can be found at: https://www.in.gov/dwd/indiana-unemployment/individuals/overpayment-faq/

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SECTION C

PANDEMIC EMERGENCY UNEMPLOYMENT COMPENSATION (PEUC)

Q1. I exhausted my 26 weeks of regular unemployment insurance benefits. Am I eligible for PEUC?

A1. Unemployment benefits are typically available to eligible claimants for up to 26 weeks. With the federal CARES Act passage, unemployment benefits have been temporarily extended through a program referred to as Pandemic Emergency Unemployment Compensation (PEUC). PEUC payments originally ended with week ending December 26, 2020. The Continued Assistance Act increased the maximum amount of benefits available under the PEUC program for an additional 11 weeks (from 13 times your

average weekly benefit amount to 24 times your average weekly benefit amount. The American Rescue Plan Act further extended PEUC benefits an additional 25 weeks.

Q2. I believe I am eligible for PEUC, but I received a PUA application. What should I do?

A2. PEUC claims are created in Uplink when the claimant files a voucher on Sunday. The Uplink system determines whether the claimant meets the basic eligibility requirements to go to this claim level. If the regular UI claim exhausts before a PEUC claim sets up, a PUA application will be generated. If you do not believe you are eligible for PUA, you can continue filing your weekly voucher and see if the PEUC claim establishes. If it does not, you should file the PUA application. You can also file the PUA application right away as it will not slow down PEUC benefits.

Q3. How much will I receive in PEUC benefits?

A3. You will receive the same weekly benefit amount as your most recent regular UI claim. You will receive a monetary determination showing your weekly benefit amount.

Q4. How do I apply for PEUC under the Continued Assistance Act or the American Rescue Plan Act?

A4. There is no new PEUC application that must be filed to receive this benefit. Continue to file your weekly voucher for the PEUC program if you remain unemployed. You will also need to complete the To-Do on your Claimant Homepage to File a New UI Claim.

Q5. When do PEUC benefits begin under the Continued Assistance Act and the American Rescue Plan Act?

A5. PEUC initially ended on Dec. 26, 2020. PEUC benefits under the Continued Assistance Act may only be collected for weeks ending on or after Dec. 27, 2020 (so week ending Jan. 2, 2021) through week ending March 13, 2021. PEUC benefits under the American Rescue Plan may only be collected for week ending March 20, 21 through week ending September 4, 2021. For example, if you had no remaining benefit under PEUC in November 2020, you will not be able to start collecting the benefits as of November. You will have a gap in payments until week ending Jan. 2nd when the new PEUC program begins. Also, if you had no remaining benefit under PEUC in Feb 2021, you will not be able to start collecting the benefits as of Feb. You will have a gap in payments until week ending March 20, 2021 when the new PEUC program begins (unless you are eligible for PUA during those weeks).

Q6. How long does PEUC last under the Continued Assistance Act and the American Rescue Plan Act?

A6. The PEUC program expired under the Continued Assistance Act with week ending March 13, 2021. With the American Rescue Plan Act, PEUC expires Sept. 4, 2021.

Q7. I was actively filing for PUA week ending 12/26/20 but previously had a PEUC claim. Which program would I be eligible for under the Continued Assistance Act? OR I was actively filing for PUA week ending 3/13/21 but previously had a PEUC claim. Which program would I be eligible for under the American Rescue Plan Act?

A7. You may only collect PUA if you have exhausted any entitlement to PEUC (e.g., used up your benefits). Because of the additional PEUC benefits available, you are no longer eligible to receive PUA. If you continue to be unemployed or partially unemployed, you will automatically be moved to your existing PEUC claim. Note that your PEUC claim may have a different weekly benefit amount because the program uses a different look-back period for your prior earnings. When you file your weekly vouchers, add employment history for any employment you have had after the last voucher you filed. If you later exhaust benefits under the PEUC program and continue to be unemployed, partially unemployed, or unable or unavailable to work because of COVID-19, you may be eligible to resume collection of your existing PUA benefits if the PUA program is still in effect.

Q8. I was receiving PEUC benefits but had to file a new UI claim. The new UI claim opened with a lower WBA than the PEUC claim. Can I stay on the PEUC claim?

A8. You will stay on the PEUC claim if:

- The UI claim your PEUC is based on expired on or after 12/27/2020 and,
- You are eligible for benefits and,
- The newly filed UI claim has a WBA that is at least $25 less than your PEUC claim WBA.

Each week, we identify claimants who meet these requirements. If you are one of these claimants and will be staying on PEUC, DWD will send you an email when your vouchers have been moved back to the PEUC claim. In the meantime, continue to file vouchers each week.

Q9: I was receiving Pandemic Unemployment Assistance (PUA) benefits, but now have a Pandemic Emergency Unemployment Compensation (PEUC) claim. My vouchers moved from the PUA claim to the PEUC claim and I now have an overpayment. Is there anything I can do about the overpayment?

A9: Based on federal guidance, DWD must pay benefits from claims in a particular order. If eligible, PEUC benefits must be paid before PUA benefits. You may qualify for the overpayment to be waived. Claimants must submit an Overpayment Waiver Request application for consideration. The Department will evaluate the request and issue a determination to the claimant. The application can be found at www.unemployment.in.gov under "Forms and Downloads." Certain exclusions apply. Please see DWD Policy 2020-04 for more information about the waiver process. More FAQs on overpayments can be found at: https://www.in.gov/dwd/indiana-unemployment/individuals/overpayment-faq/

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SECTION D

FEDERAL PANDEMIC UNEMPLOYMENT COMPENSATION (FPUC)

Q1. Am I eligible for the additional CARES Act federal pandemic unemployment compensation (FPUC) benefits?

A1. If you are eligible for regular UI, PEUC, Extended Benefits (when they are available), or PUA, you will receive the additional FPUC payment. There is no application. FPUC was initially in the amount of $600 effective from week ending April 4, 2020, to week ending July 25, 2020. With the Continued Assistance Act, FPUC was reinstituted at $300 a week effective week ending January 2, 2021, to week ending March

13, 2021. With American Rescue Plan Act, FPUC is available from week ending March 20, 2021, to week ending Sept. 4, 2021. The FPUC benefit is taxable and is subject to child support withholding.

Q2. How do I get the additional FPUC payment each week?

A2. The additional weekly payment will automatically be applied to any eligible payments. There are no additional steps you need to take.

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SECTION E

WHAT HAPPENS AFTER I FILE FOR UNEMPLOYMENT INSURANCE BENEFIT?

Q1. I filed a claim, and the Uplink online system shows that I have an issue holding my payments. What does that mean?

A1. This means that your claim or voucher needs further analysis. This could be due to your earnings, your answers during filing, information from your employer, or information from other sources. Do not be worried. This is the normal process for many claims. A DWD Claims Investigator may have to contact you and/or your employer for more information. They also may be able to make a determination without contacting you. Under normal circumstances, decisions are typically made within 21 days but due to the high volume of claims, it could take longer to review claims that have issues that need to be reviewed. Common issues are (these are not an exhaustive list but are the most common):

- **Deductible Income** – the department received information that the claimant received some type of income from his/her employer during the week at issue, such as payments from employment, vacation, sick, or other paid time off.
- **Employed Full Time** – We have received information from the employer or the claimant that indicates the claimant is employed either full or part-time.
- **No Reasonable Assurance or School Worker** – The claimant was a school employee or had school wages reported during the base period. There are state and federal guidelines requiring analysis on under these circumstances.
- **Not A&A** or Availability – The agency received information that the claimant was not able and available to accept full time work that week.
- **Other Discharge** – The agency received information that the claimant was discharged from their job for a non-specific reason.
- **Temporary Service** – The agency received information that the claimant worked for a temp service.
- **Work Performance** – The agency received information that the claimant was discharged from a base period employer for work performance issues.
- **Work Refusal** – The agency received information that the claimant was offered work and refused the offer of employment.

- **Gross Misconduct** – The agency received information that the claimant was discharged for a reason that is legally defined as gross misconduct.
- **Personal Reasons** – The agency received information that the claimant had quit their job.
- **Job Attachment** - Claimant has requested to backdate their PUA claim, and more information is needed to verify employment at the date of impact. See more information on how to resolve this issue under the PUA FAQ section below.
- **Eligibility** – The agency received information on a PUA claim that needs additional investigation to determine if the claimant is eligibility for PUA.
- **PUA Multistate Verification** – The agency received information on a PUA claim that the claimant worked or filed taxes in another state in the last two years.
- **PUA Earnings Verification** – This issue does not hold payment; it allows a claimant to provide proof of earnings to adjust their PUA weekly benefit amount (WBA).
- **Identity Verification –** The agency needs to verify your identity. You will have a TO DO item on your claimant homepage that says, "Identity Verification Needed." Click on that link and it will walk you through the steps to verify your identity through ID.me. For instructions on how to use ID.me, **visit this page**.
- **Claim Investigation issue** - more information is needed to verify details about eligibility for benefits. To resolve this issue, claimants should visit their Uplink homepage and download State Form 57031. This form must be filled out completely with the requested supporting documentation and mailed or faxed to the department. Failure to return the form and the supporting documentation to the department could result in an investigation of your claim and/or suspension of benefits that results in an overpayment on your claim.

Q2. Do I need to file anything else after the initial claim application for unemployment insurance (UI) benefits?

A2. Yes. You must file a voucher EACH WEEK through the Uplink online filing system and comply with the terms of the weekly vouchers to continue to be eligible for and receive benefits each week. You must submit your weekly voucher during the week following your initial application and then every week after for as long as you remain unemployed. You must file the weekly vouchers even if you have not received a determination regarding eligibility for benefits.

Q3. Is the one week waiting period for unemployment insurance benefits being waived?

A3. Yes. The one-week waiting period for payment of unemployment insurance (UI) was waived by the Governor's Executive Order. The waiver is retroactive to the week of March 8, 2020. This means that benefits will be paid for the first week you are eligible.

Q4. When will I receive my first unemployment insurance (UI) payment?

A4. You should receive your first payment within three weeks if there are no issues with your initial claim application for benefits.

Q5. Am I required to search for work?

A5. Yes. While the requirement to search for work was waived for a period of time, this requirement has been restarted based on the Governor's Executive Order 21-13. Beginning the week of June 06-12, 2021,

you must complete a work search activity or benefits can be denied for that week. For more information on what qualifies as a work search activity, please see Work Search.

Q6. If I receive a "Check Stub Coversheet" asking me to send a copy of my pay stubs to DWD via mail or fax, but I do not have a fax machine, can I email these?

A6. You likely received a form called "Check Stub Coversheet." If so, this is automatically sent to a claimant who might have a deductible income issue (you reported receiving vacation pay, sick pay or the like from your employer) on a regular UI claim. If you fax the information, then it goes to the DWD imaging department to be imaged under your claim. When it gets assigned to a DWD claims investigator, then they will have the information. If you don't have access to a fax machine, then you can wait until the claims investigator contacts you. There is even a chance that the claims investigator won't need to contact you. You will not be penalized by not sending the pay stub information via fax.

Q7. How do I get paid if I am eligible?

A7. At the end of the claim filing process, you will make a payment election. You will be directed to Key Bank's website as Key Bank is the DWD payment vendor. You can choose between: (1) Direct Deposit to a U.S. checking/savings account, or (2) a Key2Benefits prepaid MasterCard. If you do not make a choice, you will receive a Key2Benefits prepaid MasterCard at the mailing address on file for you on CSS. As to when you will receive payment:

- Direct deposit: money will be deposited in the bank account provided within two business days **of the weekly voucher being approved**.
- Debit Card: money will be deposited on the Key2Benefits card within a day **of the weekly voucher being approved.**

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SECTION F

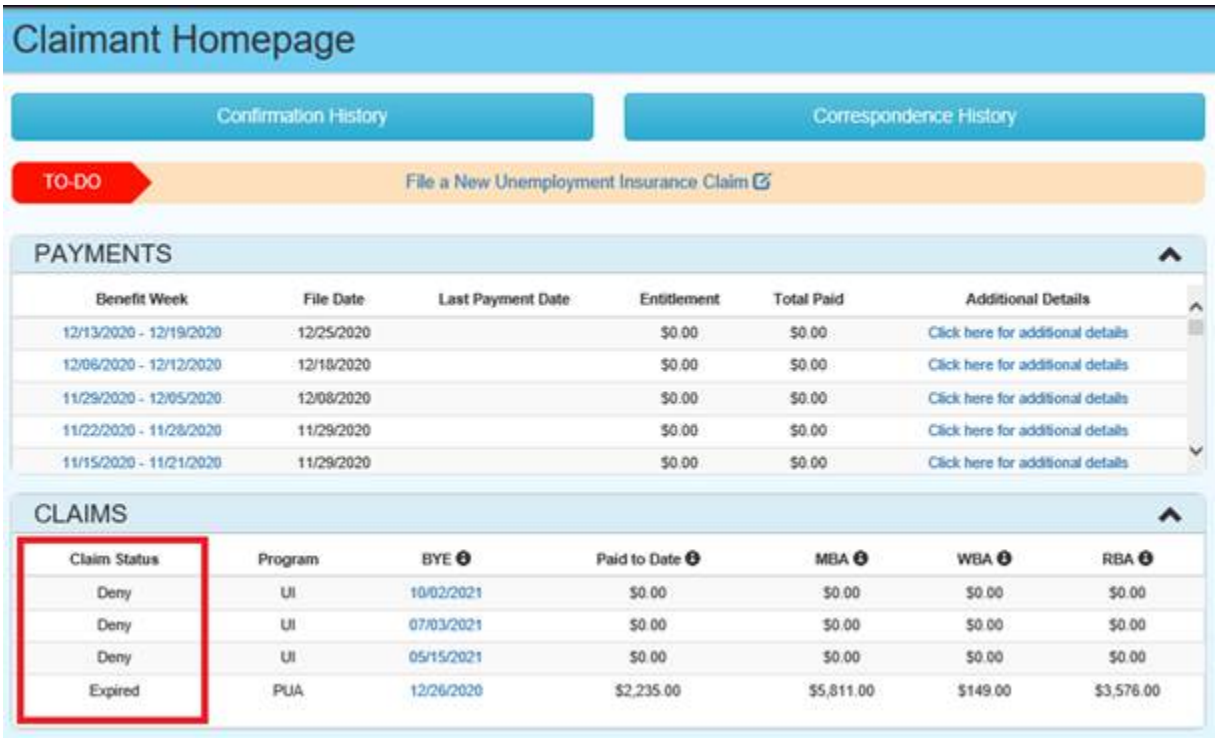
IDENTITY VERIFICATION, IDENTITY THEFT AND OTHER INFORMATION ON POSSIBLE FRAUD?

Q1. I have an "Identity Verification" issue on my claim. What does that mean and how do I resolve it?

A1. Due to the national fraud scheme that is occurring, DWD has taken some additional steps to verify claimant's identities. For your unemployment claim to move forward, DWD must verify your identity. To complete the identity verification process, click on the TO DO item on your claimant homepage that says, "Identity Verification Needed." Click on that link and it will walk you through the steps to verify your identity through ID.me which is a quick and secure identity verification process. For instructions on how to use ID.me, **visit this page**. Once your identity is successfully verified and matches the records on file at DWD (which can take up to 72 hours to resolve in Uplink), we can move forward with any other issues on your claim that may be holding benefits. Continue to check your Uplink account regularly for the most current status. NOTE: Do not submit any other personal documentation through other means as this will only delay the resolution of your issue and subject you to potential theft by criminals.

Q2: What if I can't click the button to go to ID.me?

A2: You cannot verify through ID.me if you do not have an open claim. **You will need to wait until your claim is in open status** in order to complete identity verification. To check if your claim is in open status, look at the Claims section of your Claimant Homepage. Under the Claim Status column, you will see the word "Open". If you see "Deny", "Expired", or "Pending" you will not be able to access Identity Verification through ID.me. (See red box below for where to look)



Q3. What does it mean when my account is "revoked", or I have a message on my CSS home page that states there is a problem with my account and to call the contact center?

A3. Due to the national fraud scheme that is occurring, DWD has taken some additional measures to detect suspected fraud and locked certain accounts for suspicious activity. If you have a message that states there is a problem with your account, you should first ensure you check your correspondence to see if you received a notice requiring you to submit additional documentation to the department. You should also check to see if there are any to-do items on your homepage, including a request to verify your identity through ID.me. If you have sent in all required documentation and resolved any outstanding to-do items and your account is still locked, please contact DWD at 1-800-891-6499 for more information on next steps.

If you have a message that states your account has been revoked and you are unable to login, please contact DWD at 1-800-891-6499 for information on next steps. Do not submit any personal documentation to DWD unless specifically requested as this will only delay the process and subject you to potential theft by criminals. See DWD's latest fraud alert for important steps to protect yourself. https://content.govdelivery.com/accounts/INDWD/bulletins/29861eb

Q4. What do I do if information in my UI Uplink account is changed without my knowledge?

A4. DWD issued a fraud alert on June 16, 2020 to notify those who have filed for unemployment insurance benefits in 2020 that they need to protect their personal information from potential scammers. As a result of continued attempts by fraudsters, on August 2, 2020, DWD asked that you do the following two things before filing further vouchers:

- Change your password in Uplink to something no one else will know and something that you have not used in the past on other sites (use the password reset option on the Uplink homepage); AND
- Check your payment election status to ensure it is the payment election that you chose; if you chose direct deposit to your bank account, ensure that the correct bank account is listed. If it is not, immediately fix it. It is recommended that you check this each week prior to completing your weekly voucher.

If you are unable to access your account using the "forgot username" or "forgot password" process, please contact DWD at 1-800-891-6499 for information on next steps.

Q5. What do I do if someone changed my banking information, and my payments were wrongfully sent to another account?

A5. If you believe that your payments were wrongfully diverted to another bank account, follow the steps below. Then file an electronic report with the Indiana State Police by filling out the form available at https://www.in.gov/dwd/2464.htm and emailing it to uifraud@isp.in.gov.Please do not contact Key Bank as they are unable to assist in the recovery of these funds.

- Change your password in Uplink to something no one else will know and something that you have not used in the past on other sites (use the password reset option on the Uplink homepage); AND
- Check your payment election status to ensure it is the payment election that you chose; if you chose direct deposit to your bank account, ensure that the correct bank account is listed. If it is not, immediately fix it. It is recommended that you check this each week prior to completing your weekly voucher.
- Fill out State Form 57068 and mail or fax it to the department. Upon receipt of this form, DWD will initiate an investigation and issue a determination.
- If you are requesting payments be re-issued, you must also file a file an electronic report with the Indiana State Police by filling out the form available at https://www.in.gov/dwd/2464.htm and emailing it to uifraud@isp.in.gov. Include a copy of the report when you submit the above form.

Q6: I received a text message regarding an unemployment insurance claim or account advising me to click a link. What do I do?

A6: Do not click on the link provided in the text message. These text messages are from fraudsters attempting to obtain personal information from individuals to perpetrate fraud. These text messages are being sent both to individuals who have never filed an unemployment claim and to individuals who have filed. The DWD Unemployment Insurance division does NOT send claimants text messages regarding their unemployment insurance claim. Individuals who receive this text message should notify the department by sending an email to AskUIContactCenter@dwd.IN.gov. A screenshot of the text message would be helpful as we work to have these fraudulent sites shut down. If you clicked on the

link and your unemployment insurance account was compromised, please call the DWD Contact Center immediately for further assistance. If payments were wrongfully diverted to the fraudster, you will need to fill out State Form 57068 as discussed above so that we can investigate the matter and repay the funds to the legitimate claimant.

Q7. What do I do if someone has stolen my identity and filed an account using my personal information?

A7. If you believe you are a victim of ID theft, please do the following:

- Fill out State Form 57068 and mail or fax it to the department. Upon receipt of this form, DWD will lock the account from further use and initiate an investigation and issue a determination.
- If you are currently employed, contact your employer's human resources department so that they can protest your claim with DWD
- Report to Law Enforcement:
    - File an electronic report with the Indiana State Police by filling out the form available at https://www.in.gov/dwd/2464.htm and emailing it to uifraud@isp.in.gov.
    - File an identity theft complaint with the Indiana Attorney General's Office at https://www.in.gov/attorneygeneral/2895.htm or by calling (800) 382-5516.
    - The FBI also encourages victims to report fraudulent or any suspicious activities to the Internet Crime Complaint Center at http://www.ic3.gov. You may consult http://identitytheft.gov for help in reporting and recovering from identity theft.
- Protect your credit: Notify the Credit bureaus (Equifax, Experian, and TransUnion)
- Understand identity theft and taxes: For more information about identity theft and the taxes/the 1099-G, please visit:
    a) Indiana: https://www.in.gov/dwd/indiana-unemployment/individuals/1099g/
    b) IRS: https://www.irs.gov/identity-theft-fraud-scams/identity-theft-and-unemployment-benefits

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SECTION G

WHAT IF I REFUSE TO RETURN TO WORK OR REFUSE AN OFFER OF EMPLOYMENT?

Q1. I have a general fear of work due to COVID-19. If I quit or refuse to return to work, would I be eligible for benefits?

A1. No. You will not be eligible for any unemployment benefits (UI, PEUC or PUA) based solely on a general fear of COVID-19. Please contact your employer regarding potential telecommuting, paid time off or other options they may be offering.

Q2. I am called back to work but either myself or a household member has COVID-19 or are quarantined. Can I not return to work and continue to be eligible for unemployment benefits during this time period?

A2. You will not be eligible for regular UI effective with week ending June 6, 2021. You may be eligible for PUA. See the PUA section for more information.

Q3. I do not have childcare due to my child's school or daycare being closed from COVID-19. I am called back to work (either after being off of work or after teleworking due to Covid-19) or quit due to my childcare situation. Am I eligible for unemployment benefits?

A3. You should work with your employer to identify whether they can make accommodations to your job (such as a shift change or telework) to allow you to work. However, if your employer is unable to do this, you will no longer be eligible for regular unemployment insurance benefits as of May 23, 2020. You may be eligible for PUA. See more information on PUA in these FAQs. If you receive a Determination of Eligibility that you are denied regular unemployment benefits due to this issue, you can then apply for PUA on your Claimant Homepage.

Q4. I am called back to work but am high risk as defined by the CDC and have been advised to quarantine by my medical provider. Am I eligible for unemployment benefits if I do not return to work?

A4. You should work with your employer to identify whether they can make accommodations to the workplace or your job to ensure that your specific medical issues are addressed. However, if your employer is unable to do this, you will not be eligible for regular unemployment insurance benefits, but you may be eligible for PUA if one of the PUA reasons applies to you for each week you claim. See more information on PUA in these FAQs. If you receive a Determination of Eligibility that you are denied regular unemployment benefits due to this issue, you can then apply for PUA on your Claimant Homepage.

Q5. I was offered to return to my job or was offered a new job but refused it. Will it impact my unemployment insurance, PEUC or PUA benefits?

A5. Refusing a suitable job offer can impact your eligibility for benefits. A suitable job offer is a job under substantially the same terms and conditions as your previous job. Other factors that are looked at when determining if a job offer is suitable are:

1) the risk involved to your health, safety, and morals;

2) your physical fitness and prior training and experience;

3) how long you have been unemployed and how likely you are to receive a better job offer; and

4) whether the work is more than 30 miles from your home or most recent worksite.

Once you have claimed benefits for more than five weeks in a row, there are rules about the amount of pay you must accept.

- If you have been unemployed for more than five weeks, the work is suitable if it pays 90% or more than your most recent regular weekly wage and meets all the other standards for suitable work.
- If you have been unemployed for more than eight weeks, the work must pay 80% or more than your most recent regular weekly wages and meet all the other standards for suitable work.

There are three reasons that a job offer is not suitable work:

1) The job is available because of a strike, lockout, or other labor dispute;

2) The job requires you to join a union, resign from a union, or prohibits joining a union;

3) You would have to drop out of DWD approved training to take the job.

Even if the job offer is considered suitable, you can refuse it for work related reasons if you have good cause. Work related reasons could be pay, hours, type of work, or distance. Good cause will be determined based on your length of employment, prior pay, conditions of work, additional or new education or skills, prospect of other employment, and availability of work and pay. Personal reasons will not usually be considered good cause because they are not related to the job.

Q6. If an employer reports my refusal to return to work or my refusal to accept a suitable job offer, what happens next?

A6. You will receive a notice on your Uplink correspondence page that an employer has made a report. The Department will investigate the work refusal, and you will receive a Determination of Eligibility (DOE) in Uplink. The DOE will state whether you are qualified or ineligible for UI benefits and explain why the decision was made. If the DOE denies or reduces your UI benefits, you have the right to appeal the DOE. The instructions for appealing are on the DOE.

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SECTION H

THE LOST WAGES ASSISTANCE (LWA) PROGRAMS

Q1. What is the Lost Wages Assistance (LWA) program?

A1. The federal Lost Wages Assistance (LWA) Program was created through a Presidential Executive Order to provide temporary FEMA benefits to unemployed workers impacted by the COVID-19 pandemic. Because this program is administered through FEMA, it is not an unemployment insurance program. The program lasted 6 weeks, from August 1 through September 5, 2020.

Q2. Who was eligible for the $300 in LWA funding?

A2. To be eligible to receive an additional $300 per week, all the conditions below had to be met:

1) Your weekly benefit amount was at least $100 under regular state unemployment insurance (UI), Pandemic Unemployment Assistance (PUA), Pandemic Emergency Unemployment Compensation (PEUC), or other eligible federal UI programs; and
2) You certified that you were unemployed or partially unemployed due to disruptions caused by the COVID-19 pandemic; and
3) DWD determined that you were eligible for an underlying benefit payment for the week; and
4) The LWA program was available funding from FEMA.

Q3. Where can I find additional information on the LWA program?

A3. You can find additional information on the FEMA website at;

https://www.fema.gov/disasters/coronavirus/governments/supplemental-payments-lost-wages-guidelines

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SECTION I

OTHER QUESTIONS

Q1. What are Extended Benefits (EB)?

A1. The Extended Benefits (EB) program is a program that triggers on during periods of high unemployment. During the COVID-19 pandemic, EB extended benefits were available after UI and PEUC was exhausted, during the following period: June 7 – November 14, 2020.

Q2. What happens if I have Extended Benefits remaining on my claim when the program ends?

A2. If there were benefits remaining on your claim when the Extended Benefits program ended, you will not be able to collect them. Depending on your circumstances you may be eligible for Pandemic Unemployment Assistance (PUA).

Q3. I had a previous unemployment insurance claim that is still open. What do I do?

A3. If the claim is still open, you only need to start filing vouchers again. This will reopen the claim.

Q4. If my employer continues to provide health insurance, will it impact my benefits?

A4. No.

Q5. If my employer lays me off and pays for my healthcare insurance coverage through COBRA, how does that impact my unemployment insurance benefits?

A5. If your employer pays for your COBRA coverage, this is considered deductible income and must be reported to DWD and could impact the amount of UI benefits you are eligible to receive.

Q6. Do I have to use all my paid time off (PTO), such as vacation, sick and personal time, before filing for benefits?

A6. No, but you must report any PTO that has been paid to you by your employer. This is considered deductible income and will be used to calculate your weekly unemployment insurance benefit.

Q7. Do I need to do anything if I reported other state employment on my claim and it is not showing on my monetary determination?

A7. If you chose the state where you physically worked, you do not need to do anything else. A request has been sent to the other state. The other state will send your wages for use in your Indiana claim. If your claim amount changes, you will be sent a new monetary determination.

Q8. Do I need to do anything if I reported Federal Civilian or Military employment and have received a monetary determination that does not show those earnings?

A8. You received a monetary determination because you have enough Indiana wages to open claim. Please follow the instructions on the Federal Employment Coversheet and/or Military Employment Coversheet you received to submit proof of earnings. We can then add those wages to your claim. If your claim amount changes, you will be sent a new monetary determination.

Q9. Do I need to do anything if I reported Federal Civilian or Military employment and have not received a monetary determination?

A9. Please follow the instructions on the Federal Employment Coversheet and/or Military Employment Coversheet you received to submit proof of earnings. We can then add those wages to your claim. If your claim amount changes, you will be sent a new monetary determination.

Q10. What should I do if I did not report out-of-state, Federal Civilian, or Military employment and should have?

A10. Please follow the instructions on the monetary determination to file an appeal.

Q11. I received my federal stimulus payment from the Internal Revenue Service (IRS). Will this impact my unemployment insurance benefits?

A11. No. The federal stimulus payment from the IRS is not considered deductible income for unemployment insurance benefit purposes so it will not impact your weekly benefits.

Q12. I filed my initial claim late. What can I do?

A12. Under the Indiana Administrative Code and the Governor's Executive Order (which is ending on June 1, 2021), backdating of initial UI claims is not permitted except for limited circumstances. Currently, it is if you filed late due to DWD error or if COVID-19 prevented you from being able to file your claim electronically (e.g., you were sick or quarantined and could not access a computer to file your claim timely). Not knowing that you needed to file or could be eligible are not COVID-19 related reasons. Beginning June 1, 2021, claims will no longer be backdated if COVID-19 prevented you from being able to file your claim electronically and will be approved only when there is a verified agency error that prevented you from filing on time. If you believe you may be eligible for a backdated initial claim, you must complete this form: Request to File a Late initial Claim for Unemployment Insurance Benefits. You must provide complete information, or the request will be denied. If the claim is back dated, DWD will contact you to file back vouchers. You will receive a call from DWD at 1-800-298 6650 or 1-800-891-6499.

Q13. My employer received a small business PPP loan to maintain payroll. If my employer paid me full or partial wages with the PPP loan, will this impact my unemployment insurance benefits?

A13. Yes. If you are receiving wages from your employer, whether the wages come from a PPP loan or elsewhere, you must disclose the wages to DWD on the weekly voucher. The wages will impact the weekly benefit amount. You could still be eligible for some UI benefits depending on the amount of wages being paid.

Q14. If I am working part-time, how will that impact my benefits?

A14. Part-time employment during the week claimed will reduce the amount of benefits paid for that week. If you do work while receiving benefits, you **must** report any money you earned on the voucher **for the week you worked** (not the week you ultimately get paid for the work). You will report GROSS earning on your weekly voucher (this is for both regular UI, PUA and PEUC). Failure to report money you earned is fraud and can result in denial of benefits, collections actions, and criminal prosecution. If you earned wages from a Base Period Employer (see your Monetary Determination of Eligibility), then a dollar-for-dollar deduction will be taken from your Weekly Benefit Amount (WBA). If you earned wages from an

employer who is NOT on your Monetary Determination of Eligibility or in your Base Period, then the following calculation applies. If you earn 20% or less of your WBA from an employer that is not listed on your Monetary Determination of Eligibility, no deduction will be made from your benefit payment. If you earn more than 20% of your WBA from an employer that is not listed on your Monetary Determination of Eligibility, a dollar-for-dollar deduction will be made from your benefit payment for all wages earned in excess of 20% of your WBA. If you work odd jobs for anyone other than your base period employer(s), a dollar-for-dollar deduction will be made after an amount equal to 20% of your weekly benefit amount has been earned.

Q15. I was appointed as a poll worker for Indiana's June 2, 2020 Primary Election or the November 3, 2020 Election. Should I report the stipend I was paid as income when filing my claim or voucher?

A15. No. Under Executive Order 20-27 and 20-45, stipends paid to those appointed as poll workers for Indiana's June 2, 2020 Primary Election and November 3, 2020 Election (work beginning with early absentee in-person voting and ending with tabulation of mailed-in ballots) are not considered deductible income under Indiana unemployment compensation law and should not be reported as income. Reporting your poll worker stipend as income will result in the reduction of your benefits and a delay in claims processing. Any income other than the poll worker stipend should continue to be reported in the weekly filing process.

Q16. I received an overpayment notice. Can my overpayment be waived?

A16. In certain circumstances, a claimant may be eligible to have his/her overpayment waived. In accordance with Ind. Code §22-4-13-1(i), an overpayment may be waived upon the request of the individual only if the following criteria are met:

1. the benefits were received by the individual without fault of the individual;
2. the benefits were the result of payments made:
    a. during the pendency of an appeal before an administrative law judge or the review board under IC 22-4-17 under which the individual is determined to be ineligible for benefits; OR
    b. because of an error by the employer or the department; AND
3. repayment would cause economic hardship to the individual.

Claimants must submit an Overpayment Waiver Request application for consideration. The Department will evaluate the request and issue a determination to the claimant. The application can be found at www.unemployment.in.gov under "Forms and Downloads." Certain exclusions apply. Please see DWD Policy 2020-04 for more information about the waiver process. More FAQs on overpayments can be found at: https://www.in.gov/dwd/2345.htm

Q17. I owe an overpayment for unemployment insurance payments. If I receive the 3rd Economic Impact Payment under American Rescue Plan Act of 2021, will it be offset to pay my outstanding UI overpayment?

A17. DWD is required to send certain overpayment debts to the IRS for offsetting of federal tax returns once the debt is a year old. Pursuant to the IRS, if the Economic Impact Payment is paid as an advance, then no, the Economic Impact Payment is not subject to offset for the unemployment insurance debt. If

the Economic Impact Payment is added to your return, then it would be subject to offset if the debt meets the criteria above. See https://fiscal.treasury.gov/top/faqs-for-the-public-covid-19.html

Q18. I already have an active claim, but there is a "To-Do" on my Uplink Claimant Homepage with the message to "File a New Unemployment Insurance Claim". Do I have to file a new claim?

A18. YES, you will need to file a new Unemployment Insurance claim in order to continue to be eligible to be paid. Unless you are within the 52-week period of an active unemployment insurance (UI) claim, DWD is required to have you file a new claim each quarter of the year to ensure you do not meet the minimum eligibility requirement for wages earned. You should click the link to file any outstanding vouchers before you file the new UI claim. Filing a new claim is required under the federal CARES Act. If you are receiving any CARES Act benefits, such as PUA or PEUC, this is required from you each quarter change (e.g., July, October). If you have enough wages, you would be eligible for a regular UI claim, and DWD will automatically put your vouchers on the correct claim. Continue to file your vouchers each week if you are unemployed.

Q19. What happens after I file a quarter change UI claim?

A19. The below are the most common scenarios that will occur after you file your quarter change UI claim:

- A: The claimant has been receiving PUA because all prior UI claims filed on or after 01/27/2020 were denied monetarily. The new quarter change UI claim opens monetarily. Any issues on the UI claim will need to be decided before weekly vouchers can be paid. This is because the UI separation and other UI issues were not originally investigated because the UI claim was denied monetarily. The claimant was only determined eligible for PUA based on PUA eligibility requirements.
- B: The claimant has been receiving PUA because all prior UI claims filed on or after 01/27/2020 were denied monetarily. The claimant's new quarter change UI claim is again denied monetarily. The claimant will remain on PUA.
- C: The claimant has been receiving PUA because they were denied UI on a non-monetary issue (e.g., a discharge, voluntary quit, work refusal or the like). These claimants will only file a quarter change claim if their monetarily eligible UI claim expired. If the newly filed claim monetarily opens, scenario A would apply.
- D: The claimant has been receiving PEUC. The new quarter change opens monetarily. The issues will need to be resolved before payment can occur on the new UI claim. In some cases, the claimant may be able to stay on PEUC. See the PEUC section.
- E. The claimant has been receiving PEUC. The new quarter change claim is denied monetarily. The claimant will remain on PEUC.

Q20. Do I have to pay taxes on unemployment insurance benefits, including pandemic benefits?

A20. Yes. We will issue you a 1099G for benefits earned in the calendar year. For more information, please visit https://www.in.gov/dwd/indiana-unemployment/individuals/1099g/. Please NOTE that pursuant to the IRS webpage, the following now applies to your federal taxes: "If your modified adjusted gross income (AGI) is less than $150,000, the American Rescue Plan enacted on March 11, 2021, excludes from income up to $10,200 of unemployment compensation paid in 2020, which means you don't have to pay tax on unemployment compensation of up to $10,200. If you are married, each spouse receiving unemployment compensation doesn't have to pay tax on unemployment compensation of up

to $10,200. Amounts over $10,200 for each individual are still taxable. If your modified AGI is $150,000 or more, you can't exclude any unemployment compensation." For more information, see https://www.irs.gov/faqs/irs-procedures/forms-publications/new-exclusion-of-up-to-10200-of-unemployment-compensation

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SECTION J

MIXED EARNERS UNEMPLOYMENT COMPENSATION (MEUC)

Q1. Am I eligible for the Mixed Earners Unemployment Compensation (MEUC) benefits?

A1. You may be eligible for an additional $100 payment under MEUC if you received or are receiving:

- Unemployment Insurance (UI) benefits,
- Pandemic Emergency Unemployment Compensation (PEUC) benefits, or
- Trade Readjustment Allowance (TRA) benefits
- **And** you were self-employed.
- **And** earned at least $5,000 net income in self-employment during the applicable tax year.

MEUC is not available for the Pandemic Unemployment Assistance (PUA) program. You must have applied by June 19, 2021, to be considered for this program.

Q2. How much will I receive in MEUC benefits?

A2. If eligible, you will receive an additional $100 each week you receive UI, PEUC, or TRA from 01/02/2021 – 06/19/2021 as the MEUC ended 6/19/21 in Indiana

Q3. How do I get the additional MEUC payment each week?

A3. The additional weekly payment will automatically be applied to any eligible payments. There are no additional steps you need to take.

Q4. How do I apply for MEUC under the Continued Assistance Act?

A4. Step 1: On your Claimant Self-Service homepage click on the To-Do: Mixed Earners Unemployment Compensation Question(s)

Step 2: Answer the question for each applicable tax year listed - Did you earn $5,000 net self-employment income in the year before you filed your UI claim?

Step 3: You will receive a document in your Correspondence History titled "Mixed Earners Unemployment Compensation Application." Follow the instructions to send proof of net earnings. If you do not send in your earnings following these instructions, your application processing may be delayed.

Q5. For what weeks can MEUC benefits be paid?

A5: MEUC is payable for weeks ending January 2, 2021 through June 19, 2021.

Q6. What year of self-employment earnings is used to determine eligibility?

A6. Eligibility is determined based on the year before you filed your UI claim. It is called the applicable tax year. Examples:

- You are currently receiving PEUC. You filed your UI claim in 2020. Eligibility is determined based on self-employment from 2019.
- You are currently receiving UI. You filed your UI claim in 2020. Eligibility is determined based on self-employment from 2019.
- You are currently receiving PEUC. Your PEUC claim is based on a UI claim you filed in 2019. Eligibility is determined based on self-employment from 2018.
- You are currently receiving TRA. Your TRA claims are based on a UI claim you filed in 2018. Eligibility is determined based on self-employment from 2017.

Q7. What do I send as proof of self-employment?

A7. You must send your Mixed Earners Unemployment Compensation Application and your entire tax return for the applicable tax year. The tax return must clearly show net self-employment, which is often shown on Schedule C and SE.

Q8. What happens if I have a PEUC claim during the MEUC payable period, then open a new UI claim.

A8. MEUC eligibility will be determined for the PEUC claim and the new UI claim. Eligibility will be based on the applicable tax year as mentioned above.

Q9. I have several MEUC Questions to answer on my CSS Homepage. What should I do?

A9. Answer each question honestly.

Q10. I accidentally chose No to the MEUC Question on my CSS Homepage. I meant to say Yes. What do I do?

A10. Log-in to your CSS homepage and click on the dropdown menu next to your name. Go to the MEUC question and answer it again.

Q11. I chose Yes to the MEUC Question, but do not want to apply. What should I do?

A11. Since you chose Yes, you are able to apply for MEUC benefits. If you choose not to apply, do not send in the barcoded document.

Q12. I applied for MEUC. What happens next?

A12. Your application will be reviewed. You will be contacted if additional information is needed. You will receive a determination of eligibility. If you are eligible, MEUC payments will begin. If you are not eligible, you can appeal the decision.

Q13. My determination tells me that MEUC is payable for applicable weeks during the MEUC period, which began January 2, 2021. How are payments issued?

A13. If you are eligible for MEUC, you will likely receive a lump sum payment for past weeks. For weeks after you are determined eligible for MEUC, you will see an additional $100 added to your weekly benefit amount.

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SECTION K

RESTART OF PUA, PEUC AND FPUC

Q1. When will PUA, PEUC and FPUC be restarted?

A1. You will be able to access weekly vouchers for PUA and PEUC no later than Friday, July 16, 2021. If you are eligible for UI, PEUC or PUA for any weekly vouchers, then FPUC will be payable also. NOTE: Due to the quarter change on July 4, 2021, you will be required to file a new UI claim if you have not already done so. We are required to ensure you are not eligible for regular UI prior to making PUA and PEUC vouchers available. If you are eligible to set up a new UI claim as of July 4, 2021, you will receive vouchers for PUA or PEUC (whichever is applicable) for weeks ending June 26, 2021, and July 3, 2021, but those will be delayed until approximately July 23, 2021.

Q2. Will PUA, PEUC and FPUC be available back to June 19, 2021, when the program was originally ended?

A2. Yes. PUA, PEUC and FPUC will be restarted effective benefit week ending June 26, 2021 (June 20-26, 2021). This means that there will be no gap in the programs.

Q3. Will I need to take any action to receive PUA, PEUC or FPUC if I received it previously?

A3. Yes. All unemployment insurance benefits, whether the regular UI program, PUA PEUC, or FPUC, can only be paid if the claimant submits a weekly voucher attesting to being unemployed/partially unemployed, able and available and actively searching for work (as long as other statutory requirements are met). For PUA and PEUC, the claimants must also have a valid COVID-19 reason for each week being requested. Additionally, for the regular UI program, PUA and PEUC, claimants must disclose wages received each week (e.g., if they had part time employment or earnings from self-employment) as those wages are required to be deducted from the weekly benefit amount. This is a week-by-week requirement and evaluation. FPUC can only be paid in a week if the claimant is found eligible for the underlying benefit program (i.e., UI, PUA or PEUC).

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Aug 16 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Hon. R. Lawton McIntosh, Circuit Court Judge

Case No. 2021-CP-40-03774

Sheena Brannon, Shane Stencil, Tina Sullivan, and Brandon Beaty

Appellants

v.

Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina, and G. Daniel Ellzey, in his official capacity as Director of the South Carolina Department of Employment and Workforce

Respondents

CERTIFICATE OF SERVICE

I certify that I have served Appellants' MOTION FOR EMERGENCY REVIEW AND EXPEDITED CERTIFICATION on Henry Dargan McMaster and G. Daniel Ellzey by E-mail to their counsel of pursuant to *In Re; Operation of the Appellate Courts During the Coronavirus Emergency (as Amended May 29, 2020),* Appellate Case No. 2020-000447 on August 16, 2021.

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August 16, 2021

SOUTH CAROLINA APPLESEED
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Adam Protheroe

From: Adam Protheroe
Sent: Monday, August 16, 2021 6:06 PM
To: Limehouse, Thomas (Other); Lambert, Grayson (Other); ttimmons@dew.sc.gov (Other); Jordan, Steven (Other); Becky Laffitte (Other); Rob Tyson (Other); Lisle Traywick (Other)
Cc: Sue Berkowitz; jkassel@kassellaw.com
Subject: Brannon v. McMaster - Notice of Appeal and Motion for Certification
Attachments: Notice of Appeal_FINAL.pdf; Mot for emerg review and cert_FINAL.pdf

Counsel,

I hope all of you are well. Please find attached and served upon you pursuant to *In Re; Operation of the Appellate Courts During the Coronavirus Emergency (as Amended May 29, 2020)* a notice of appeal and motion for emergency review and expedited certification in this case.

Kind regards,
Adam Protheroe

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2021-000883

Case No. 2021-CP-40-03774

Sheena Bannon, Shane Stencil, Tina Sullivan, and Brandon Beaty, ... Appellants,

v.

Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina; and G. Daniel Ellzey, in his official capacity as Director of the South Carolina Department of Workforce and Employment, ... Respondents.

RESPONDENTS' RETURN TO APPELLANTS' MOTION FOR EMERGENCY REVIEW AND EXPEDITED CERTIFICATION

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Pursuant to Rule 240(e), SCACR, Respondents submit this Return to make two brief points in response to Appellants' Motion for Emergency Review and Expedited Certification:

1. Appeals from circuit court may be taken directly to this Court in only limited instances, one of which is when a final judgment involves "a challenge on statute or federal grounds, to the constitutionality of a state law." S.C. Code Ann. § 14-8-200(b)(3). Appellants filed their Notice of Appeal in the Court of Appeals, presumably because they do not believe this case involves a constitutional challenge to state law. They did, however, move to transfer the case under Rule 204(b), SCACR. The Court of Appeals transferred this case under Rules 203(d)(1)(A)(ii) and 204(a), SCACR, "because the order on appeal involves a challenge to the separation of powers." Order. Respondents do not oppose this Court deciding this appeal in the first instance but will defer to this Court as to the proper procedural path for the appeal. If the Court does take this appeal, it should be clear at the outset that Appellants did not ask the circuit court—and thus cannot ask this Court—to hold any part of state law unconstitutional. Instead (and assuming Appellants even have a private right of action here), this case is about the interpretation of section 41-29-230 and raises to two questions: (1) whether three federal unemployment-benefits programs enacted as part of the CARES Act at the beginning of the COVID-19 pandemic are provisions of the Social Security Act and (2) if so, whether Governor McMaster or Director Ellzey has discretion to determine whether those voluntary programs and additional unemployment benefits are "advantages" to "this State and its citizens" amidst a significant labor shortage. S.C. Code Ann. § 41-29-230(1).[*]

[*] To the extent Appellants' Motion attempted to include a request for this Court to exercise its original jurisdiction, Respondents oppose any such request. Not only is such a request procedurally improper, *see* Rule 245(c), SCACR, original jurisdiction is inappropriate because this action could have been—and in fact was—"determined in a lower court in the first instance," Rule 245(a), SCACR. Moreover, permitting Appellants to invoke the Court's original jurisdiction to circumvent an unfavorable record and adverse ruling and serve as a substitute for a direct appeal would prejudice the rights of Respondents.

2. As for Appellants' request for expedited briefing, Respondents recognize that this appeal involves unusual timing considerations. Respondents take issue with some of Appellants' characterizations of the facts, issues, and law in their Motion. Nevertheless, Respondents, will save their merits arguments for the appropriate time. Should the Court determine that this appeal warrants the requested "emergency review," Respondents are willing to brief the issues and respond to Appellants' arguments on whatever schedule the Court deems necessary.

Respectfully submitted,

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August 17, 2021
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF RICHLAND) 2021-CP-40-03774

S.B., S.S., T.S., and B.B.,)
)
Plaintiffs,)
)
vs.) TRANSCRIPT OF RECORD
)
Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina, and G. Daniel Ellzey, in his official capacity as Director of the South Carolina Department of Employment and Workforce,)
)
Defendants.)

August 11, 2021
Columbia, South Carolina

B E F O R E:

THE HONORABLE LAWTON R. MCINTOSH, JUDGE.

A P P E A R A N C E S:

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DEBORAH M. McCURDY, RPR
Official Court Reporter

I N D E X O F W I T N E S S E S

(WHEREUPON, no witnesses were called during these proceedings.)

E X H I B I T S

(WHEREUPON, no exhibits were introduced during these proceedings.)

AUGUST 11, 2021

(WHEREUPON, the proceedings began at 9:05 a.m.)

THE COURT: I have removed my mask. I am going to ask when you speak you do the same.

We have, according to my reading, three motions. And this is S.B., S.S., T.S., and B.B. versus Governor McMaster and Director Ellzey, of the Department of Employment and Workforce.

We have the Plaintiffs' motion for a TRO and a temporary -- or injunction. We have the Defendants' motion to dismiss, and also the Defendants' motion to identify themselves.

Any other motions pending?

MR. PROTHEROE: Not from us, Your Honor.

MR. LIMEHOUSE: No, Your Honor, we would just clarify that there is no TRO that has been requested, Your Honor, it is a preliminary injunction.

THE COURT: First I will be glad to hear from the Plaintiffs on the TRO.

MR. PROTHEROE: Your Honor, I will be happy to address this in any order that you would like, but I think --

THE COURT: Would you do me a favor and remove

your mask? I'm sorry, I just cannot hear you.

MR. PROTHEROE: I apologize. Habit.

THE COURT: Yes. It is a good habit, though.

MR. PROTHEROE: Sure. I would be happy to discuss this in any order that you would like. We discussed in advance that it might be more advantageous to take up the motion to strike first because I think the Defendants' position is that would affect the disposition of some other things.

THE COURT: It doesn't matter to me. Your motions I have written down, if it is correct, is a motion to dismiss, a motion to strike, or both?

MR. LIMEHOUSE: Both. There is a motion to dismiss, and also a motion to require the Plaintiffs to identify themselves.

THE COURT: I've got that. In my mind, I was thinking in terms of the TRO first. You know, it is your pleasure here. If y'all have a different order you want to go in, it doesn't matter to me.

MR. LIMEHOUSE: The Defendants' position would be we prefer to take the motion with respect to anonymous Plaintiffs first, just because that could affect the --

THE COURT: I am not going to hear that one first.

MR. LIMEHOUSE: Sir?

THE COURT: All due respect, that is going to go last.

MR. LIMEHOUSE: Okay.

MR. PROTHEROE: Thank you, Your Honor. And may it please the Court?

My name is Adam Protheroe. I am here representing the Plaintiffs in this case.

This case presents a simple question. It is not a policy question, it is not a question of politics, it is a statutory interpretation question.

The question is this: Are unemployment benefits that are funded, administered, and governed by the Social Security Act and under the Social Security Act, available under the Social Security Act, as that term is used in South Carolina Code Section 41-29-230? We, like the substantial majority of the courts that have already considered this question, believe that they are.

The CARES Act does several things to enhance the existing regime of unemployment benefits that have existed for many, many years.

The CARES Act does three things to enhance the

existing system of unemployment benefits. It provides those benefits to more people, it provides more weeks of those benefits, and the enhancements enhance the weekly amount of those benefits. Those enhancements would not exist but for the Social Security Act.

Now, Congress enacted these enhancements through the CARES Act but implemented it through the Social Security Act.

When Congress did in fact create a new benefit, as it did with benefits to non-profit and government employers, it did so by amendments to the Social Security Act. It didn't need to do that for these benefits that we are litigating here today. An amendment just simply wasn't necessary because the infrastructure already existed under the Social Security Act for those benefits.

Now, the Defendants argue that one of the types of benefits that we are discussing here, the FPUC benefits, don't actually flow through the SSA, the Social Security Act, and they are mistaken in that analysis.

They look specifically at the CARES Act section that essentially -- that creates the enhancement, but to look for where the funding for

those benefits comes from, you have to actually look at the two other statutes that deal with --

THE COURT: The Defendants' funding comes from the general fund.

MR. PROTHEROE: Ultimately, I would imagine all federal programs come from the general fund, but to say the fact the money for the FPUC benefits actually flow through the Social Security Act accounts, we have to look at the statutes dealing with PUA and PEUC benefits, because ultimately the FPUC benefits are enhancements that apply to those benefits. And those benefits, including the FPUC enhancements, all flow through the Social Security Act accounts, which we detailed in our brief, either the Employment Security Administration account or the Enhanced Unemployment Benefits account, one of those two accounts.

THE COURT: May I ask you a question?

MR. PROTHEROE: Certainly.

THE COURT: According to the briefing I read that under the CARES Act there was a provision made for municipalities and for -- or non-profits, they specifically singled those out.

MR. PROTHEROE: Yes, sir.

THE COURT: But they did not make any mention

of these programs under the CARES Act. In other words, they had the ability to say, We will bring these programs under these other programs, but chose not to, or knew how to.

MR. PROTHEROE: Sure.

THE COURT: How do you get around that?

MR. PROTHEROE: Your Honor, the amendment to the Social Security Act I believe you are talking about is the one that provides a new and different type of benefit to governmental entities and non-profits. Those entities typically don't pay taxes into the Unemployment Trust Fund, and so they are required to share their burden of unemployment benefits by reimbursements to that fund.

Benefits to those entities didn't exist before the passage of the CARES Act, so the CARES Act did in fact create a new type of benefit. It was that specific benefit for government entities and non-profits. So to do that, Congress did amend the Social Security Act. And what that shows is congressional intent that all these benefits flow through the Social Security Act. When they created a new benefit, it amended the Social Security Act to allow that. When it enhanced the existing benefits through PUA, PEUC, and FPUC, it had the

infrastructure already there in the Social Security Act to administer those benefits. It didn't need to make an amendment. Did that address your question?

THE COURT: Yes, sir. Thank you.

MR. PROTHEROE: All right. Thank you very much.

Now, the Defendants argue that the Social Security Act doesn't actually typically provide benefit amounts to individuals, instead it provides administrative funds to states. In other words, it pays the cost of administering state unemployment benefits, but the benefits themselves come from state dollars.

The simple answer to that is it doesn't act. The CARES Act enhanced those benefits in a way that provide federal dollars for the payment of those benefits. These benefits clearly do flow through the Social Security Act.

Cases like this have now been filed in 11 states. Five of those states have spoken, and four have agreed with our position.

In Arkansas, the statute is functionally identical. The Court there granted the preliminary injunction the Plaintiff sought.

Now, to note Arkansas, just like Oklahoma, this preliminary injunction was granted after the benefits actually terminated. The Defendants argue again that that is not, for some reason, because they already ended the benefits, that we are not entitled to the relief we seek. Now, neither Arkansas nor Oklahoma saw that as a barrier, and I think there are other reasons that we cite in our brief where that is not a barrier as well.

In Indiana, again a functionally identical statute, again preliminary injunction granted. And, again, the -- and in that case, it has already proceeded on appeal to the point that an appellate court has denied stay on the preliminary injunction, so the appellate court has spoken on that question as well.

In Maryland, the statute is less clear than ours about what is required of the Department, what benefits they are required to go get. That actually only says that the Department has to cooperate to the fullest extent consistent with these chapters. So the Maryland statute, even more vague than ours, still the court found that a preliminary injunction was direct relief.

In Ohio, essentially they have an identical

statute. Now, in that case, the preliminary injunction was denied. We do point to the fact that there is a very high burden for preliminary injunctions in Ohio, much higher than there is in South Carolina, but ultimately, just to be candid, we are just going to be allowed to withdraw for all the reasons we have cited in our brief. It is against the great weight of authority at this point, and it is clearly against the plain language of the statute.

Finally, Oklahoma, again with an identical statute, their preliminary injunction granted, their preliminary injunction granted after the benefits were already ended. I do want to note that we provided a table on the status of these cases as an attachment to one of our briefs. That did not note that Oklahoma, that an appeal has now been filed in Oklahoma. That appeal was filed the same day we filed that table. I just want to note that appeal has now been filed.

But the language in 41-29-230 is clear. The Department is required to secure all advantages available under the Social Security Act. Very simple statutory language.

The Defendants would like to make advantage

mean whatever Governor McMaster believes is advantageous, and that is not basically -- that is not what the statute says. It says advantages available under the Social Security Act. It is very specific about what advantages it is talking about.

Effectively, that reading would read the statute out of existence. If the General Assembly did intend to leave this entirely to Governor McMaster's discretion, there would be no need for that section, but the General Assembly has mandated that the Department go get these benefits for the benefit of South Carolina and its citizens.

THE COURT: Well, let me ask you this. The way I have read your memoranda that you submitted, essentially you are saying that the director and the governor, based on 41-29-230(a), have zero discretion, and if this is a benefit available to an unemployed worker, they have to take it. Is that -- and because they didn't in this case, they are ultra vires, and therefore their acts are void. Is that essentially your argument?

MR. PROTHEROE: In essence, yes, Your Honor. One minor correction is that it is 41-29-230(1).

THE COURT: Say that again.

MR. PROTHEROE: 41-29-230(1) and not (a), but other than that minor correction, yes. Yes, essentially that is our position. And it is not the fact that, you know, the federal government has mandated that the state take these benefits. The state -- these are voluntary programs. The federal government has created a voluntary program. The General Assembly has just said, We volunteer. They said so long ago, and they said so by statute. It is a statute that neither the Department nor the governor can ignore.

The Defendants essentially argue as well that because the statute, 41-29-230(1), it doesn't specifically mention the governor, it does not even control the governor's discretion. Again, if it didn't somehow control the governor's discretion or if it didn't control what the Department has to do, there is no point to the statute. If the governor -- if the General Assembly had passed and created a statutory obligation on the part of an executive agency but the governor is then free to tell the agencies to do otherwise, what is the point of the statute, right? And the statute would --

THE COURT: The fact -- so if I understand

what you are telling me, the governor has the discretion to opt in in the first place, is that true, since it is voluntary?

MR. PROTHEROE: I don't believe the governor has the discretion to opt in. That discretion has already been --

THE COURT: The language says that either him or his designee had to either opt in --

MR. PROTHEROE: Correct. But that opted in, we would take the position that that is a ministerial act that is required by the statute, so it does require an opt in by the governor or his designee. That is at the federal level, the federal -- the CARES Act and the agreements between the Department of Labor and the workforce agencies all say that the states can opt in and the states can opt out. We are constrained by 41-29-230.

THE COURT: So it gives the discretion under the CARES Act for the governor to opt in or opt out?

MR. PROTHEROE: 41-29-230 takes that discretion away, Your Honor.

THE COURT: It does?

MR. PROTHEROE: Yes, sir. What -- I mean, the federal programs themselves are in fact voluntary.

If we didn't have 41-29-230, it would be a discretionary act.

THE COURT: So as I understand your argument, the governor had discretion to opt in, because it is a voluntary program, or his designee, but once he is opt in, 41-29-230(1) controls, and therefore he can no longer opt out of the program, he has to accept all the benefits that are provided to him for the workers?

MR. PROTHEROE: We would argue that he did not --

THE COURT: Yes or no. Is that correct?

MR. PROTHEROE: That is not correct.

THE COURT: Okay.

MR. PROTHEROE: Just on one half of the point, Your Honor. We would argue that he did not have the discretion to refuse to opt in in the first place, that 41-29-230 requires the Department and the governor, if he has chosen -- if he is involved in that decision, or his department as his executive agency, to seek and obtain those benefits that fall under the Social Security Act.

So had he made the decision not to opt in in the first place, we could potentially be in the same position. We take the position that 41-29-230

simply leaves no discretion to the governor or the Department as to whether to take these benefits. The legislature has said, Go get the benefits that exist under the Social Security Act.

THE COURT: Well, let me ask you this. Isn't it true that the statutes have to be read in pari materia?

MR. PROTHEROE: Yes, sir.

THE COURT: And if you look at 41-29-25, it sets forth: Executive director; discharge of his duties. And if you look under Section (a), it says: Director shall discharge his duties: (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner he reasonably believes to be in the best interests of the Department, which as used in this chapter, best interests means a balancing of the following. It says: (a) achieving the purposes of the Department; (b) preservation of the financial integrity of the Department and its ongoing operations; and (c) exercise of the powers of the Department in accordance with good business practices and the requirements of applicable laws.

Doesn't that definition or those requirements

inherently give discretion to the director to make business judgment decisions whether to accept or to reject benefits that may be available while cooperating under 230(1)? Is that not --

MR. PROTHEROE: It certainly gives the director discretion sometimes, yes, Your Honor. I think --

THE COURT: Well, how do you get around your argument that he has no discretion?

MR. PROTHEROE: We take the position that in this context, in the context of the case in front of you, that discretion has been taken away by 41-29-230. He may have discretion in other contexts, but when it comes to benefits that are available under the Social Security Act, he has to obtain those benefits.

THE COURT: Well, let me ask you something further. Under 41-29-25(D), it says: Nothing in this chapter gives rise to a cause of action against the executive director or any decision made by the executive director concerning departmental operations and development. Isn't that exactly what you have done?

MR. PROTHEROE: Your Honor, I think the declaratory judgment act still allows a cause of

action for this.

THE COURT: Declaratory judgment action is depending on what the nature of the underlying case is, right?

MR. PROTHEROE: Yes.

THE COURT: It doesn't give you any separate standing, it is just ability to get the underlying cause disposed of, my understanding, legal or ethical.

MR. PROTHEROE: Right.

THE COURT: In this case you brought it under the statute, right?

MR. PROTHEROE: Yes, sir.

THE COURT: So under this section, doesn't that prohibit you from doing exactly what you have done?

MR. PROTHEROE: I don't believe that it does. The section that you are talking about would absolve in a civil liability under a direct cause of action.

THE COURT: I'm sorry?

MR. PROTHEROE: Would potentially absolve in some kind of civil liability. The Declaratory Judgment Act, true, doesn't create new rights or obligations, but we do have an existing obligation

in 41-29-230. We also have a ministerial conduct, basically a ministerial duty that would give rise to our right to a writ of mandamus as well.

THE COURT: So your argument is that once those benefits became available, we had to opt in and it is just a ministerial function to go opt in and accept these benefits under the CARES Act?

MR. PROTHEROE: I think that that is the result that 41-29-230 mandates, Your Honor.

THE COURT: Let me ask you this. If you are reading these different sections under the Title 41-29 together, and you look at 41-29-120, and it says: Employment stabilization; report requirements; joint electronic filing, et cetera. Under (A)(1), if my notes are right, it says: The Department, with the advice and aid of its advisory councils and through its appropriate divisions, shall take appropriate steps to -- and you look at Subsection (a) -- and there are other subsections, but I am looking at Subsection (a)(d). (a) says: Reduce and prevent unemployment. (d) says: Promote the reemployment of unemployed workers through the state in every other way that is feasible, right?

MR. PROTHEROE: (Nods affirmatively.)

THE COURT: So if you look at 230(1), paid benefits, cooperating to do that, but under this you have to read it together to get people back into the workforce, do you not?

MR. PROTHEROE: I do believe -- I agree that you have to read the statutes together, correct.

THE COURT: So doesn't that involve a discretionary decision on the part of the director and/or the governor to make a decision whether to accept these benefits or not to accept these benefits?

MR. PROTHEROE: Your Honor, we still take the position that there certainly is discretion available to the governor and the director in a variety of contexts, but those contexts are not before you. The context that is before you has been clearly addressed by 41-29-230. And to read these other sections to allow discretion in the case that 41-29-230 addresses, you would essentially --

THE COURT: Say that again, I'm sorry.

MR. PROTHEROE: To read the other statutes that you cite to allow the governor or the Department to have discretion in the case that is before you would essentially read 41-29-230 out of

existence. There would be no need for the legislature to pass a statute that says the Department must go get these benefits if it was within the Department's discretion to go get these benefits.

THE COURT: All right, sir. Go ahead.

MR. PROTHEROE: Thank you. Your Honor, in addition -- I believe we have addressed the merits. Obviously if you have any other questions, I will be happy to address those.

The Defendants have requested that if in fact you were to grant the preliminary injunction that we requested, that that order be stayed. In doing so, the Defendants really seek to balance their interest in having their precise policy preferences versus the harm to tens of thousands of South Carolinians that they will suffer if these benefits continue to be withheld from them.

The Defendants aren't without other options if they feel that incentivizing workforce development -- workforce or reentry into the workforce is necessary. For example, at least four other states have offered return-to-work bonuses in order to incentivize people to return to work anywhere between $500 and $2,000 for taking certain

types of jobs.

The two main reasons -- and I think these are the studies that the Amicus briefs cite, they mention and point to the fact that there are some people who in those surveys that reported to be unemployment benefits have been some reason that they may not have reentered the workforce as quickly as they would otherwise have. Obviously we think that is highly debatable, and we cited some of the research in our briefing.

But what those studies -- what those briefs fail to mention is that health concerns and the child care obligations are above and beyond any unemployment benefits, the reason that folks give for not re --

THE COURT: Say that again, please, sir.

MR. PROTHEROE: Health concerns and child care obligations are above and beyond unemployment benefits, the reasons that folks give in those surveys conducted by industry groups for not returning or not taking certain types of jobs.

Increasing vaccination rates, for example, or enhancing child care options would be ways that the governor or the Department could try to incentivize reemployment if they felt that that was necessary.

Essentially, this is not an all or nothing proposition for the Defendants. This case and the relief that we are asking for doesn't take all policy options off the table. It is an all or nothing proposition for the Plaintiffs, though.

THE COURT: Say that last part. I'm sorry.

MR. PROTHEROE: That's okay. I'm sorry.

THE COURT: You are doing fine. I am just having a hard time.

MR. PROTHEROE: I understand. This is not an all or nothing proposition.

THE COURT: Well, isn't that in fact what you are arguing in your brief, that it is in fact an all or nothing proposition in the sense that they have no discretion, once it is available they have to take it and they can't opt out, so it is all or nothing, they have to?

MR. PROTHEROE: In that sense, yes, Your Honor. I don't want to misspeak on that. What I mean when I say it is not an all or nothing proposition is that this is not the only policy option that is available to the Defendants to achieve the objective that they would like to achieve. It is an all or nothing proposition to the Plaintiffs, though, who are facing

homelessness, who are facing loss of property, who are facing lack of ability to pay medical care, who are facing losing food insecurity.

So taking this particular option off the table, which we believe the legislature has already done, taking this option off the table does not tie the Defendants' hands entirely. So the prejudice to them is really minimal by comparison.

One thing I would like to mention briefly on the Amicus briefs that were filed, I mean, we don't contest too strongly the idea of Amicus appearing in this case. What we would ask, though, is that for the purposes of this hearing and this record that those not be considered simply because at the time that they were filed in the middle of party's review schedule, it gives the Plaintiffs no opportunity to respond. And if we were to request an opportunity to respond, it would be delayed consideration of this motion, and I don't think that is a position the Plaintiff should be placed in. So I would just ask that they not be considered a part of the record for this hearing.

And with that, unless Your Honor has any other questions, I will be happy to close.

THE COURT: Let me ask you a question under

just the basic tenants of a temporary restraining order. If I read right, 83 days before filing suit. And you have three elements: Immediate irreparable harm; likelihood of success on the merits; and then you have an adequate remedy at law.

MR. PROTHEROE: Right.

THE COURT: But typically the TRO is designed to maintain the status quo, correct?

MR. PROTHEROE: Yes.

THE COURT: Otherwise, you would have an affirmative order for them to go back and do something else, which is antithetical to the idea of a TRO, is that not correct?

MR. PROTHEROE: Your Honor, I would argue that mandatory preliminary injunctions have not been embraced by our courts. We acknowledge that the burden typically is higher for those, but they are more disfavored than our prohibitory injunctions, but it is not a type of relief that is non-existent. That would seem to be the Defendants' position in this case.

We do potentially bear a higher burden than that. I think that we have met that burden by the clear statutory language. This is a

straightforward statutory interpretation case. But we do acknowledge that the burden is higher, if that is what you are driving at.

THE COURT: Okay, thank you.

MR. PROTHEROE: Thank you very much.

MR. LAMBERT: Good morning, Your Honor. I'm Grayson Lambert, on behalf of Governor McMaster. And I think it is prudent to pick up exactly where the Plaintiffs left off, and that is the relief they are seeking here is a mandatory preliminary injunction.

The Supreme Court in Poynter said the only reason to issue a preliminary injunction is to preserve the status quo. They could have sought just that type of preliminary injunction at any point between May 6th when the announcement the program was being terminated in the state was made to June 30th when that took effect. That is 55 days that the Plaintiffs didn't act. Then they waited another four weeks, another 28 days to file this lawsuit.

For someone who is facing irreparable harm, for someone who is so right on the merits, the waiting of 83 days, more than two-thirds of the window between the May 5th announcement and the

September 6th national end to these federal programs is inexplicable, Your Honor.

And what they are asking you to do here is something that frankly the Supreme Court has said that courts in this state don't have the authority to do. And that right there could end this case, the analysis need go no further. But if you keep going further, the result continues to be the same.

And another threshold place to start, Your Honor, is a point that you had made already, which is 41-29-25(D) about whether a private right to action even exists.

Not only is that section clear that there shouldn't be, but the general rule for whether a statute provides a private right of action is whether there was an intent to provide something to a specific party or, on the other hand, whether a statute was to the benefit of the state as a whole.

Well, 41-29-230(1) speaks of advantages to the state and its citizens. That is about as general as a statute can get. So there is no reason to think that the General Assembly in enacting 41-29-230 intended to create a private right of action. So there is another threshold issue the Plaintiffs cannot get over.

But, Your Honor, I don't want you to think by raising the threshold issues we think the Plaintiffs are right on the merits. They are not.

And I think before we get into the alphabet soup of federal programs and all the numbers and code sections, it is worth stepping back for a moment to put into context what all of this is.

So let's start with what -- how unemployment insurance worked before the pandemic. Unemployment benefits, the checks that workers received, were provided for by the state through the unemployment taxes that the state imposed on businesses.

The administrative costs of running the unemployment insurance program was provided to the state by the federal government through the Social Security Act. So the federal government was providing administratively the back-end money to run the program, but the money that was going to people themselves was provided for by the State of South Carolina in Chapter 31 of Title 41, so 41-31-5 and going forward.

That didn't work because what the federal government did in the CARES Act, March 27, 2020, less than two weeks after the president had issued the first declaration of emergency related to

COVID, was enact three new benefits. One of them, which is the Pandemic Unemployment Assistance, changes who may be eligible for the federal benefits that are being provided.

The Pandemic Emergency Unemployment Compensation, that is PEUC -- now we are to the alphabet soup -- extends the time that people may be eligible -- or, excuse me, creates a window of time, to put it more accurately, in which people may be eligible for federal benefits.

And then there is the Federal Pandemic Unemployment Compensation, or FPUC, which is that supplemental unemployment benefits. When people talk about the extra $600 a week, and then the extra $300 a week, that is FPUC. All of these are new federal benefits.

The Plaintiffs tried to say, Well, the Social Security Act now provides these benefits. What that really means is the federal government has created new benefits. And it created those benefits in the CARES Act. It says in that Act -- I'm sorry to give you more numbers, Your Honor, but I think numbers are important here. In the CARES Act, Title 2, Section 2101, is the PUA, Pandemic Unemployment Assistance, codified at 15 USC Section

9021. The CARES Act, Title 2, Section 2107 is PEUC. That is now at 15 USC Section 9025. And FPUC is titled to the CARES Act, Section 2104, now at 15 USC 9025.

All of those were enacted in the CARES Act creating a new category of federal unemployment benefit that had never existed before under the Social Security Act.

All Congress did as it relates to these benefits of the Social Security Act was say, We are going to have states administer these federal programs because states are already running unemployment insurance programs. And we are going to funnel the federal money that provides these benefits to individuals, the actual checks, through these accounts we already have set up to go to the state because we are in the middle of a pandemic and we want to get the money out quickly rather than deal with the, shall I say, headache and government bureaucracy of creating something out of whole cloth. But they are, at the end of the day, new benefits.

I think the fact that they are in Title 15 and not in Title 42 is indicative of the fact that these are a new part of the federal code. They

were not woven into the Social Security Act in Title 42 as many other provisions that were enacted within the CARES Act or other COVID-related legislation were.

And the Plaintiffs talk a bit about the new benefits for governmental entities and the non-profits that were in the middle of the CARES Act. That was in Section 2103, so right in the middle of these other benefits.

And the difference there is employees of governmental entities and non-profits could get unemployment benefits before, but those entities did not pay taxes, unemployment taxes, like private businesses did. They, at the end of the year, had to repay dollar for dollar whatever benefits were paid out.

The amendment to the Social Security Act creates a similar structure of administrative costs for these governmental entities and non-profits that existed before everything else. But when Congress did that, Congress said, Section 903 of the Social Security Act is amended by...and then it ended. When Congress wanted to change the Social Security Act, when Congress wanted to make something a part of the Social Security Act,

Congress knew exactly how to do that. If Congress had wanted to create new benefits under the Social Security Act, Congress could have done that, but Congress didn't. Separately as part of the CARES Act, it would have been a separate part of the US Code and simply found administrative ways to get money to the states efficiently.

So that deals with I think, Your Honor, are these three benefits, the PUA, the PEUC, and FPUC, part of the Social Security Act. They are not. They are new federal benefits that are not an advantage under the Social Security Act, so therefore 41-29-230 is simply irrelevant. It doesn't speak to whether the state must participate in these programs at all. That decision belonged to the governor, according to the United States Department of Labor.

When these programs were first announced in this hurry to get them out and rolling and for states to enroll, the Department of Labor told state agencies, It is the governor or his designee's decision whether you participate.

And South Carolina, like all the other states in the country, said in March or early April of 2020, Yes, we want to participate, we had no idea

what the future was about to look like. And that was at a point where unemployment had gone up above 12 percent in this state.

Well, you fast-forward a year later and it is a very different world. Unemployment is down to 4.6 percent as of May. I think that number is continuing to trend down now through the course of the summer.

And as you noted, one of the DEW's mission isn't simply to provide unemployment benefits to people, it is to reduce unemployment and get people back into the workforce.

There are competing goals, and sometimes admittedly may have some tension between them, but there is always a mission of promoting a strong and vibrant workforce in this state.

And for there to be in place federal benefits that now as the economy is recovering and there were, as of May 6th, the governor's announcement, more than 81,000 available jobs in this state. As of this morning, the federal government announced there are more than ten million open jobs across the country. It did not make sense, it was not an advantage to the state's workforce and the state's businesses to have people receiving potentially

more money on unemployment insurance than they were in wages. I mean, it is conceivable, there are records, Your Honor, of individuals who received 20 times more income from the unemployment benefits than they did the previous year from wages. Anyone who is receiving that much more benefits isn't going to think about going to find a job as long as those benefits continue to flow.

So there was a good and valid reason for doing what the state did here in terminating these federal programs, to encourage people to get back to work, because working is good for all of us.

There was a laundry list from the Plaintiffs, Your Honor, of cases in other states. And as you well know, counting cases is no substitute for the reasoning behind those cases. All of those cases have now been attached to various pleadings. You can read the decisions for yourself and see which ones are compelling and which ones aren't. But I will make a couple of notes as you review those.

The Arkansas case, it is very short, 3- or 4-page order, has said -- and two things happened to it. One, the General Assembly in Arkansas, their legislature seemingly thought it was so wrong they had already enacted a statute to legislatively

overrule what the injunction did. And the Arkansas Supreme Court has already stayed that order pending appeal.

As for Indiana, the statute is not the same, it is different. It talks about rights and benefits and it applies to the state. Our statute talks about advantages and applies to DEW.

And if you look at the Oklahoma case, Your Honor, there is a lot of discussion in that case about the structure of Oklahoma's Commission, that it is different in the way it is structured now that we don't have the Employment Commission in South Carolina. Those are all distinctions to keep in mind as you review them.

And I do want to return briefly to this idea that, Well, if the Defendants are right, what is the point of having 41-29-230 in the first place?

Your Honor, there is a very good reason to have it under the Defendants' interpretation.

For South Carolina to be eligible to have the federal government fund the administrative costs of the unemployment program through the Social Security Act, South Carolina must comply with certain federal requirements on how these programs are structured and run.

So what 41-29-230 is doing is telling you, You must promulgate -- if you read the section, it is not, Just take whatever action, don't go obtain, it is promulgating rules --

THE COURT: Say that again, please? I'm sorry.

MR. LAMBERT: The statute itself doesn't just say, You must go obtain these benefits. The title says -- or, excuse me, the statute says, The Department must cooperate with the Secretary of Labor to the fullest extent consistent with the provisions of these chapters, sending it back to everything we had talked about earlier, Your Honor, reducing unemployment and promoting people to work, through the promulgation of appropriate rules, regulations, administrative methods and standards.

What that is saying is, You must put in place the procedures and the programs to run South Carolina Unemployment Insurance Program as necessarily required by federal law so that the state and all those administrative funding benefits that the Social Security Act provides.

THE COURT: Well, let me ask you this. How do you read the phrase "as necessary to secure to this state and its citizens all advantages available

under the provisions of the Social Security Act?" I know you said the CARES Act is not a part of it.

MR. LAMBERT: Yes, sir.

THE COURT: Assuming that it was -- that it is, excuse me -- part of the Social Security Act. Doesn't that seem to indicate that you have got to go out there and get everything available for the employees that are unemployed?

MR. LAMBERT: It does not, Your Honor. And there are a couple of reasons for that.

THE COURT: Okay.

MR. LAMBERT: And I think that the first one to start with is, For this state and its citizens. This is requiring the DEW to take a holistic view of what is an advantage, what puts the state in a better position than it would be otherwise under the Social Security Act.

THE COURT: Is advantages defined anywhere under the act?

MR. LAMBERT: No, sir, not to my knowledge, so we are looking at the dictionary definition, yes, sir.

But what that is saying is, All right, well, what is the best thing for South Carolina and its citizens?

The Plaintiffs have one view of that. They say, It is getting more money from the federal government into this state that can help some unemployed people and get pumped into the economy. Your Honor, that is a perfectly reasonable view.

There is an alternative view that says, We want people to get back into the workforce to have a job to help grow the economy in a long-term sustainable way. That is also a perfectly reasonable view.

If you are correct in the premise of your question that these benefits are under the Social Security Act and there are competing views, this does not deal with a fundamental right or a suspect class. It is not subject to high scrutiny, strict scrutiny, intermediate scrutiny, it is just a rational basis. So if there is any logical basis for the governor's action here, it must be upheld by the courts.

And we have laid out in our briefing studies and explanations for why this is right. The amici has done the same. At best for Plaintiffs under this scenario, there is a policy question about what is an advantage here and what is not. And it is not the province of the courts to overrule a

policy decision of the political branches.

If the Plaintiffs have issue with the policy, they can lobby them to the General Assembly, they can lobby the governor, they can vote, they can do any number of things in the political arena. Filing a lawsuit to get an injunction to overrule a policy decision is not an option that is available to them.

So even if they are right, it is under the Social Security Act, they still can't prevail under the advantages language, and that is if they even get past the private right of action issue that has been laid out there before.

Your Honor, that is a lot. I know it is a lot of statutes back and forth. It is a lot of issues. But if I may just briefly in closing hit a couple of points.

THE COURT: Sure.

MR. LAMBERT: One, the delay here is inexplicable. There is a real challenge. And I don't want to go as far as impossibility because I don't know that, but there is a real challenge to ramping up to reenroll and getting these benefits out in the three weeks that are left before they expire. There is so prejudice from this delay.

The Plaintiffs had 55 days before the program ended to do something, and they didn't. They haven't told you why they didn't. They have no explanation for that. There is nothing in the record. The silence is deafening.

And, Two, the Social Security Act has never before been the means of providing unemployment benefits to individuals, it was to provide administrative funding for states.

The PUA, PEUC, and FPUC are new creatures of federal law. They are created under the CARES Act, put in a different part of Title 15. The Department of Labor has called them new programs. Everyone seems to think they are new except for the Plaintiffs, and the reason the Plaintiff is saying they are not new is that is the only way they can prevail here. But they are wrong, they are new benefits. They are not subject to 41-29-230. And their motion for a preliminary injunction should be denied. And because it is not just that they don't have a likelihood of success on the merits, they have no chance of success on the merits, you should go ahead and dismiss the complaint as well.

Thank you, Your Honor.

MR. TRAYWICK: Your Honor, if we might? Chief

Counsel for DEW, Todd Timmons, is here to offer a couple of brief points.

Thank you.

MR. TIMMONS: Good morning, Your Honor. As Lisle said, my name is Todd Timmons. I am chief counsel for the agency. I am here representing Director Ellzey. He is in the courtroom today.

Just a couple of brief points. The PUA, FPUC, and PEUC laws all provide that any state that desires to do so and agrees to do so can participate in these programs. And by statute the states also have a right to terminate these programs. And then the big guidance question, the U.S. Department of Labor has issued federal guidance, which we have quoted in our brief, saying that the programs are new, reiterating that the programs are voluntary, and reiterating that termination -- that the states possess termination rights.

Now, I would not want to nullify these rights that South Carolina has in relation to the federal government without a clear unambiguous mandate under state law that says South Carolina must participate in the CARES Act and must --

THE COURT: Say again? South Carolina must do

what?

MR. TIMMONS: I was saying that if we are going to nullify these rights that we have under federal law and in contact with the federal government, I would think we would need a very clear unambiguous mandate in state law saying you have to participate in the CARES Act and you can never exercise your right to terminate. I would think it would have to be clear and unambiguous. And there is no law like that in our legislation.

The Plaintiffs point to 41-29-230, the law of those four statutes, none of which are the CARES Act. And it assigns duties to an administrative agency, DEW. But DEW's authority is not at issue. The U.S. Department of Labor, when they came to South Carolina and asked if we would participate in this program, they asked the governor. They required the governor's authority to do it. They did not ask us as the administrative entity to make that decision.

And so I don't think that that mandate is clear on its face. To accept the Plaintiffs' argument you have to say that PUA, FPUC, and PEUC are programs -- are actually provisions of the Social Security Act. You could read the Social

Security Act from cover to cover and you wouldn't find a single mention of any of those three programs in it.

And the second leap you would have to make is that reference to the Department in the statute actually meant the governor or the State of South Carolina.

The Plaintiffs have argued that if you don't read it that way, you have read it out of existence. And that is just not true.

The Department -- we interface with the United States Department of Labor every day. We are audited by them. We have to cooperate with them in those audits. We have to promulgate rules and regulations to administer the program. And if we don't do those things, we lose the administrative funding, which is the advantage under the CARES Act, as Grayson mentioned.

So it is not toothless if you don't somehow insert governor for the Department in that statute as the Plaintiffs have asked you to do.

The other point that I wanted to touch on just very briefly was your -- what you highlighted, the section that deals with unemployment relief for governmental and non-profit entities.

As I understand the Plaintiffs' argument, they are saying that because Congress did not also amend FPUC, PUA, and PEUC as a part of the Social Security Act, that that somehow expressed an intent that they were supposed to be amendments to the SSA. And I just don't think --

THE COURT: Explain that to me again. Say that again, please.

MR. TIMMONS: Yes. So as I understand their argument, they are saying that by not amending the SSA to include PUA, PEUC, FPUC, that Congress was saying those programs aren't in the Social Security Act. And there is no citation for that reading of the statute. I just don't think that is correct. I think a more correct view is when they did amend the Social Security Act for the governmental and non-profit entities, they did it explicitly.

And the reason they did it for that program and not the others is because this relief deals directly with the state unemployment insurance program, which is governed by the Social Security Act. The CARES Act is not. But the state unemployment insurance system is. That is a broad framework for how we create statutory rights at the state level.

And so when you provide those benefits to governments and non-profits under the state UI, they need to amend the CARES Act, I mean, they need to amend the SSA to do that.

If you are creating new programs under the CARES Act, which they did with the three programs at issue here, there is no need to talk about the SSA because they are programs under the CARES Act, not the Social Security Act.

And so that is the rationale for how we see those programs.

So those are the only points that I have. I will be happy to answer any questions if you have any.

THE COURT: That's fine, I don't have any. Thank you.

Just one second. Any other from the defense side or any intervenors who want to speak?

MR. TRAYWICK: Not on this motion, Your Honor. Thank you.

THE COURT: All right, thank you. All right.

MR. PROTHEROE: Thank you, Your Honor. I think it is important to address briefly the -- well, again, the statutory language in 41-29-230 because I think it is getting little bit stretched

here.

The Defendants have argued in a couple of places that that statute refers to the benefit has to be under the provisions of the Social --

THE COURT: Say that again.

MR. PROTHEROE: That the statute only refers to benefits that are under the provisions of the Social Security Act, for example. And I think three was another description of that statutory language that I think isn't quite in line with how the language actually reads, so I want to be real crystal clear about that.

41-29-230 refers to all advantages available under the provisions of the Social Security Act that relate to unemployment compensation.

It is benefits that are available under the provisions of the Social Security Act, not part of the Social Security Act. These benefits are available under those provisions of the Social Security Act, so what are those provisions, for example.

One of those provisions is the Unemployment Trust Fund and the accounts under the Unemployment Trust Fund. The Employment Security Administration account and the extended unemployment benefits

account. Those accounts exist under the provisions of the Social Security Act. The dollars to these benefits go sit in that account. I don't see any other way practically to say how else it would be that these benefits are not available under the provisions of the Social Security Act if the money is sitting in accounts created by the provisions of the Social Security Act.

So I want to be real clear about what the statutory language actually is, because that really is the key to this case.

I think the Defendants talked briefly about delay and potential prejudice that they suffer by the fact that it took, as they say, 83 days for us to file a lawsuit and that we haven't explained the delay. I can very simply explain the delay, that we are a small non-profit and it takes a minute to set up a lawsuit when we are hearing from hundreds of people who are suffering serious hardship because of these benefits, finding out what is going on with these folks, finding out what their situations are, whether they are appropriate, whether they are still eligible for benefits. Our litigation department is standing at this podium. It takes a minute to spin those things up.

And what the Defendants would have to show I think per their laches defense would be that the delay is unreasonable and that they were prejudiced by it.

The prejudice that they point to in having to restart these benefit programs, it is -- to my understanding, these benefit programs are still operating, they are still paying out benefits. The most recent time that I have looked at DEW's date asked for, which they publish, they still show benefit payments under these programs.

It is my understanding as well that they would still be required to accept applications for benefits for the T Ray program specifically for weeks of unemployment ending before June 26 when the benefits stop. So if people are eligible for benefits before that, my understanding is they are still required to accept applications for that.

These programs have already been set up. The infrastructure has been built. It is not as if they have to start from scratch. The Defendants say that they would have to hire more staff. That is consistent with their statutory obligation to minimize unemployment, would be my response to that. They would have to hire more staff with the

hundreds of millions of federal dollars that would flow into the state as a result of granting the relief that the Plaintiffs request.

Those are the two main points that I wanted to address on reply. I would be happy to address any questions you have.

THE COURT: Thank you.

MR. PROTHEROE: Thank you very much, Your Honor.

THE COURT: We haven't argued the motion to identify the Defendants themselves. Do you want to argue that now?

MR. TRAYWICK: If I might, Your Honor? With the two new points raised in reply, would there be a brief opportunity for a sur-reply just to address those two issues that Plaintiffs' counsel just addressed?

THE COURT: Yes.

MR. TRAYWICK: I think Mr. Timmons was going to take those, if that is okay.

THE COURT: Yes, sir.

MR. TIMMONS: Your Honor, since he brought up the accounts under the Social Security Act, I figured I might at least clarify what those accounts are and what we use them for because I

think that might explain the situation a little bit better.

42 USC 1101 is the account where states get paid their administrative funding from the federal government, but the account itself is not the advantage. It is the entitlement to federal funding that is put into that account. It is not the fact that the account exists, it is the entitlement to other provisions under the Social Security Act that allow money to flow into that account.

And the situation is similar with the account in 42 USC 1105. The 1105 account is what we use to pay extended benefits. Extended benefits are created by law, passed in 1970 -- I'm sorry for this -- the federal-state extended unemployment compensation act, but that account has never been used to pay Social Security Act benefits because, as Mr. Lambert pointed out, there is no such thing as Social Security Act benefits that an individual client may seek. Advantages under the Social Security Act are administrative funding.

So that is a clarification of what the accounts are. I would argue that is kind of like saying that I have an advantage because I have a

checking account with Bank of America. The advantage to me is the funds from my paycheck that are deposited into that account. It is not the banking law and the banking regulation that allows the account to exist, it is the money that I have entitlement to that is deposited into that account. So I would just argue that the fact that the accounts exist has no consequence here.

I would also point out --

THE COURT: Say that, the fact accounts exist has what?

MR. TIMMONS: Is not dispositive here. It doesn't convert the CARES Act benefits to the Social Security Act benefits.

And the last point I would make on that is the FPUC benefits are funded completely different. As Your Honor said, they are funded through a general appropriation of the treasury. Nowhere in the FPUC legislation is there any mention of 1101 or 1105. There is, as best I can tell, no legal authority for an argument that FPUC falls through or flows through the Social Security Act account.

So I just want to make sure you understand that that particular program is completely different than the other two in terms of how they

are funded. There is no relation, period, with FPUC to the SSA.

The other thing I would mention in terms of prejudice, it is absolutely true that my salary, the salary of my co-workers are federally funded, and the government will pay those costs under the CARES Act, but that does not mean that the work will be done by the federal government. It will be done by public service, DEW. And it is prejudicial to say after a program has been off for seven weeks that for the last three weeks you have got to turn it back on on an emergency basis. It is going to require a lot of work by our agency. It is going to require new programmatic changes to our benefit system. It is going to require more staff, or it is going to require the staff that are there to take their time from other duties to restart this process. I mean, the program is closed. We do pay benefits out if someone shows, for example, they win their case on appeal and we pay the benefits out. Something like that would result in a payment under these programs, but we are not actively administering them on a daily basis.

So I hope that clarifies what the prejudice would be if Your Honor would consider a preliminary

injunction while this case moves forward on the merits.

MR. TRAYWICK: Thank you, Your Honor. If I might on the motion to require identification and to strike? May it please the Court?

Lisle Traywick, of Robinson Gray, on behalf of Governor McMaster and DEW.

Your Honor, we have spent a lot of time on the merits today. We just want to take a brief moment of your time for a threshold issue that we wanted to raise. And that is our motion to require that the Plaintiffs identify themselves and/or to strike their anonymous certifications from the record in this matter.

Let me start with Article 1, Section 9 of the South Carolina Constitutional. That requires that all courts shall be open in South Carolina. The people of South Carolina made that policy decision, and the General Assembly has also given teeth to it.

And Section 14-5-10 of the South Carolina Code states that: Circuit courts shall be courts of record and the books of record thereof shall at all times be subject to the inspection of any person interested therein.

So against that backdrop, the Plaintiffs come in here with a heavy burden for requesting that they be allowed to proceed anonymously.

And fortunately we have got some guidance from the appellate courts. Justice Kittredge, when he was on the Court of Appeals, authored an opinion called Doe v. Howe -- we cited that in our brief -- that sets forth a list of five factors. Respectfully, we do not believe the Plaintiffs can meet any of them here.

To start, Rule 10(a) of the South Carolina Rules of Civil Procedure requires that all parties shall be named in the caption. Rule 10(e) goes further to say that the clerk of court shall not accept a filing that does not comply with the rules.

Now, we are not trying to get greedy here and ask that the complaint be dismissed outright for that reason. Our request is simply that you require that the Plaintiffs identify themselves. And for the reasons that are in the Doe factors.

We are both governmental defendants, and at issue in this case are public dollars, not just from the state treasury but from the federal treasury that are at issue. And so when a

Plaintiff comes to court requesting public money and arguing that the Defendants, both of whom are public officials, have violated the state law, the public has a right to know who those parties are.

And so for those reasons, we think the Plaintiffs have not shouldered their high burden of proceeding anonymously.

We have cited some cases from the District of South Carolina, as well as the United States Court of Appeals for the Fourth Circuit, all of which stand for the proposition that it is a very rare dispensation for the Plaintiffs to be allowed to proceed anonymously, an exceedingly rare circumstance. This is not one of those circumstances.

In the Doe case, the Court of Appeals pointed to two statutes under which victims of sexual assault or sexual violence would of course be entitled to proceed anonymously in civil actions. That is not what we have here. And I would note as examples other cases in which folks who are seeking unemployment benefits have proceeded with their names. In fact, there are hundreds a year filed in the South Carolina Administrative Law Court just on routine unemployment insurance benefit disputes.

So therefore this case doesn't meet the elements for anonymity, and we think that the public has a right to know consistent with the constitutional command that all courts shall be open.

And so for those reasons -- we would also note that the Plaintiffs have offered nothing except for an anonymous conclusionary assertion of retaliation, but courts have said that that is insufficient, and we don't see any evidence in this record to demonstrate that, and we think it is unfounded.

And so for those reasons, we would ask that Your Honor require that the Plaintiffs identify themselves and amend the pleadings accordingly. And in the alternative, to strike the anonymous declarations that were submitted in connection with the motion for preliminary injunction.

I am happy to answer any questions you have on that point, but otherwise we would rest on our briefs, respectfully.

THE COURT: Thank you, sir.

MR. TRAYWICK: Thank you, Your Honor.

MR. PROTHEROE: Your Honor, the Plaintiffs filed this case anonymously. This is not a

run-of-the-mill unemployment benefits appeal, it is not a run-of-the-mill unemployment benefits case. We are all aware of the target political environment that we exist in and the parties in context in which these decisions in unemployment benefits have taken place.

THE COURT: Why do you say not a run-of-the-mill? I know that you are seeking the executive branch in the governor and director of the employment workplace, why is it not a regular run-of-the-mill? If I am turned down for unemployment benefits, my name is there in the caption and I go appeal that, is that not correct?

MR. PROTHEROE: Sure. That is correct, Your Honor.

THE COURT: So why should there be any distinction here?

MR. PROTHEROE: Just because of the effects --

THE COURT: You named the governor and the director.

MR. PROTHEROE: Sure.

THE COURT: It is only for those reasons --

MR. PROTHEROE: I'm sorry?

THE COURT: Only because you named as defendants the governor of the state and the

director of DEW, is there any other factors that you are seeking to have these people remain anonymous?

MR. PROTHEROE: No, Your Honor, not because they named the governor and the director. Just simply the environment that they exist in. We asked this minor protection of the court. And to be clear, this is not the hill that the Plaintiffs seek to die on. Our clients want to get to the merits of this case. We have asked this court for a relatively minor protection of their identities in what is I think admittedly a politically charged environment.

THE COURT: I don't know if they agree it is relatively minor.

MR. PROTHEROE: Sure. And I understand. The one thing we won't -- you know, what we have done is we provided the Defendants with the unredacted affidavits. I think it has been included in the exhibit. We understand there is a legitimate need to have those, and offered them early on. Ultimately we want to get to the merits. The one thing we would push back strongly on is the idea that the disposition of this motion would delay consideration of our preliminary injunction motion.

You know, we don't contest too strongly the idea that perhaps these folks need to identify themselves. They are willing to do so if necessary. We think they do have legitimate concerns. But what we just -- what we don't want to have happen is after consideration of this PI motion delay.

Thank you.

THE COURT: All right. Anything further from anyone?

MR. TRAYWICK: Nothing from the Defendants, Your Honor.

MR. PROTHEROE: There is nothing from the Plaintiffs either.

THE COURT: I will get an order out today. I'll go back and review this a little bit further, and I'll send it to each of you in accordance with your briefs.

Thank you very much.

MR. TRAYWICK: Thank you very much.

MR. PROTHEROE: Thank you, Your Honor.

(WHEREUPON, the hearing adjourned at 10:08 a.m.)

(END OF TRANSCRIPT)

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Deborah M. McCurdy, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Richland County, South Carolina, on the 11th day of August, 2021.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

August 19, 2021

s/*Deborah M. McCurdy, RPR*

Deborah M. McCurdy, RPR
Fifth Circuit Court Reporter

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Hon. R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2021-000883

Sheena Brannon, Shane Stencil, Tina Sullivan, and Brandon Beaty

Appellants

v.

Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina, and G. Daniel Ellzey, in his official capacity as Director of the South Carolina Department of Employment and Workforce

Respondents.

CERTIFICATE OF APPELLANTS

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

August 24, 2021

s/ Adam Protheroe

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Appellants

v.

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Respondents.

PROOF OF SERVICE

I certify that I have served the Record on Appeal on Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina, and G. Daniel Ellzey, in his official capacity as Director of the South Carolina Department of Employment and Workforce by E-mail to their counsel of record pursuant to *In Re; Operation of the Appellate Courts During the Coronavirus Emergency (as Amended May 29, 2020),* Appellate Case No. 2020-000447 on August 24, 2021.

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Good morning,

Please find attached and served upon you pursuant to *In Re; Operation of the Appellate Courts During the Coronavirus Emergency (as Amended May 29, 2020),* Appellate Case No. 2020-000447, Appellants' Final Brief and the Record on Appeal in the above-referenced case. I've also linked these files below in case any are too large to transmit via e-mail.

Kind Regards,
Adam Protheroe

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