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Pro Se Petitioner

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

_____,

Case No.

Petitioner,

Dept. No.

vs.

EMPLOYMENT SECURITY DIVISION,
STATE OF NEVADA; and
LYNDA PARVEN, Administrator,

Respondents.

_____ /

PETITION FOR WRIT OF MANDAMUS

Pursuant to Article 6, Section 6(1) of the Nevada Constitution, and NRS 34.160 and 34.170, Petitioner, _____ [“Petitioner”], hereby requests that this Court issue a writ of mandamus to compel the Respondents, the NEVADA EMPLOYMENT SECURITY DIVISION and LYNDA PARVEN, its Administrator [collectively “Respondents”], to comply with the statutory mandate of 42 U.S.C. §503(a)(1), the regulatory mandate of 20 C.F.R. Part 640.1(a)(2), and the Due Process Clause of the 14th Amendment by scheduling a

1 hearing on Petitioner’s denial of/application for Pandemic Unemployment Assistance under the
2 CARES Act, Publ. L. 116-136 (March 27, 2020) or to show cause why a hearing has not been
3 scheduled.

4 Petitioner applied for Pandemic Unemployment Assistance [“PUA”] on
5 _____ (date). Petitioner was denied PUA on _____ (date). To date,
6 Petitioner has not received any PUA benefits and has not gotten a hearing. Respondents have
7 violated federal law and the procedural due process rights of the Petitioner by not disbursing
8 PUA and not holding a hearing in over _____ months. Petitioner asks this Court to require
9 Respondents to disburse, schedule a hearing, or show cause why PUA and a hearing have been
10 denied. This Petition is supported by the concurrently filed Memorandum of Points and
11 Authorities and verification of Petitioner.

12 **JURISDICTION AND RELIEF SOUGHT**

13 NRS 34.160 allows the district court to issue a writ of mandamus “to compel
14 performance of an act which the law especially enjoins as a duty resulting from an office, trust,
15 or station. . . .” NRS 34.170 also requires a writ to issue “in all cases where there is not a plain,
16 speedy and adequate remedy in the ordinary course of law.” Typically, a denial of
17 unemployment benefits requires an administrative hearing and allows a petition for judicial
18 review under NRS 612.500, 612.530, and NRS 233B.039(3)(a). Respondents acted on
19 Petitioner’s application and have not scheduled or held a hearing so there is no “contested case”
20 under NRS 233B.032, no opportunity for judicial review, and no adequate remedy at law.

21 NRS 34.150 through 34.310 provide the legal basis for a writ of mandamus. A writ of
22 mandamus is not a complaint, but extraordinary relief (NRAP Part III) that is discretionary,
23 meaning a court may deny or accept the writ. NRAP 21(b)(1). A writ of mandamus is available
24

1 when the moving party lacks an adequate remedy at law “to compel the performance of an act
2 which the law especially enjoins as a duty resulting from an office, trust or station.” NRS
3 34.160. The petition seeking writ of mandamus relief is not served upon any party, but the actual
4 writ, if approved by the court, must be served the same as any other civil action unless otherwise
5 ordered by the court. NRS 34.280. If the court accepts a writ, the court may either grant it or
6 schedule a hearing and usually set a briefing schedule. NRS 34.200, 34.260.

7 This Court “may issue a writ of mandamus to control the . . . arbitrary or capricious
8 exercise of discretion.” *Meyer v. Eighth Judicial District Court*, 110 Nev. 1357, 1361, 885 P.2d
9 622, 625 (1994); *see also Int’l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193,
10 197, 179 P.3d 556, 558 (2008). “Mandamus will not lie to control discretionary action, unless
11 discretion is manifestly abused or is exercised arbitrarily or capriciously.” *Round Hill Gen. Imp.*
12 *Dist. v. Newmann*, 97 Nev. 601, 603-604, 637 P.2d 534, 536 (1981). Thus, this Court can issue a
13 writ of mandamus if Respondents have acted arbitrarily, capriciously, or abused their discretion.
14 Respondents have acted arbitrarily and capriciously if its failure to disburse PUA or schedule a
15 hearing is contrary to law. *Nevada Gaming Commission v. Consolidated Casinos*, 94 Nev. 139,
16 141, 575 P.2d 1337, 1338 (1978); *Redmer v. Barbary Coast Hotel & Casino*, 110 Nev. 374, 378,
17 872 P.2d 341, 344 (1994); *see also* NRS 233B.135(3)(a)(where court may set aside agency
18 actions that violate constitutional or statutory provisions). Stated another way, this Court may
19 issue a writ of mandamus if Respondents have acted contrary to law. *Sullivan v. Eighth Judicial*
20 *Dist. Court*, 111 Nev. 1367, 1372, 904 P.2d 1039, 1042-43 (1995).

21 **ISSUE PRESENTED**

22 Have Respondents Violated 42 U.S.C. §503(a)(1) and 20 C.F.R. Part 640.1(a)(1), and Due
23 Process by Not Disbursing PUA or Holding a Hearing on Petitioner’s PUA Application within 7
24 weeks?

1 **NECESSARY FACTS**

2 Petitioner filed an application for PUA on _____ (date). Petitioner received
3 a denial of PUA benefits on _____ (date) and requested a hearing on
4 _____ (date). Petitioner was not eligible for regular unemployment or extended
5 benefits and was idled as a result of the COVID-19 shutdown under Governor Sisolak’s state of
6 emergency declaration. Furthermore, Petitioner cannot telework and has not received any
7 severance package or cashed out vacation or sick time. Therefore, Petitioner is eligible for
8 PUA.

9 Petitioner has not heard anything on the application in over _____ months. Petitioner
10 has been without benefits for almost _____ months. Respondents have a duty to timely
11 disburse PUA or hold hearings if these benefits are denied.

12 **REASONS WHY WRIT SHOULD ISSUE**

13 If Respondents have violated the U.S. constitution or other federal law, a writ of
14 mandamus may be issued by this Court to prevent such illegal activity. *Stumpf v. Lau*, 108 Nev.
15 826, 836, 839 P.2d 120, 126 (1992)(overruled on justiciability grounds in *Herbst Gaming, Inc.,*
16 *v. Heller*, 122 Nev. 877, 141 P.3d 1224 (2006)); *see also State v. Eighth Judicial Dist. Court*,
17 129 Nev. 492, 306 P.3d 369 (2013)(where writ of mandamus or writ of prohibition sufficient to
18 challenge constitutionality of state sex offender registry). Respondents have violated the
19 CARES Act of 2020, 42 U.S.C. §503(a)(1), the regulatory mandate of 20 C.F.R. Part
20 640.1(a)(2), and the Due Process Clause of the 14th Amendment by not acting promptly in
21 disbursing PUA benefits and not holding hearings.

1 *The CARES Act of 2020 and PUA*

2 Pandemic Unemployment Assistance under the CARES Act of 2020 [“CARES Act”]
3 provides PUA or cash assistance to workers idled by the COVID-19 pandemic for up to 39 weeks,
4 between January 27, 2020 and December 31, 2020.¹ CARES Act Section 2102(c). PUA provides a
5 safety net for self-employed, independent contractors, church workers, and others who are not
6 eligible for regular unemployment benefits. CARES Act at Section 2103.

7 Congress allocated funding for PUA and administrative expenses without any obligation to
8 Nevada to pay it back. CARES Act Section 2102(f)(2), (g)(1)(B) and (g)(2)(B). A critical
9 component of PUA is getting this money to idled workers without the usual seven day waiting period
10 (Section 2102(e)) and allowing self certification that the lack of work is related to COVID-19.
11 Section 2102(a)(3)(A)(ii).

12 The Department of Labor issued guidance to Respondents in Unemployment Insurance
13 Program Letter [“UIPL”] No. 16-20 on April 5, 2020. The Department of Labor required “[f]ull
14 payment of PUA when due must be made as soon as administratively feasible.” UIPL No. 16-20 at
15 I-11. On July 21, 2020, the Department of Labor issued Change 2 to Program Letter No. 16-20,
16 emphasizing the prompt determination of suspected fraud claims and the constitutional due process
17 requirements set forth in *California Dept. of Human Resources Development v. Java*, 402 U.S. 121,
18 133 (1971). UIPL No. 16-20 Change 2 at I-10 (referencing UIPL No. 01-16 (2015)). The *Java*
19 Court interpreted the “when due” words in 42 U.S.C. § 503(a)(1) and found that a seven week delay
20 before a hearing to adjudicate a claim violated the “when due” obligation. *See infra* at 6.

21
22
23 ¹ The Continued Assistance for Unemployed Workers Act of 2020 extends these benefits to
24 <https://blog.dol.gov/2021/01/11/unemployment-benefits-answering-common-questions>

1 The State of Nevada has a similar “when due” requirement for unemployment benefits. NRS
2 612.612. 20 C.F.R. Part 640.4 requires Nevada to provide “unemployment benefits to eligible
3 claimants with the greatest promptness that is administratively feasible.” To comply with this
4 requirement, federal regulations require Respondents to disburse unemployment benefits to 87% of
5 claimants within 14 days. 20 C.F.R. Part 640.5 (2020). Disbursement of benefits and prompt
6 adjudication go together and Nevada must ensure the promptness of payments and “the
7 corresponding need for promptness by the State in making determinations of eligibility.” 20 C.F.R.
8 Part 640.1(a)(2)(2020). 42 U.S.C. § 530(a)(1) is codified at 20 C.F.R. Part 640.2(a)(2020).

9 On May 11, 2020, Governor Steve Sisolak issued Directive 19 and recognized that the delay
10 in unemployment benefits may result in “serious health, safety, welfare and financial consequences”
11 to Nevada workers. Respondents have received funding under the CARES Act to disburse PUA to
12 Nevada workers.² On May 16, 2020, ESD allowed online PUA applications for the first time.
13 DETR Press Release of May 23, 2020.³ On July 18, 2020⁴, appeals of PUA denials first became
14 available and hearings started sometime in October of 2020.

15 Under the CARES Act, idled workers can self-certify that they are entitled to PUA based on
16 losing a job or job offer because of the COVID-19 pandemic, among other reasons.⁵ Respondents
17 have a duty to disburse PUA benefits “when due . . . as soon as administratively feasible.” UIPL
18 No. 16-20 at I-11. Respondents also have a duty to schedule and hold administrative hearings on the
19 denial of PUA benefits as soon as administratively feasible. The excessive delay in providing these

21 ² <https://nvhealthresponse.nv.gov/wp-content/uploads/2020/05/COVID-19-Directive-019.pdf>

22 ³ <https://cms.detr.nv.gov/Content/Media/PUA%20Weekly%20Filing.pdf>

23 ⁴ Nevada Department of Employment, Training and Rehabilitation Press Release of July 18 2020 see
https://www.fox5vegas.com/coronavirus/pua-claimants-can-file-appeals-online-as-of-saturday/article_32fde3b8-c946-11ea-a125-f7a0aeca43.html

24 ⁵ UIPL No. 16-20 at 3. In addition, PUA is not available to those idled workers who can telework or have received severance, sick or vacation benefits from their employer.

1 benefits implicates 42 U.S.C. § 503(a)(1) and the statutory obligation to disburse benefits “when
2 due.” *California Dept. of Human Resources Development v. Java*, 402 U.S. 121, 133 (1971).

3 The same “when due” and “administratively feasible” language in the CARES Act was used
4 for regular unemployment involved in *Java*. *Java*, 402 U.S. at 131. In *Java*, the unemployed worker
5 was eligible for unemployment benefits and receiving them when the State of California stopped
6 payment based on the employer appeal. *Java*, 402 U.S. at 123. The Supreme Court held that a seven
7 week delay before a hearing violated 42 U.S.C. § 503(a)(1). In the instant case, Petitioner’s
8 application was submitted on _____, almost _____ months ago. Petitioner
9 appealed the denial on _____, almost _____ months ago.

10 In *Fusari v. Steinberg*, the United States Supreme Court found that excessive delay in the
11 adjudication of claims for unemployment benefits could deprive due process even if those benefits
12 are ultimately granted. *Fusari*, 419 U.S. 379, 389 (1975).

13 In this case, Respondents have not disbursed PUA or scheduled a hearing in over _____
14 months. Petitioner has been idled because of COVID-19 and does not qualify for regular
15 unemployment assistance. Because Petitioner qualifies for a government benefit, Respondents
16 cannot delay a hearing without violating procedural due process. Even if Petitioner is not eligible,
17 Respondents have a duty hold a hearing on the denial.

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

21 virtual nullity, limiting it to those cases where the state concedes that unemployment is
22 due someone and simply fails to establish administrative mechanisms that result in
23 paying him within a reasonable amount of time If the content of the “when due”
24 clause were so eviscerated, a state could take all the time in the world to decide that an
unemployed person was entitled to compensation, provided that it got the check to him
promptly when it did decide[.]

1 *Pennington v. Didrickson*, 22 F.3d 1376, 1386 (7th Cir. 1994) (internal quotations and
2 citations omitted).

3 The Seventh Circuit has also found that a delay in excess of 14 days after the first
4 compensable week violates the “when due” language of the Social Security Act dealing with
5 unemployment benefits. *Burton v. Johnson*, 538 F.2d 765 (7th Cir. 1976); *see also Islam v. Cuomo*,
6 2020 U.S. Dist. LEXIS 133082, *14 (E.D. N.Y. 2020). Respondents have grossly exceeded this
7 deadline.

8 As the Supreme Court in *Java* noted, unemployment benefits have a much greater
9 importance than providing income to workers idled through no fault of their own, it exerts
10 an influence upon the stabilization of industry. . . . Early payment of insurance
11 benefits serves to prevent a decline in the purchasing power of the unemployed,
which in turn serves to aid industries producing goods and services.

12 *California Dep’t of Human Resources v. Java*, 402 U.S. 121, 132 (1971).

13 The Nevada economy and job stabilization are harmed by Respondents’ delay in providing EUC
14 and PUA.

15 *Denial of Procedural Due Process of Law*

16 Respondents’ delay also violates the constitutional protection of procedural due process of
17 law. In order to prevail on a due process claim, Petitioner must show a protected property
18 interest in the benefit before determining what process is then due. *Mathews v. Eldridge*, 242
19 U.S. 319, 332, 96 S. Ct. 893 (1976); *Goldberg v. Kelly*, 397 US 254, 297, 90 S. Ct. 1011 (1970).

20 The interest that Petitioner has in receiving PUA benefits is a federal right and property
21 interest protected by the 14th Amendment. *See Veterans for Common Sense v. Shinseki*, 644 F.3d
22 845, 873 (9th Cir. 2011)(where right to federal benefits entitled to due process protection).

1 The next element of due process is a prompt hearing. An excessive delay in holding a
2 hearing and disbursing PUA is an “important factor” in determining whether procedural due process
3 has been violated. *Id.* (citing *Fusari supra*). As the Ninth Circuit described, “at some point delay
4 must ripen into deprivation, because otherwise a suit alleging deprivation would forever be
5 premature.” *Id.*, 644 F.3d at 873-74 (citing *Schroeder v. City of Chicago*, 927 F.2d 957, 960 (7th Cir.
6 1991) (Posner, J.)).

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

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

15 *Shinseki*, 644 F.3d at 884.

16 In *Wheeler v. Vermont*, the Court found 37.5 days violated the statutory mandate of 42 U.S.C. §
17 503(a)(1) and the procedural due process clause of the United States Constitution. *Wheeler v.*
18 *Vermont*, 335 F.Supp. 856, 861 (D.Vt. 1971).

19 Petitioner applied for PUA on _____. Here, Petitioner’s interest is vitally
20 important as Governor Sisolak has indicated in Directive 19. As pointed out above, PUA serves to
21 stabilize Nevada’s economy and the harmful effects of job loss. *Java*, 402 U.S. at 132. Other courts
22 have held that unemployment benefits are more important than other assistance, like Social Security
23 or Medicare reimbursements. *See supra Java, Fusari*. There is also a broader, public policy reason
24 for disbursing unemployment benefits. As one court has found, the prompt payment is needed to
effectuate

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

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

6 The only government interest is Respondents constant focus on fraud, but fraudulent claims
7 should not slow down hearings because any fraud allegation will be addressed at the hearing. And
8 there is no fraud allegation in Petitioner's case. Petitioner is qualified to receive PUA and the
9 deprivation is erroneous, so ordering the disbursement will prove to be 100% successful.

10 CONCLUSION

11 Respondents have violated the statutory and regulatory mandate of 42 U.S.C. § 503(a)(1),
12 the CARES Act, and 20 C.F.R. Part 640.1 by not disbursing PUA or holding a hearing on the
13 PUA application for more than _____ months. Respondents have also violated the
14 constitutional mandate of the 14th Amendment by the excessive delay in disbursing and in
15 adjudicating PUA claims without any rational basis. Petitioner respectfully requests that this
16 Court issue a writ of mandamus requiring Respondents to follow federal law, disburse PUA
17 benefits, hold a hearing, or show cause why such relief is not warranted.

18 Wherefore, Petitioner respectfully requests that this Court:

19 (1) Issue a writ of mandamus requiring Respondents to comply with the mandates of 42
20 U.S.C. § 503(a)(1), the CARES Act, and 20 C.F.R. Part 640.1 and the Due Process Clause under
21 the 14th Amendment and disburse PUA benefits, hold a hearing, or show cause why such relief is
22 not warranted;

23 ///

24 ///

///

1 (2) Award costs pursuant to NRS 34.270; and

2 (3) For such further relief as this Court deems just and equitable.

3 **Affirmation pursuant to NRS 239B.030:** The undersigned does hereby affirm that the
4 preceding document does not contain the social security number of any person.

5 DATED this _____ day of _____, 2021.

6 Respectfully submitted,

7 By: _____
8 Petitioner, Pro Se

9 _____
10 Printed Name

11 _____
12 Address

13 _____
14 Address

15 **CERTIFICATE OF MAILING**

16 I hereby certify that on this _____ day of _____, 2021, I served the Petition
17 for Writ of Mandamus upon the following person by email and by depositing a copy of same in a
18 sealed envelope in the United States mail, postage pre-paid, and addressed as follows:

19 State of Nevada, Attorney General’s Office
20 100 N. Carson Street
21 Carson City, Nevada 89701

22 Employment Security Division, State of Nevada
23 Lynda Parven, Administrator
24 500 E. Third Street
Carson City, Nevada 89713

By: _____
Petitioner, Pro Se