AlaFile E-Notice

03-CV-2021-900863.00

To: MICHAEL LEE FORTON
mforton@alsp.org

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

SHENTEL HAWKINS ET AL V. GOVERNOR KAY IVEY ET AL
03-CV-2021-900863.00

The following complaint was FILED on 8/10/2021 5:16:50 PM

Notice Date: 8/10/2021 5:16:50 PM

GINA J. ISHMAN
CIRCUIT COURT CLERK
MONTGOMERY COUNTY, ALABAMA
251 S. LAWRENCE STREET
MONTGOMERY, AL, 36104

334-832-1260

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8/10/2021 5:16 PM
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CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

State of Alabama
Unified Judicial System
Form ARCiv-93 Rev. 9/18

COVER SHEET
CIRCUIT COURT - CIVIL CASE
(Not For Domestic Relations Cases)

Case Number: 03...
Date of Filing: 08/10/2021
Judge Code:

GENERAL INFORMATION

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA
SHENTEL HAWKINS ET AL v. GOVERNOR KAY IVEY ET AL

First Plaintiff: ☐ Business ☑ Individual ☐ Government ☐ Other

First Defendant: ☐ Business ☐ Individual ☑ Government ☐ Other

NATURE OF SUIT: Select primary cause of action, by checking box (check only one) that best characterizes your action:

TORTS: PERSONAL INJURY
- ☐ WDEA - Wrongful Death
- ☐ TONG - Negligence: General
- ☐ TOMV - Negligence: Motor Vehicle
- ☐ TOWA - Wantonness
- ☐ TOPL - Product Liability/AEMLD
- ☐ TOMM - Malpractice-Medical
- ☐ TOLM - Malpractice-Legal
- ☐ TOOM - Malpractice-Other
- ☐ TBFM - Fraud/Bad Faith/Misrepresentation
- ☐ TOXX - Other: ______

TORTS: PERSONAL INJURY
- ☐ TOPE - Personal Property
- ☐ TORE - Real Properly

OTHER CIVIL FILINGS
- ☐ ABAN - Abandoned Automobile
- ☐ ACCT - Account & Nonmortgage
- ☐ APAA - Administrative Agency Appeal
- ☐ ADPA - Administrative Procedure Act
- ☐ ANPS - Adults in Need of Protective Service

OTHER CIVIL FILINGS (cont'd)
- ☐ MSXX - Birth/Death Certificate Modification/Bond Forfeiture Appeal/ Enforcement of Agency Subpoena/Petition to Preserve
- ☑ CVRT - Civil Rights
- ☐ COND - Condemnation/Eminent Domain/Right-of-Way
- ☐ CTMP - Contempt of Court
- ☐ CONT - Contract/Ejectment/Writ of Seizure
- ☐ TOCN - Conversion
- ☐ EQND - Equity Non-Damages Actions/Declaratory Judgment/ Injunction Election Contest/Quiet Title/Sale For Division
- ☐ CVUD - Eviction Appeal/Unlawful Detainer
- ☐ FORJ - Foreign Judgment
- ☐ FORF - Fruits of Crime Forfeiture
- ☐ MSHC - Habeas Corpus/Extraordinary Writ/Mandamus/Prohibition
- ☐ PFAB - Protection From Abuse
- ☐ EPFA - Elder Protection From Abuse
- ☐ QTLB - Quiet Title Land Bank
- ☐ FELA - Railroad/Seaman (FELA)
- ☐ RPRO - Real Property
- ☐ WTEG - Will/Trust/Estate/Guardianship/Conservatorship
- ☐ COMP - Workers' Compensation
- ☐ CVXX - Miscellaneous Circuit Civil Case

ORIGIN: F ☑ **INITIAL FILING** A ☐ **APPEAL FROM DISTRICT COURT** O ☐ **OTHER**
R ☐ **REMANDED** T ☐ **TRANSFERRED FROM OTHER CIRCUIT COURT**

HAS JURY TRIAL BEEN DEMANDED? ☐ YES ☑ NO

Note: Checking "Yes" does not constitute a demand for a jury trial. (See Rules 38 and 39, Ala.R.Civ.P, for procedure)

RELIEF REQUESTED: ☐ **MONETARY AWARD REQUESTED** ☑ **NO MONETARY AWARD REQUESTED**

ATTORNEY CODE:
FOR057

8/10/2021 5:16:39 PM
Date

/s/ MICHAEL LEE FORTON
Signature of Attorney/Party filing this form

MEDIATION REQUESTED: ☐ YES ☑ NO ☐ UNDECIDED

Election to Proceed under the Alabama Rules for Expedited Civil Actions: ☐ YES ☐ NO

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CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

SHENTEL HAWKINS, ASHLEE LINDSEY, JIMMIE GEORGE, and CHRISTINA FOX	*	
	*	
Plaintiffs	*	
v.	*	
KAY IVEY, Governor of Alabama, and	*	Case No. CV-2021-
FITZGERALD WASHINGTON, Secretary of the Alabama Department of Labor,	*	
	*	
Defendants	*	

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

NATURE OF CLAIM

1. Plaintiffs bring this action against defendant Kay Ivey, in her official capacity as Governor of the Alabama, seeking that she be ordered to perform her duty under Ala. Code § 36-13-8, specifically the duty to “participate fully in grants and advances made available to it by the federal government.”

2. Plaintiffs bring this action against defendant Fitzgerald Washington, in his official capacity as Secretary of the Alabama Department of Labor, seeking that he be ordered to perform a mandatory duty under the Alabama Unemployment Compensation Act, Ala. Code §§ 25-4-1 et seq., specifically the duty under Alabama Code § 25-4-118 to “cooperate to the fullest extent possible” with the U.S. Department of Labor and provide pandemic unemployment compensation benefits as long as the programs continue to be federally funded and available pursuant to regulations and guidance provided by the U.S. Department of Labor.

3. A claimant's expectation of benefits beyond June 19, 2021, is a property interest protected under the 14th Amendment to the U.S Constitution, and plaintiffs have a due process right to the unemployment compensation benefits for which they qualify. *Griffeth v. Detrich*, 603 F.2d 118, 122 (9th Cir. 1979).

PARTIES

4. Plaintiff Shentel Hawkins is a resident of Montgomery, Alabama. She worked as a customer service representative at MetroPCS. Ms. Hawkins had a miscarriage and was hospitalized. She was off work for a total of two weeks, during which time she kept in touch with her supervisor and requested time off. Nevertheless, when Ms. Hawkins was physically able to return to work, MetroPCS told her that she was no longer needed and no longer had a job. Ms. Hawkins applied for unemployment compensation and was approved for pandemic unemployment compensation benefits. She last received pandemic unemployment compensation benefits June 19. Since she lost her job, Ms. Hawkins has been seeking other work, but she has not been able to find a job.

5. Plaintiff Ashlee Lindsey lost her job as a full-time substitute teacher in Montgomery, Alabama, prior to the school closing down due to COVID-19 in March 2020. She applied for unemployment compensation and was approved for pandemic unemployment compensation in 2020 and renewed in 2021. Her benefits stopped only because the defendants discontinued the program in Alabama. While on unemployment, Ms. Lindsey has made at least 45 applications. Most times, she receives no response, but some have told her she is overqualified. She has run out of savings and is on the verge of losing her housing and her transportation.

6. Plaintiff Jimmie George is a resident of Gulf Shores, Alabama. He worked approximately six years for a pizza restaurant in Gulf Shores that stayed open during COVID. His employer knew

of Mr. George's health problems, which put him at risk of severe complications from COVID, and that employer filed an unemployment compensation claim for Mr. George. Mr. George received 39 weeks of pandemic unemployment compensation benefits and then was approved for extended benefits. At the time that the Alabama Department of Labor opted out of pandemic benefits, Mr. George was still entitled to $700 in potential pandemic unemployment compensation. This money is needed to pay his bills.

7. Christina Fox is a resident of Hoover, Alabama. For the past year, Ms. Fox has been working approximately nine hours per week at Jimmy John's, where she has worked for the past eight years, mainly full-time. She has an unvaccinated four-year-old child. Ms. Fox has recently applied for at least twenty jobs, but she has not received an interview. She has gone on AL Works website to look for jobs, but she is not qualified for the ones that she has found there, since they require more technical skill than she possesses. Ms. Fox also utilizes Indeed.com. Ms. Fox used the $300 weekly pandemic benefits to pay rent and other bills, but she is running out of her savings and unable to pay rent and other bills.

8. Defendant Kay Ivey in her official capacity is the Governor of Alabama. As such, she is vested with the supreme executive power of Alabama pursuant to Section 113 of the Alabama Constitution. Pursuant to Section 120 of the Alabama Constitution, she must "take care that the laws be faithfully executed." Pursuant to Alabama Code §36-13-8, defendant Ivey accepts funds from the federal government for any purpose not contrary to the Alabama Constitution.

9. Defendant Fitzgerald Washington in his official capacity serves as Secretary of the Alabama Department of Labor and, pursuant to Ala. Code §5-4-110, administers Alabama's unemployment compensation program.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this matter under Ala. Code §§12-11-30 et seq. As recognized again as recently as 2009 in *Ex parte Russell*, 31 So.3d 694, 697 (Ala.Civ.App. 2009), the claims against defendant are not barred by section 14 of the Alabama Constitution, because plaintiffs seek "to compel State officials to perform their legal duties. *Dep't of Indus. Relations v. West Boylston Mfg. Co.,* 253 Ala. 67, 42 So.2d 787 [(1949)]; *Metcalf v. Dep't of Indus. Relations,* 245 Ala. 299, 16 So.2d 787 [(1944)]."

11. Venue is appropriate in Montgomery County under Ala. Code §6-3-7.

STATUTORY AND REGULATORY SCHEME

12. Created in 1935 during the Great Depression, unemployment insurance is a joint federal-state system, overseen by the federal government and operated by the states, that provides cash benefits to qualifying individuals to limit immediate hardship experienced from the loss of employment and in turn, to stabilize the economy by shoring up workers' purchasing power during economic downturns. Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment was therefore a subject of general interest and concern that required appropriate action by the Alabama Legislature and other legislatures across the country to prevent its spread and to lighten its burden, which so often falls with crushing force upon the unemployed worker or the worker's family. "Unemployment benefits provide cash to a newly unemployed worker 'at a time when otherwise [they] would have nothing to spend,' serving to maintain the recipient at subsistence levels without the necessity of [their] turning to welfare or private charity." *Cal. Dep't of Human Res. v. Java*, 402 U.S. 121, 131-132 (1971).

13. Unemployment insurance provides payments to states to finance the administration of their unemployment insurance compensation laws. 42 U.S.C. §§ 501-504.

14. Alabama is eligible to receive unemployment insurance payments from the federal government if it meets certain federal requirements, including that its law has a provision for "such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. § 503(a)(1) (emphasis added). This section of the Social Security Act is known as the "when due" provision. The federal regulation interpreting the "when due" provision requires that Alabama unemployment compensation laws provide for "such methods of administration as will reasonably ensure the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a).

15. In accordance with these federal requirements, Alabama passed the Unemployment Compensation Act, Ala. Code §§ 25-4-1 et seq., to "provide a worker with funds to avoid a period of destitution after having involuntarily lost his employment and thus his income. It aids in sustaining him while he looks for other employment." See *Arrow Co. v. State Dep't of Indus. Relations,* 370 So. 2d 1013, 1015 (Ala. Civ. App. 1979). The Alabama Supreme Court has stated that the purpose of the Act is "beneficent" and that Alabama's unemployment-compensation law "should be construed liberally to effectuate its purpose." *Ex parte Doty*, 564 So.2d 443, 446 (Ala. 1989). As stated in *State Dep't of Indus. Relations v. Bryant*, 697 So.2d 469 (Ala.Civ.App. 1997), "[t]he Unemployment Compensation Act is insurance for the unemployed worker and is intended to be a remedial measure for his benefit[; i]t should be liberally construed in the claimant's favor and the disqualifications from benefits should be narrowly construed." 697 So.2d at 470 (citations and internal quotation marks omitted).

16. Ala. Code §25-4-91 provides that “A determination upon a claim file . . . shall be made promptly by an examiner designated by the secretary, and shall include a statement as to whether and in what amount a claimant is entitled to benefits and, in the event of denial, shall state the reasons therefore . . .” Despite the “prompt” processes mandated by this statute, defendants are failing to act or perform in a prompt manner, which has caused plaintiffs to experience extreme delays—for months at a time—at every step of the claims process.

17. In response to the unprecedented numbers of workers who have become unemployed across the country due to the COVID-19 pandemic, Congress established Pandemic Unemployment Assistance (“PUA”), Pandemic Unemployment Compensation (“PUC”), and Pandemic Emergency Unemployment Compensation (“PEUC”) as part of the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act. 15 U.S.C. §§ 9021, 9023, and 9025. PUA expanded unemployment insurance coverage to those workers who would not be eligible for regular state unemployment compensation, such as workers who are independent contractors, are self-employed, or whose wages and hours would not be sufficient to qualify for state unemployment compensation. 15 U.S.C. §§ 9021(c)(2), (a)(3(A)(i). PUA is temporary and applied to unemployment costs incurred by states between March 1 and December 31, 2020. Id. Claimants may be eligible for PUA benefits only if they are not eligible for regular state unemployment compensation. See 20 C.F.R. § 625.4(i).

18. The CARES Act provided claimants with an additional $600 weekly for the weeks between March 29 and July 31, 2020, extended unemployment compensation for an extra 13 weeks to those who exhausted their benefits under state programs and allowed states to pay claimants for the first week of regular unemployment, rather than requiring a one-week waiting period. 15 U.S.C. §§ 9023, 9024, 9025 (“PEUC”). An extension of the CARES Act in the Consolidated

Appropriations Act of 2021 passed December 21, 2020, provided that recipients of regular state unemployment benefits are eligible for an additional $300 per week (instead of $600) from December 26, 2020, through March 14, 2021, and provided a new unemployment compensation benefit program for "mixed earners". It also gave states the authority to waive overpayments of PUA that a claimant received because of an honest mistake.

19. On February 25, 2021, the U.S. Department of Labor issued Unemployment Insurance Program Letter No. 16-20, Change 5. USDOL exercised the authority provided by Section 2102(a)(3)(A)(ii)(l)(kk) of the CARES Act to expand PUA eligibility to include three COVID-19 related reasons to which a claimant can self-certify:

1. Individual refusing to return to or accept an offer of new work that is unsafe;
2. Individual providing services to educational institutions or educational service agencies;
3. Individual experiencing a reduction of hours or a temporary or permanent lay-off.

20. On March 11, 2021, the CARES Act was extended again to provide extra unemployment compensation benefits until September 6, 2021.

21. In accordance with Alabama Code §36-13-8 and Alabama Code §25-4-118, defendants entered into an agreement with the U.S. Secretary of Labor to enable Alabamians to receive federal pandemic unemployment compensation benefits.

22. On May 10, 2021, defendant Ivey announced that Alabama would end its participation in all federally funded pandemic unemployment compensation programs effective June 19, 2021 including:

I. **Federal Pandemic Unemployment Compensation (FPUC),** which provides for an additional $300 weekly payment to recipients of unemployment compensation.
II. **Pandemic Unemployment Assistance (PUA),** which provides benefits for those who would not usually qualify, such as the self-employed, gig workers, and part-time workers,
III. **Pandemic Emergency Unemployment Compensation (PEUC),** which provides for an extension of benefits once regular benefits have been exhausted, and
IV. **Mixed Earner Unemployment Compensation (MEUC),** which provides an additional $100 benefit to certain people with mixed earnings.

She noted that claims filed prior to and up to June would continue to be processed under these programs. She further said:

"As Alabama's economy continues its recovery, we are hearing from more and more business owners and employers that it is increasingly difficult to find workers to fill available jobs, even though job openings are abundant . . . Among other factors, increased unemployment assistance, which was meant to be a short-term relief program during emergency related shutdowns, is now contributing to a labor shortage that is compromising the continuation of our economic recovery."

"Alabama has an unemployment rate of 3.8%, the lowest in the Southeast, and significantly lower than the national unemployment rate. Our Department of Labor is reporting that there are more available jobs now than prior to the pandemic. Jobs are out there,"

"We have announced the end date of our state of emergency, there are no industry shutdowns, and daycares are operating with no restrictions. Vaccinations are available for all adults. Alabama is giving the federal government our 30-day notice that it's time to get back to work."

Defendant reinstated the work search requirement for all claimants, which had been temporarily waived during the height of the pandemic, requiring all claimants to actively search for work in order to remain eligible for unemployment benefits.

In support of defendant Ivey's announcement, defendant Washington said:

"We have more posted job ads now than we did in either February or March 2020. Ads for workers in the leisure and hospitality industry are up by 73%. Overall, ads are up by nearly 40%. There are plenty of opportunities available in multiple industries in Alabama."

Neither defendant said anything about recipients of pandemic unemployment compensation who were unable to work because of COVID.

22. The defendants have not commissioned or presented expert studies indicating that the federal pandemic unemployment benefits are the cause of continued unemployment in Alabama despite a duty “to employ experts and to carry on and publish the results of investigations and research studies [related to unemployment in Alabama].” Ala. Code § 25-4-115.

23. Discontinuing the federal pandemic unemployment benefits makes it more difficult for unemployed Alabamians to retain housing, transportation, utilities, and other services that make it possible for these Alabamians to look for and secure employment. This is in direct contradiction to defendant Washington’s duties under Ala. Code § 25-4-115.

24. The action taken by the State of Alabama is not irreversible. On July 12, 2021, the Department of Labor issued guidance to state workforce agencies 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.” Unemployment Insurance Program Letter No. 14-21, Change 1 (available at https://wdr.doleta.gov/directives/corr_doc.cfm?docn=9502).

CLAIMS FOR RELIEF

25. Defendants’ early termination of all forms of pandemic unemployment compensation benefits violates Alabama Code §25-4-118, which requires defendant to “cooperate to the fullest extent possible” with the U.S. Department of Labor.

PRAYER FOR RELIEF

Accordingly, plaintiffs request that this Court:

a. Declare that defendants' termination of Alabama's agreement with the U.S. Department of Labor for pandemic benefits violates Alabama Code §25-4-118, which requires defendant to "cooperate to the fullest extent possible" with the U.S. Department of Labor.

b. Declare that defendants' termination of Alabama's agreement with the U.S. Department of Labor for pandemic benefits violates the intent of the legislature to participate fully in grants and advances made available to it by the federal government pursuant to Alabama Code §36-13-8 and the intent of the legislature to provide workers with funds to avoid a period of destitution and to aid in sustaining them while they look for other employment pursuant to Alabama Code §§25-4-1 *et seq.*;

c. Issue preliminary and permanent injunctions directing defendants to rescind their termination of Alabama's agreement with the U.S. Department of Labor for pandemic unemployment compensation benefits retroactive to the date of its termination;

d. Issue preliminary and permanent injunctions directing defendants to accept applications for people retroactive to June 19, 2021, and to process those claims and to pay eligible claims for so long as federal funds are available to pay them; and

e. Grant such other relief as is just and proper.

Respectfully Submitted:

/s/ Michael Forton
Michael Forton

/s/ Ford King
Ford King

/s/ Lawrence Gardella
Lawrence Gardella
Legal Services Alabama

Attorneys for the Plaintiffs
2567 Fairlane Drive, Suite 200
Montgomery, Alabama 20787
(256) 551-2671

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SHENTEL HAWKINS, ASHLEE LINDSEY, JIMMIE GEORGE, and CHRISTINA FOX	* *	
Plaintiffs	*	
v.	*	
KAY IVEY, Governor of Alabama and	*	Case No. CV-2021-
FITZGERALD WASHINGTON, Secretary of the Alabama Department of Labor,	* *	
Defendants	*	

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Come now plaintiffs and respectfully move that this Honorable Court grant a preliminary injunction requiring defendants to rescind the termination of Alabama's participation in the federal pandemic unemployment compensation benefits programs and reinstate those programs retroactive to the date of termination. In support whereof, plaintiffs respectfully submit the following:

1. Defendants' premature termination of the programs that were paying benefits to the plaintiffs leaves plaintiffs without the means to secure housing and other necessities and thereby causes them irreparable harm for which plaintiffs have no adequate remedy at law.
2. Plaintiffs have a reasonable chance of success on the merits because Ala. Code § 36-13-8 requires the governor to "participate fully in grants and advances made available to it by

the federal government" and Alabama Code §25-4-118 requires defendant to "cooperate fully" with the Secretary of the U.S. Department of Labor, and such cooperation includes participation in the administration of the programs for pandemic unemployment compensation established by the CARES Act, administer by the Secretary of the U.S. Department of Labor and funded by the federal government.

3. Any harm to defendant from reinstating the pandemic unemployment compensation programs is far outweighed by the benefits accruing to the plaintiffs and other unemployment claimants.
4. Issuance of a preliminary injunction serves the public interest in preventing harm to thousands of unemployed Alabamians who were relying on CARES Act programs to provide benefits to meet their basic needs as they continue their job search, all while stimulating consumer spending and encouraging labor market recovery. Terminating these benefits does not address the real barriers workers are facing in returning to work, including continued health concerns, childcare availability, and the availability of quality jobs that match their skills. Moreover, prematurely cutting off unemployment benefits does not push people back to work, as claimed by defendant and by Governor Ivey in their press announcement. As shown by several of plaintiffs' affidavits, employers do not want to hire overqualified people.
5. In light of the public interest served and the indigency of the plaintiffs, this Court should not require any of the plaintiffs to post more than a nominal bond.

Accordingly, Plaintiffs request that this Court:

a. Issue a preliminary injunction directing the Defendants to reverse their termination of

Alabama's agreement with the U.S. Department of Labor for pandemic unemployment compensation benefits and to accept applications for people retroactive to June 19, 2021, and to pay those claims for so long as federal funds are available to pay them; and

b. Grant such other relief as is just and proper.

Respectfully Submitted:

/s/ Michael Forton
Michael Forton

/s/ Ford King
Ford King

/s/ Lawrence Gardella
Lawrence Gardella
Legal Services Alabama
Attorneys for the Plaintiffs
2567 Fairlane Drive, Suite 200
Montgomery, Alabama 20787
(256) 551-2671

PLAINTIFF'S AFFIDAVIT

STATE OF ALABAMA *
COUNTY OF MONTGOMERY *

COMES NOW **SHENTEL HAWKINS**, a resident of Montgomery County, Alabama, who is of lawful age, and being duly sworn, deposes and says as follows:

1. I am a plaintiff in this matter challenging the decision of Fitzgerald Washington to cease all pandemic unemployment compensation programs in Alabama.
2. I am 29 years old and a resident of Montgomery, Alabama.
3. I worked as a customer service representative at MetroPCS until I had a miscarriage and was hospitalized. I was off work for a total of two weeks, during which time I kept in touch with my supervisor and requested time off. Nevertheless, when I was physically able to return to work, MetroPCS told me that I was no longer needed and no longer had a job.
4. I applied for unemployment compensation and was approved for regular unemployment compensation benefits and pandemic unemployment compensation in 2020 and renewed in 2021. I received $135 per week in regular benefits and $600 and then $300 a week in pandemic benefits, but both stopped in June 2021.
5. I remained eligible for the pandemic benefits, which only stopped because the Alabama Department of Labor stopped the program.
6. Since I lost my job, I have made several requests to return to MetroPCS and I have looked for other work through Indeed, Monster.com and making calls and visits to possible places of employment, but I have not been able to find a job.

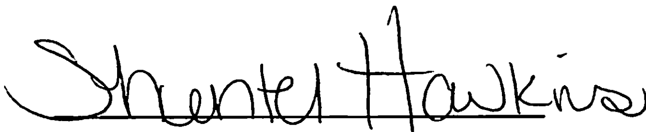
7. Late last month, I was approved for a special five-week training program with my local employment office, for which I receive $247 per week. I have gotten two payments so far, but the payments will end this month.

8. I last paid rent approximately a year ago. I am not at risk of losing my housing right now, because I have been getting my rent and some utilities paid through an emergency rental program.

9. I was able to save some money from my unemployment compensation benefits, but I will be exhausting my savings soon.

10. I do not own a car. I have been using my mother's car, which has no air conditioning. I need more reliable transportation in order to be able to work, but right now I cannot afford to buy a car.

11. Without pandemic unemployment compensation benefits I do not know how I will be able to pay for transportation and how I will be able to pay my other bills.



Shentel Hawkins

Sworn to and subscribed before me this the 8th day of August, 2021.

NOTARY PUBLIC, STATE AT LARGE
My Commission Expires: 10/8/22

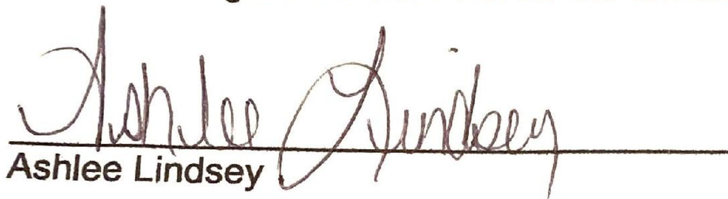
PLAINTIFF'S AFFIDAVIT

STATE OF ALABAMA *
COUNTY OF MONTGOMERY *

COMES NOW **ASHLEE LINDSEY**, a resident of Montgomery County, Alabama, who is of lawful age, and being duly sworn, deposes and says as follows:

1. I am a plaintiff in this matter challenging the decision of Fitzgerald Washington to cease all pandemic unemployment compensation programs in Alabama.
2. I am 38 years old and a resident of Montgomery, Alabama.
3. I worked approximately three months as a full-time substitute teacher at Lee High School in Montgomery, Alabama, prior to the school closing down due to COVID-19 in March 2020.
4. I applied for unemployment compensation and was approved for pandemic unemployment compensation in 2020 and renewed in 2021. I received $78 weekly, in addition to the $600 and then $300 in pandemic benefits.
5. I stopped receiving benefits in June 2021 when Governor Ivey discontinued the federal benefits in the State of Alabama.
6. I have put in many applications, approximately between 45 and 50 total. For most, I receive no response. Some have told me I am overqualified because I have a four-year degree. I have also applied with Montgomery County Schools. I last interviewed with Lee High School in early August 2021, and was unsuccessful in finding a new position.

7. Because of the spike in COVID cases, particularly from the Delta variant, I am concerned I will not be able to find a job in Montgomery County Schools.
8. I have used the entirety of my savings account, and my housing and transportation are at risk of being taken away in the near future as of this month.
9. At the time the Alabama Department of Labor stopped the pandemic unemployment compensation programs, I was eligible for benefits. I would still be eligible if it were not for the termination.

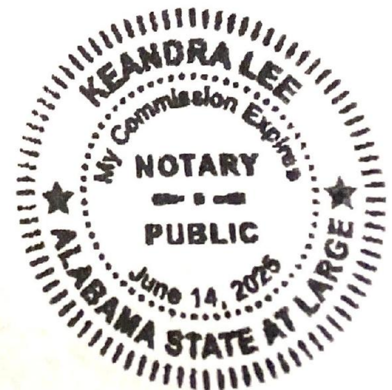


Ashlee Lindsey

Sworn to and subscribed before me this the 7th day of August, 2021.

NOTARY PUBLIC, STATE AT LARGE

My Commission Expires: 6-14-2025



PLAINTIFF'S AFFIDAVIT

STATE OF ALABAMA *

COUNTY OF BALDWIN *

COMES NOW **JIMMIE GEORGE**, a resident of Baldwin County, Alabama, who is of lawful age, and being duly sworn, deposes and says as follows:

1. I am a plaintiff in this matter challenging the decision of Fitzgerald Washington to cease all pandemic unemployment compensation programs in Alabama.
2. I am 52 years old and a resident of Gulf Shores, Alabama.
3. I worked approximately six years for a pizza restaurant in Gulf Shores that stayed open during COVID. My employer was aware of my health problems, which put me at risk of severe complications from COVID. I have Baker's lung and have recently had pneumonia twice and multiple respiratory infections.
4. My employer filed an unemployment compensation claim for me, which the Alabama Department of Labor approved. I received 39 weeks of pandemic unemployment compensation benefits and then was approved for extended benefits. At the time that the Alabama Department of Labor opted out of pandemic benefits, I was was still entitled to $700 in potential pandemic unemployment compensation.
5. Because of the spike in COVID cases, particularly from the Delta variant, my employer still does not want me to return to my job at the pizza place.
6. I have put in many applications, in person and online. For most, I receive no response. Some have told me I am overqualified. One place last week told me that it could hire me, but he would not because he was sure I would quit and then we would both lose out.

7. I am a bit behind on my rent, but my landlord has rented to me for six years, and she will work with me. The rent is only $450 a month. I asked her if she would agree to participate in the rental program that would pay my rent, but she declined.
8. I have been selling some of my belongings to get money to pay rent and other bills. I have also gotten loans from my ex-wife and other people. I am just about out of things to sell and just about out of people to try to borrow money from. It appears that in another month I will have nothing left, and I do not know what I will do then.
9. At the time the Alabama Department of Labor stopped the pandemic unemployment compensation programs, I was eligible for benefits. I would still be eligible if it were not for the termination.

N/A

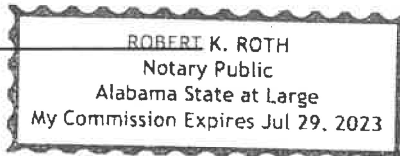
Jimmie George

Sworn to and subscribed before me this the 9 day of August, 2021.

Robert K. Roth – Notary for Jimmie George

NOTARY PUBLIC, STATE AT LARGE

My Commission Expires:


ROBERT K. ROTH
Notary Public
Alabama State at Large
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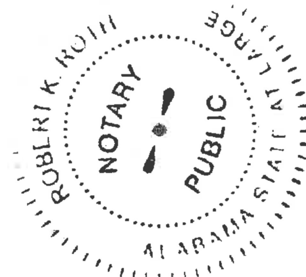


PLAINTIFF'S AFFIDAVIT

STATE OF ALABAMA *
COUNTY OF JEFFERSON *

COMES NOW **CHRISTINA FOX**, a resident of Jefferson County, Alabama, who is of lawful age, and being duly sworn, deposes and says as follows:

1. I am a plaintiff in this matter challenging the decision of Fitzgerald Washington to cease all pandemic unemployment compensation programs in Alabama.
2. I am 37 years old and a resident of Jefferson County, Alabama.
3. I worked at Jimmy John's and continue to work part-time for roughly 9 hours per week at a rate of $13 per hour. I have worked in this part-time capacity for much of the past year. I have worked at this Jimmy John's location for 8 years in total.
4. I work in a part-time capacity to ensure that my son and I have health insurance throughout the course of the pandemic.
5. I applied for unemployment compensation and was approved for regular unemployment compensation benefits and pandemic unemployment compensation in 2020 and renewed in 2021. I received $275 per week in regular benefits and $300 a week in pandemic benefits, but both stopped in June 2021.
6. I remained eligible for the pandemic benefits, which only stopped because the Alabama Department of Labor stopped the program.
7. In June 2021, I was approved for a special five-week training program with my local employment office, for which I received $275 per week. These benefits have since stopped.

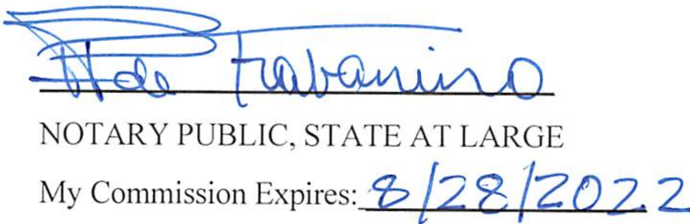
8. I have applied to roughly 20 jobs but have not received any interviews. I have used the AL Works website and Indeed.com but the AL Works website generally has jobs that I do not meet the qualifications for. Many of the jobs I find are only for part-time work, similar to what I have now with Jimmy John's.

9. I have used up almost all my savings even as I have relied on credit cards to help cover expenses since the federal benefits stopped in Alabama. I also filed for bankruptcy in April 2020.

10. Without pandemic unemployment compensation benefits I do not know how I will be able to pay all of my expenses including, but not limited to, rent and utility bills, the cell phone I need to look for work, car payments, car insurance, and food and medicines.

Christina Fox

Sworn to and subscribed before me this the 9th day of August, 2021.



NOTARY PUBLIC, STATE AT LARGE

My Commission Expires: 8/28/2022

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CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

SHENTEL HAWKINS, ASHLEE LINDSEY, JIMMIE GEORGE, and CHRISTINA FOX	* *	
Plaintiffs	*	
v.	*	
KAY IVEY, Governor of Alabama, and	*	Case No. CV-2021-
FITZGERALD WASHINGTON, Secretary of the Alabama Department of Labor,	* *	
Defendants	*	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs are seeking to stop defendants from depriving them and many others across Alabama from receiving federally-funded pandemic unemployment compensation benefits that they need in order to meet basic living expenses and to keep making diligent searches for work. They seek injunctive relief requiring the defendants to rescind their termination of the agreement to participate and to provide benefits from June 16 until the end of the programs.

STANDARD FOR PRELIMINARY INJUNCTION

A preliminary injunction should be issued only when the party seeking an injunction demonstrates: (1) that without the injunction the party would suffer irreparable injury; (2) that the party has no adequate remedy at law; (3) that the party has at least a reasonable chance of success on the merits of his case; and (4) that the hardship imposed on the party opposing the

preliminary injunction by the injunction would not unreasonably outweigh the benefit accruing to the party seeking the injunction.' *State ex rel. Marshall v. TY Green's Massage Therapy, Inc.*, 2021 Case WL 524492 (Feb. 12, 2021). Application of these factors to the facts and law of plaintiffs' claims requires that a preliminary injunction be issued requiring defendants to reinstitute the federal pandemic unemployment compensation benefits retroactive to the date it terminated them.

A. Defendants' premature termination of the programs that were paying benefits to the plaintiffs leaves plaintiffs without the means to secure housing and other necessities and thereby causes them irreparable harm for which plaintiffs have no adequate remedy at law.

Plaintiffs by their affidavits show that they have exhausted savings and are at risk of loss of housing and other basic necessities. Other courts around the country have reviewed similar decisions by state officials. All the other courts that have issued decisions in challenges to termination of a state's participation in federal pandemic unemployment compensation programs have found that claimants, such as plaintiffs, who had been eligible for the pandemic benefits and were now at risk of loss of essentials are at risk of irreparable harm. *Armstrong v. Hutchison*, case no. CV-2021-4507 (Cir. Ct. of Pulaski Co., Ark., Jul. 28, 2021); *T.L. v. Holcomb*, case no. 49D11-2106-PL-020140 (Marion Sup. Ct., Indiana, June 25, 2021); *D.A. v. Hogan*, case no 24-C-21-02988 (Cir. Ct. for Baltimore City, Maryland, July 13, 2021) and *Harp v. Hogan*, case no 24-C-21-02999 (Cir. Ct. for Baltimore City, Maryland, July 13, 2021); *State ex rel. Bowling v. Dewine*, case no. 21-CVH07-4469 (Franklin Co. Ct. of Common Pleas, Ohio, July 29, 2021); *Owens v, Zunwalt*, case no. CV-21-1703 (Dist. Ct. of Oklahoma Co., Oklahoma, Aug. 9, 2021) (copy of all cited cases attached as an appendix).

Similarly, in granting a preliminary injunction, the court in *Thomas v. Heckler*, 598 F.Supp. 492 (M.D. Ala. 1984), found that people improperly terminated from Supplemental Security Income and Social Security benefits that they relied upon for their basic needs were irreparably harmed. The court said:

> The evidence before this court reflected that the plaintiffs and members of the class are now unable to pay for medicines, clothing, shelter, food, and transportation because of the termination of their benefits. As a result, many have lost or are in danger of losing major possessions, many now suffer from anxiety, depression and a substantial decline in health, and some have even died. Retroactive restoration of benefits would obviously be inadequate to remedy these hardships. *See Lopez v. Heckler*, 725 F.2d 1489, 1497 (9th Cir.1984) ("[S]ome class plaintiffs have already died or suffered further illness as a result of the Secretary's action"); *Hyatts v. Heckler*, 579 F.Supp. 985, 995 (D.N.C.1984) ("The termination and the unjustified denial of Social Security disability benefits cause irreparable harm to eligible persons.")

598 F.Supp. at 497. Plaintiffs were relying on the pandemic unemployment compensation benefits just as the plaintiffs in *Thomas* were relying on their benefits, and their harm is just as irreparable.

B. Plaintiffs have a reasonable chance of success on the merits because Alabama Code §25-4-118 requires defendants to "cooperate fully" with the Secretary of the U.S. Department of Labor, and such cooperation includes participation in the administration of the programs for pandemic unemployment compensation established by the CARES Act, administer by the Secretary of the U.S. Department of Labor and funded by the federal government.

In *Alabama Ed. Ass'n v. Bd. of Trustees of Univ. of Alabama*, 374 So. 2d 258 (Ala. 1979), the Alabama Supreme Court affirmed a preliminary injunction, noting "the law in this State is settled that, on a motion for preliminary injunction, the burden is on complainant to satisfy the court that there is at least a reasonable probability of ultimate success on the merits of

the controversy." 374 So.2d at 261 (citation omitted). Plaintiffs meet this burden, as they are very likely to prevail on the merits.

First, this Court has the power to grant the relief the plaintiffs seek. The Court has jurisdiction over this matter under Ala. Code §§12-11-30 et seq. As recognized as recently as 2009 in *Ex parte Russell*, 31 So.3d 694, 697 (Ala.Civ.App. 2009), claims such as those against defendants are not barred by section 14 of the Alabama Constitution, because plaintiffs seek "to compel State officials to perform their legal duties. *Dep't of Indus. Relations v. West Boylston Mfg. Co.,* 253 Ala. 67, 42 So.2d 787 [(1949)]; *Metcalf v. Dep't of Indus. Relations,* 245 Ala. 299, 16 So.2d 787 [(1944)]."

Second, defendants' early termination of all forms of pandemic unemployment compensation benefits violates Alabama Code §25-4-118, which requires defendant Washington to "cooperate to the fullest extent possible" with the U.S. Department of Labor. No Alabama case has examined what this "fullest" cooperation requires of defendant. In several other states with similar statutes, courts have found that the cooperation includes continued operation of the federal pandemic unemployment compensation programs. In Indiana and Maryland trial courts have enjoined the terminations.

The language of the Maryland statute is almost identical to Alabama Code §25-4-118. Maryland Code §8-310(a)(1) reads:

> In the administration of this Title, the [Maryland] Secrtary [of Labor] shall cooperate with the United States Secretary of Labor to the fullest extent that this statute allows.

In *D.A. v. Hogan*, case no 24-C-21-02988 (Cir.Ct. for Baltimore City), and *Harp v. Hogan*, case no 24-C-21-02999 (Cir.Ct. for Baltimore City), the court issued a joint opinion, a copy of which is attached, finding that:

> Plaintiffs are likely to establish that this provision in this context operates 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 court reached this conclusion by looking at dictionary definitions of "cooperate" showing that it entails working together for a common end. In Maryland, statutory language showed the common end to involve protection against "economic insecurity" caused by unemployment. In Alabama, the same common end is set forth even more clearly. Alabama passed the Unemployment Compensation Act, Ala. Code §§25-4-1 et seq., to "provide a worker with funds to avoid a period of destitution after having involuntarily lost his employment and thus his income. It aids in sustaining him while he looks for other employment." See *Arrow Co. v. State Dep't of Indus. Relations,* 370 So. 2d 1013, 1015 (Ala. Civ. App. 1979). The Alabama Supreme Court has stated that the purpose of the Act is "beneficent" and that Alabama's unemployment-compensation law "should be construed liberally to effectuate its purpose." *Ex parte Doty*, 564 So.2d 443, 446 (Ala. 1989). As stated in *State Dep't of Indus. Relations v. Bryant*, 697 So.2d 469 (Ala.Civ.App. 1997), "[t]he Unemployment Compensation Act is insurance for the unemployed worker and is intended to be a remedial measure for his benefit[; i]t should be liberally construed in the claimant's favor and the disqualifications from benefits should be narrowly construed." 697 So.2d at 470 (citations and internal quotation marks omitted). Therefore, in Alabama cooperation to the fullest extent possible entails accepting the federal pandemic unemployment benefits for as long as they are available.

In Indiana, a county superior court relied on Indiana Code §22-4-1-1, a statute very similar to Alabama's section 25-4-1, and on Indiana Code §22-4-37-1, requiring the Indiana Department of Workforce Development to pursue available federal unemployment compensation funds, much like Ala. Code §36-13-8 to grant a preliminary injunction preventing the department

from withdrawing from the federal pandemic unemployment programs. *T.L. v. Holcomb*, cause number 49D11-2106-PL-02140 (Marion Super. Ct., Indiana June 25, 2021) (a copy of the order is attached).

In Oklahoma, a court relied on the language of a statute much like Ala. Code §25-4-118, 40 Okl.Stat. §4-313 requiring its labor department to "cooperate to the fullest extent consistent with the provisions of this Act . . .", and to secure "all advantages available", as well as 40 Okl.Stat. §1-103, regarding payment of "unemployment reserves . . . for the benefit of persons unemployed through no fault of their own" to find a reasonable probability of success on the merits and to enjoin the Oklahoma governor and secretary from withdrawing from pandemic unemployment compensation programs. *Owens v, Zunwalt*, case no. CV-21-1703 (Dist. Ct. of Oklahoma Co., Okl., Aug. 9, 2021). The court noted that the legislature set the policy on unemployment compensation benefits, and that the primary role of the governor and his agents was the "faithful execution of the law". This is also defendant Ivey's primary role pursuant to Section 120 of the Alabama Constitution. The purpose of the Alabama Unemployment Compensation Act also requires payment to persons unemployed through no fault of their own, *Arrow Co. v. State Dep't of Indus. Relations,* 370 So. 2d 1013, 1015 (Ala. Civ. App. 1979)., so plaintiffs are entitled to the relief they seek.

Arkansas has a statute that is virtually identical to the Oklahoma statute 4-313, Ark. Code. Ann'd §11-10-312, and another much like Oklahoma's section 1-103, Ark. Code. Ann'd §11-10-102. An Arkansas court relied on this statutory language to find a reasonable probability of success on the merits and to issue a preliminary injunction. *Armstrong v. Hutchison*, case no. CV-2021-4507 (Cir.Ct. of Pulaski Co., Ark., Jul. 28, 2021).

In Ohio, R.C. 4141.43(I) obligated the director to cooperate with the Department of Labor to "secure to the state and its citizens advantages available under the provisions" of three specifically named programs: the Social Security Act, the Federal-State Unemployment Compensation Act of 1970, and the Workforce Innovation and Opportunity Act. In finding a high enough likelihood of success on the merits to meet Ohio's stringent standards for issuance of a preliminary injunction, a circuit court found "The wording chosen by the Ohio General Assembly clearly does not include the CARES Act", so:

> 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.

Bowling v. Dewine, case no. (Ct. of Common Pleas, Cuyahoga Co., Ohio). Unlike Ohio and like Maryland and Indiana, Alabama's statute requires fullest cooperation in meeting the goals of unemployment compensation programs, and so it requires defendant's participation in the federal pandemic unemployment compensation programs.

C. Any harm to defendants from reinstating the pandemic unemployment compensation programs is far outweighed by the benefits accruing to the plaintiffs and other unemployment claimants.

As noted above, the harm to plaintiffs is extreme and irreparable. Defendants will get funding from the federal government both for the benefits paid to Alabamians and the costs of administering the program. 42 U.S.C. §§1101(a), 1104(a), and 1105(a); 15 U.S.C. §§9025(d) and 9023(d). Plaintiffs concede that defendants will encounter administrative hurdles in getting the system reinstated, but the burden is outweighed by the harm to plaintiffs. Recognizing the

same kind of hurdles and expenses for the Secretary of Maryland's Secretary of Labor, the Maryland court found that the balance of hardship tipped strongly in plaintiffs' favor. *D.A. v. Hogan*, case no 24-C-21-02988 (Cir.Ct. for Baltimore City, Md.), and *Harp v. Hogan*, case no 24-C-21-02999 (Cir.Ct. for Baltimore City. Md.), pp. 18-20. This Court should make the same finding.

D. Issuance of a Preliminary Injunction Serves the Public Interest

The pandemic is not over, and unemployed Alabamians need support while the economy slowly recovers. The public interest in Alabama is served by restoring the available federal pandemic unemployment compensation benefits. Issuance of a preliminary injunction serves the public interest in preventing harm to thousands of unemployed Alabamians who were relying on CARES Act programs to provide to meet their basic needs as they continue their job search, all while stimulating consumer spending and encouraging labor market recovery. Terminating these benefits does not address the real barriers workers are facing in returning to work, including continued health concerns, childcare availability, and the availability of quality jobs that match their skills. Moreover, prematurely cutting off unemployment benefits does not push people back to work, as claimed by defendants in their press announcement. As shown by several of plaintiffs' affidavits, employers do not want to hire overqualified people.

Unemployed Alabamians still need support as the pandemic continues and the economy slowly recovers. The June 2021 jobs report showed that 9.5 million people remain unemployed nationally, another 4.6 million are only working part-time but want full-time work, and the economy is still down 6.8 million jobs from pre-pandemic February 2020.[1] Pandemic

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[1] 20 U.S. Bureau of Labor Statistics, Employment Situation Summary – June 2021 (July 2021), available at https://www.bls.gov/news.release/empsit.nr0.htm (last visited August 5, 2021).

unemployment compensation benefits provide essential income support to unemployed workers while they search for work and re-enter a slowly reopening labor market. In addition, the rapid spread of COVID-19 variants has brought renewed health risks to workers planning to return to work, as well as economic impacts as businesses may again need to scale back operations and reduce their workforce if there are new restrictions. While Alabama is not currently instituting new restrictions, as recently as July 28, 2021, State Health Officer Dr. Scott Harris said masking decisions should made by Alabama's local school boards.[2] Such restrictions on schools could slow job growth and dampen economic recovery. The intensified health risks of new COVID-19 surges and the possibility of new restrictions requires the state to continue availing itself of all resources to support jobless Alabamians.

Despite what the defendants said on May 10, 2021, prematurely cutting off unemployment insurance benefits does not encourage people to go back to work. Economic research conducted during the pandemic shows that significant changes in unemployment compensation, such as the reduction in FPUC from $600 to $0 and then from $300 to $0 in Alabama and many other states, had minimal impact on job finding rates.[3] In fact, workers who experienced larger increases in unemployment benefits returned to their previous jobs over a similar timeframe as those with smaller increases.[4] Using recent Census Bureau data, economist

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[2] https://www.wkrg.com/health/coronavirus/alabama-education-leaders-leaving-mask-mandates-up-to-local-school-boards/
[3] See Joseph Altonji, Zara Contractor, Lucas Finamor, Ryan Haygood, Ilse Lindenlaub, Costas Meghir, Cormac O'Dea, Dana Scott, Liana Wang, & Ebonya Washington, Tobin Center for Economic Policy at Yale University, Employment Effects of Unemployment Insurance Generosity During the Pandemic (July 14, 2020), available at https://tobin.yale.edu/sites/default/files/files/C-19%20Articles/CARES-UI_identification_vF(1).pdf (last visited August 5, 2021).
[4] *Id.*

Arindrajit Dube found that the percentage of workers employed actually declined by 1.4% in the first round of states that cut off benefits early[5], such as Alabama. While these states saw decreases in the number of individuals receiving benefits, the premature cut-off did not result in individuals getting jobs within two to three weeks after benefits termination.[6] Instead, losing benefits caused hardship.[7] Additional research shows that insurance programs like FPUC have a very small disincentive effect on re-employment, and that very few workers would turn down a return to work at their prior wage rate due to expanded unemployment programs.[8] Comparisons between states also suggests that premature cut-offs do not encourage employment. Peter Ganong of the University of Chicago analyzed the most recent state employment report and found no statistical difference in employment levels between states that prematurely cut benefits as Alabama did and those that did not.[9] These findings signal that premature cut-offs do not push workers back into the workforce—an argument cited as the rationale for early *termination*. Instead, unemployment insurance programs provide critical support to unemployed workers to meet their basic needs as they continue their job search, all while stimulating consumer spending and encouraging labor market recovery. If workers are staying out of the workforce, it is likely

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[5] https://arindube.com/2021/07/18/early-impacts-of-the-expiration-of-pandemic-unemployment-insurance-programs/ (last visited August 5, 2021)
[6] *Id.*
[7] *Id.*
[8] See Altonji, Employment Effects, supra, at 1; Peter Ganong, Pascal J. Noel & Joseph S. Vavra, National Bureau of Economic Research, US Unemployment Insurance Replacement Rates During the Pandemic (NBER Working Paper Series 4, August 2020), available at https://www.nber.org/system/files/working_papers/w27216/w27216.pdf?utm_source=npr_newsletter&utm_medium=email&utm_content=20210329&utm_term=5278584&utm_campaign=money&utm_id=2543617&orgid=197&utm_att1=money (last visited August 5, 2021).
[9] Ganong, supra, at 3; Nicolas Petrosky-Nadeau & Robert G. Valleta, Federal Reserve Bank of San Francisco, UI Generosity and Job Acceptance: Effects of the 2020 CARES Act 3 (June 2021), available at https://www.frbsf.org/economic-research/files/wp2021-13.pdf (last visited July 29, 2021). 35 Peter Ganong (@p_ganong), TWITTER (July 16, 2021), https://twitter.com/p_ganong/status/1416160296201334786?s=20 (last visited August 5, 2021).

due to slow jobs recovery, concerns around COVID-19 safety, and childcare and caregiving responsibilities brought on by school closures and COVID-19-related illness.

E. Because of the public interest served and the indigency of the plaintiffs, this Court should not require any of the plaintiffs to post more than a nominal bond.

Although Rule 65 of the Alabama Rules of Civil Procedure generally requires a party post a bond to obtain a preliminary injunction, there are exceptions to the bond requirement. Since plaintiffs are impecunious, and the issue involved is one of “overriding public concern”, this Court should require make a specific finding that plaintiffs satisfy one or more of the exceptions to the bond requirement and order no more than a nominal security. *Spinks v. Automation Personnel Services, Inc.*. 49 So.3d 186, 190 (Ala. 2010) (which quoted from *Anders v. Fowler*, 423 So.2d 838, 840 (Ala. 1982) (which quoted *from Lightsey v. Kensington Finance and Mortg. Corp.*, 294 Ala. 281, 285, 315 So.2d 432, 434). In finding a nominal bond can be adequate in certain circumstances, the *Lightsey* Court cited by analogy 11A *Fed. Prac. & Proc*. §2954, p. 529. The important public interest underpinning this litigation and the plaintiffs’ lack of funds both dictate that only a nominal bond be ordered.

Respectfully Submitted:

/s/ Michael Forton
Michael Forton

/s/ Ford King
Ford King

/s/ Lawrence Gardella
Lawrence Gardella
Legal Services Alabama
Attorneys for the Plaintiffs
2567 Fairlane Drive, Suite 200
Montgomery, Alabama 20787
(256) 551-2671

Appendix

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Pulaski County Circuit Court
Terri Hollingsworth, Circuit/County Clerk
2021-Jul-28 12:09:43
60CV-21-4507
C06D04 : 4 Pages

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

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 (22nd)
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:

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

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.

(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

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).

(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

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

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

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

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

<table>
<tr><td>D.A., et al.,

Plaintiffs,

v.

LARRY HOGAN, in his official capacity as GOVERNOR of the State of Maryland, et al.,

Defendants.</td><td>IN THE

CIRCUIT COURT

FOR BALTIMORE CITY

Case No. 24-C-21-002988</td></tr>
<tr><td>LEONARD HARP, et al.,

Plaintiffs,

v.

GOVERNOR LARRY HOGAN, et al.,

Defendants.</td><td>Case No. 24-C-21-002999</td></tr>
</table>

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.

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).

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);

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[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.

- [*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

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

> 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

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.

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

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

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

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

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

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,"

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[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

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.

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

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.

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[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.

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

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

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

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.

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Judge Lawrence P. Fletcher-Hill
Circuit Court for Baltimore City

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

Franklin County Ohio Clerk of Courts of the Common Pleas- 2021 Jul 29 3:28 PM-21CV004469
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Court Disposition

Case Number: 21CV004469

Case Style: THE STATE OF OHIO ET AL -VS- MICHAEL DEWINE ET AL

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 21CV0044692021-07-1699740000
   Document Title: 07-16-2021-MOTION FOR TEMPORARY RESTRAINING ORDER - PLAINTIFF: CANDY BOWLING
   Disposition: MOTION DENIED

1049577600

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

Ronda Kay Owens, et al.	)	
	)	
Petitioners,	)	
	)	
vs.	)	Case No. CV-21-1703
	)	Judge Anthony L. Bonner, Jr.
Shelley Zumwalt, in her capacity as Executive Director of the Oklahoma Employment Security Commission,	)	
	)	
Respondent.	)	

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.

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.

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

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

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).

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

"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

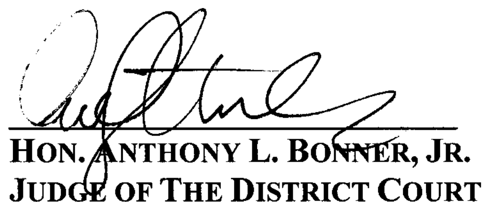
force upon the unemployed worker and his family." The federal unemployment benefits available through the CARES Act are "advantages" available to help remedy economic insecurity due to unemployment upon which COVID-19 had a significant impact.

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