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UNEMPLOYMENT INSURANCE
APPEALS COMMISSION

STATE OF MICHIGAN
MICHIGAN UNEMPLOYMENT INSURANCE APPEALS COMMISSION

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IN THE MATTER OF:

INVOLVED CLAIMANT:
CHRISTINE M. HOLIFIELD
SSN: [redacted]

_____/

ALJ: LINDSAY WILSON

APPEAL DOCKET NOs.
20-024143-262734W,
20-028282-263102W

UIA CASE NUMBERS:
24375735,
24375736

**PROOF OF SERVICE**

The undersigned certifies that on April 19, 2021, PDFs of the Motion to File an Amicus Brief and the Brief of Amicus Curiae Michigan Attorney General Dana Nessel in Support of Claimant Christine M. Holifield were filed with the Michigan Unemployment Insurance Appeals Commission via email (LEO-UIAC-Info@michigan.gov) and electronically served on the attorneys of record in the above-captioned case by emailing the PDFs to them at their respective email addresses.

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Dated: April 19, 2021

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**BRIEF OF AMICUS CURIAE MICHIGAN ATTORNEY GENERAL DANA NESSEL IN SUPPORT OF CLAIMANT CHRISTINE M. HOLIFIELD**

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## STATEMENT OF QUESTIONS PRESENTED

The federal Pandemic Unemployment Assistance (PUA) Program provides unemployment assistance for workers who are ineligible for other assistance, including state unemployment benefits. Part-time workers in Michigan, including those who are disabled and unable to work full-time, are ineligible to receive state unemployment benefits.

1. Does the plain language of state law avoid a categorical bar to those part-time workers receiving unemployment assistance under the PUA Program?

   The UIA's answer: No.

   Holifield's answer: Yes.

   The Attorney General's answer: Yes.

2. If there is a conflict between federal and state law, does federal law preempt because Congress clearly intended to benefit part-time workers who are ineligible to receive state unemployment benefits?

   The UIA's answer: No.

   Holifield's answer: Yes.

   The Attorney General's answer: Yes.

3. Would denying a claimant PUA funds solely based on the claimant's disabled status violate the Americans with Disabilities Act and the Rehabilitation Act of 1973?

   The UIA's answer: No.

   Holifield's answer: Yes

   The Attorney General's answer: Yes.

4. Would the loss of PUA funds hurt Michigan?

   The UIA's answer: No.

   Holifield's answer: Yes.

   The Attorney General's answer: Yes.

## STATEMENT OF INTEREST OF THE ATTORNEY GENERAL AS AMICUS CURIAE

This case presents an issue of statewide importance: whether Michigan's part-time workers who are unable or unavailable to perform full-time work but nevertheless have lost income as a result of the devastating and unprecedented COVID-19 pandemic, are eligible to receive assistance through the Pandemic Unemployment Assistance (PUA) program, which Congress enacted as part of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The Commission's ruling on this issue will directly impact thousands of unemployed part-time workers, including many disabled workers, and will also affect their families and the economy of the State as a whole.

The Attorney General is the constitutionally established officer who serves as the chief law enforcement officer for the State. The Legislature has authorized the Attorney General to participate in any action in any state court when, in her own judgment, she deems it necessary to participate to protect any right or interest of the State or the People of the State. MCL 14.28. Thus, Attorney General Dana Nessel participates in this action to ensure that Michigan law is properly interpreted, that the interplay between federal law and Michigan law is correctly understood, that individual rights are protected under the Americans with Disabilities Act and the Rehabilitation Act, and that Michigan's part-time workers who are unable or unavailable to work full-time are not categorically barred from receiving federal pandemic relief.

## INTRODUCTION

Attorney General Dana Nessel seeks to help Michiganders receive the federal economic benefits to which they are entitled under the CARES Act. Part-time workers who have seen their part-time income stream reduced due to COVID-19 but are not able or available for full-time work are not categorically ineligible for federal unemployment benefits under the Act's PUA Program. Assuming they are able and available to work in the same capacity as they were working prior to COVID-19, they are entitled to the safety net of the PUA. And their financial, emotional, and physical health depends on it. Part-time workers are often the most severely impacted by economic hard times. Add to that the challenges of coping with a disability, and part-time disabled workers who have lost their income stream are particularly hard hit. These are the very individuals whom Congress intended the PUA Program to benefit. When they are deprived of this needed assistance, they, their families, and the State as a whole suffer.

This is an issue of first impression, and the Unemployment Insurance Agency is rightly concerned about improperly paid-out PUA funds. But it need not be here, because Michigan law should not be interpreted to conflict with the federal Act, and even if there were a conflict, federal law would preempt state law. The intent of Congress is clear: these part-time workers—regardless of the fact that they are unable or unavailable for full-time work—are the very type of workers whom the PUA was set up to assist.

## ARGUMENT

### I. Application of the CARES Act and the Michigan Employment Security Act together causes no conflict and requires the payment of benefits in this case.

The first basis on which the decision below should be reversed is based on a straightforward application of the plain language of the applicable statutes. It is true that "the construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration," *Boyer-Campbell Co v Fry*, 271 Mich 282, 296 (1935), quoting *United States v Moore*, 95 US 760, 763 (1877). But although that deferential standard "can be particularly helpful for 'doubtful or obscure' provisions, . . . in the end, the agency's interpretation cannot conflict with the plain meaning of the statute." *In re Complaint of Rovas*, 482 Mich 90, 108 (2008). Here, there is nothing "doubtful or obscure" or otherwise ambiguous about the statutes at issue. The Michigan Legislature has nowhere provided that the meaning of "able to work and available for work" requires full-time availability, and the Unemployment Insurance Agency (UIA) erred when it held otherwise.

The PUA provision of the CARES Act provides in part that a "covered individual" must "self certif[y]" that they are "otherwise able to work and available for work under the meaning of applicable State law," but for an inability or unavailability caused by the COVID-19 pandemic. 15 USC 9021(a)(3)(A)(ii)(I). The UIA ordered that Holifield be denied benefits because she is not able to work full-time. But there is no provision of Michigan law that provides that an individual

must be able to work full-time in order to be deemed "able to work and available for work," and so the UIA erred in this holding.

It is true that an unemployed individual is ordinarily only "eligible to receive benefits" under Michigan law if, among other requirements, that individual is "able and available to . . . perform suitable full-time work . . . ." MCL 421.28(1)(c). But the PUA does not require that a covered individual be "eligible to receive benefits" under state law—indeed it requires *the opposite.* 15 USC 9021(a)(3)(A)(i) (providing that a covered individual must be "not eligible for regular compensation or extended benefits under State or Federal law . . . .").

In short, the UIA erred in holding that full-time availability is a requirement for being "able to work and available for work," when, under the plain statutory language, it is a requirement only of being "eligible to receive benefits"—and again, the purpose of the PUA is to protect workers who are *not* eligible to receive benefits. Notably, the Legislature *has* placed limitations on what it means to be considered "available for work." MCL 421.28(1)(c)(i), (ii), (iii). For example, someone is deemed "unavailable" if they fail to keep their employer updated with their contact information so they can be contacted about work. *Id.* (c)(i). Or if they fail to timely respond to the unemployment agency when contacted, *id.* (c)(ii). Or the unemployment agency cannot contact them by mail or phone, *id.* (c)(iii).

These are the conditions that the Legislature placed on being deemed "available" for work. And if the UIA had found that Holifield had failed to meet any of these conditions, then that would trigger the PUA's reference to being "available

for work within the meaning of applicable State law[.]" 15 USC 9021(a)(3)(A)(ii)(I). But the Legislature did *not* provide that being unavailable for full-time work makes one unavailable for work. And so, being unavailable for full-time work does not make Holifield unavailable for work under the meaning of Michigan law, because the Legislature never made that a requirement of availability, only of eligibility.[1]

The UIA also contends that there is no conflict between the state and federal law, but for a different reason, and one that is irrelevant to the question presented here. The UIA points out that a claimant can be *available* for full-time work but only *seeking* part-time work, and such a claimant would be eligible for PUA benefits despite not seeking full-time work. That is not the case presented here, and the UIA's observation is beside the point. But it is worth noting the absurdity of this interpretation: consider two individuals both seeking only part-time work, one who is capable of full-time work but is choosing not to seek it, and one who is incapable of full-time work due to a disability and is seeking part-time work because that is the most they can do. Under the UIA's interpretation of the statutes, the claimant who is *able* to work full-time can get PUA benefits despite not wanting to work full-time, but the claimant who is *unable* to work full-time is barred from PUA benefits, however much they might want to work full-time. This interpretation turns the incentives at work here upside-down and inside-out.

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[1] Amicus also notes that, as Holifield has pointed out, the UIA's position in this case is inconsistent with another decision made by ALJ David Marmon on February 4, 2021. (Holifield Written Argument, Ex 6, Order at 5–6.) Reversal of the decision below would not only be correct as a matter of law but would ensure consistency of UIA decisions.

It also bears noting that if the UIA's decision stands, Holifield will be penalized for failing to meet a standard that not only does not apply to her (for the reasons already discussed), but is also nowhere defined in Michigan law. Although the parties appear to agree that Holifield is incapable of full-time work, and it is on that basis that the ALJ reached her decision, it is not clear how either the parties or the ALJ could have known whether Holifield is incapable of full-time work, given the lack of a definition of that term in the MES Act. Does full-time work refer to a 40-hour week, or a 37.5-hour or 35-hour week, as many lay people might define it? Does it mean 30 hours a week, as it is defined in § 4980H of the Internal Revenue Code, 26 USC 4980H(c)(4)(a)? Is it 100 hours per month (about 23 hours per week), as the Michigan Court of Appeals has held, based on federal regulations setting eligibility for family assistance? *Timmons v Director, State Dep't of Soc Servs*, 89 Mich App 330, 338 (1979), citing 45 CFR 233.100.

It seems reasonable to expect, before the State requires a person to repay more than $10,000 in supposed "overpayments" (not to mention interest and penalties) based on their failure to meet a particular standard, that that standard be somewhere defined in the law. Further, "[i]t has long been the holding in Michigan that the unemployment compensation statute is remedial in nature and entitled to liberal construction, [and a]ccordingly, disqualification provisions should be narrowly construed in favor of those involuntarily unemployed through no fault of their own." *Chrysler Corp v DeVine*, 92 Mich App 555, 558 (1979) (citations omitted). Where, as here, there is an unanswered question about the meaning of a

disqualification provision, it should be construed in favor of the claimant. Fortunately, this Commission does not need to reach the question of what "full-time" means in this context, or whether it has any meaning, because there is no requirement in state or federal law that Holifield be available to work full-time in order to receive PUA benefits.

For all these reasons, there is no conflict between Michigan unemployment law and the PUA. Because the UIA's finding of unavailability was a legal error, there is no need to consider the way that finding frustrates the intended operation of the PUA. To the extent, however, that there is conflict, amicus contends that the PUA preempts the contrary provision of state law and requires payment of benefits, for the reasons explained in the following section.

## II. Even assuming a conflict between federal law and Michigan's standards for regular unemployment insurance, under the doctrine of conflict preemption, state law cannot thwart Congress's clear purpose in enacting the PUA program.

To the extent this Court interprets state law as conflicting with the federal CARES Act, federal law preempts.

Although federal agencies sometimes expressly preempt state law, the U.S. Supreme Court distinguishes between "express" and "implied" preemptive intent; conflict preemption turns on the identification of "actual conflict," rather than on an express statement of pre-emptive intent. *Geier v Am Honda Motor Co,* 529 US 861, 884 (2000) (internal citations omitted). That is, conflict preemption analysis considers whether concurrent compliance with a federal law and state standard is

possible. See *Boggs v Boggs*, 520 US 833, 844 (1997) (explaining that "[c]onventional conflict pre-emption principles require pre-emption where compliance with both federal and state regulations is a physical impossibility, . . . or *where state law stands as an obstacle to the accomplishment and execution of the* ***full*** *purposes and objectives of Congress.*") (emphasis added) (cleaned up). See also *Packowski v United Food & Com Workers Loc 951*, 289 Mich App 132, 140 (2010) (explaining that, under conflict preemption, "a federal law preempts state law to the extent that the state law directly conflicts with federal law *or with the purposes and objectives of Congress*") (emphasis added); see *id.* at 144 (holding that the democratic purposes of the Labor–Management Reporting and Disclosure Act would be contravened by allowing a demoted or discharged business agent or organizer to sue for wrongful discharge.)

Notably, courts do not require a specific, formal agency statement identifying a conflict in order to conclude that such a conflict exists. See *Geier,* 529 US at 884. Instead, one can assume that Congress or an agency ordinarily would not intend to permit a significant conflict. *Id.* at 485.

That is the case here. Although Congress referenced state law, it is clear it did not intend for state law to thwart the very purpose for which the PUA Program was designed. This is not a situation where Congress intended only to prescribe minimum federal standards, leaving room for states to set stricter standards that would prohibit relief entirely. Application of state law as the UIA and the ALJ have interpreted it would make compliance with the federal Act impracticable for many.

The PUA program was intended to benefit individuals whose work was disrupted by the pandemic and who are otherwise ineligible for lost-income benefits. In Michigan, that includes part-time workers—many of whom are disabled—who are either unable to or unavailable to work full-time. The ALJ's decision to the contrary is inconsistent with Congress's purpose, which is clear from the language of the PUA and the Disaster Unemployment Assistance (DUA), legislative history, and guidance from the federal Department of Labor (DOL).

### A. Congress's purpose is clear from the plain language.

The CARES Act provides that the Secretary of Labor shall provide unemployment assistance "to any covered individual" to cover the weeks in which "the individual is not entitled to any other unemployment compensation." 15 USC 9021(b). The Act defines a "covered individual," in relevant part, as an individual who "is not eligible for regular compensation or extended benefits under State or Federal law or pandemic emergency unemployment compensation." 15 USC 9021(a)(3)(A)(i). Again, a "covered individual" must also self-certify that they are "otherwise able to work and available for work within the meaning of applicable State law." 15 USC 9021(a)(3)(A)(ii)(I).

If this Commission accepts the UIA's interpretation of state law, there *is* a conflict between Section 2102(a)(3)(A)(i) and Section 2102(a)(3)(A)(ii)(I) of the Act. And in that conflict, state law must yield to Congress's purpose behind the PUA Program, which is clear from the language Congress chose to use.

The PUA Program is fully funded by federal disaster assistance funds under the framework of the DUA laws. With respect to the meaning of "able to work and available for work," the DUA provides that

> [a]n individual shall be eligible to receive a payment of DUA with respect to a week of unemployment, in accordance with the provisions of the Act and this part if . . .
>
> * * *
>
> (g) The individual is able to work and available for work within the meaning of the applicable State law: *Provided*, That an individual shall be deemed to meet this requirement if any injury caused by the major disaster is the reason for inability to work or engage in self-employment; or, in the case of an unemployed self-employed individual, the individual performs service or activities which are solely for the purpose of enabling the individual to resume self-employment . . . . [20 CFR. 625.4(g) (emphasis added).]

In addressing availability for work, a state may consider, among other things, whether an individual "is available for any work for all *or a portion* of the week claimed" and whether "[t]he individual limits his or her availability to work *which is suitable* . . . ," provided that neither constitutes a withdrawal from the labor market. 20 CFR 604.5(a) (emphasis added).

The language of the PUA and DUA shows that Congress did not intend "able to work and available to work" to be a rigid standard that would categorically exclude part-time workers in need of assistance.

### B. Congress's purpose is clear from the legislative history.

Ways and Means Republican Staff has instructed that "a person can receive UI benefits (which requires an individual be willing and able to work) while also receiving DI benefits (be unable to work)." (Holifield Written Argument, Ex 2,

COVID-19 Pandemic Unemployment Insurance Law, Guidance and FAQs at p 14 (Prepared by Ways and Means Republican Staff as of April 20, 2020)). This recognition that someone may receive both disability insurance benefits and unemployment insurance benefits at the same time demonstrates that Congress did not intend to categorically exclude a disabled worker who is unable to work full-time.

### C. Congress's purpose is clear from DOL guidance.

The CARES Act provides that the Secretary of Labor "may issue any operating instructions or other guidance necessary to carry out the provisions of, or the amendments made by, this subtitle." 15 USC 9032. Pursuant to that authority, the DOL has issued a number of Unemployment Insurance Program Letters (UIPLs) to instruct states on administering the PUA program.

For example, the DOL has explained that "[t]he CARES Act was designed to mitigate the economic effects of the COVID-19 pandemic in a variety of ways" including by providing "temporary benefits for individuals who have exhausted their entitlement to regular . . . as well as coverage for individuals who are not eligible for regular [unemployment compensation]." DOL summary to UIPL 16-20 and change documents.[2] Indeed, individuals who qualify for such benefits include "gig economy workers, clergy . . . and other workers who may not be covered by the regular UC program under some state laws." *Id.* The DOL has also indicated that

[2] Available at https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=4628 (accessed 4/18/2021).

individuals who are disqualified from receiving state unemployment compensation benefits remain eligible for PUA, so long as they meet all other requirements under the Act. (Holifield Written Arguments, Ex 10, UIPL 16-20 Change 1, April 27, 2020.)

Moreover, the DOL explicitly contemplates that a student who is presumptively unable and unavailable for full-time work may nevertheless be eligible for PUA. (*Id.*) Question 28 of Program Letter 16-20-Change 1 addresses the eligibility of full-time students who lost a part-time job for a qualifying reason. The DOL's answer to Question 28 specifically states: "Provided a full-time student who worked part-time is unemployed, partially unemployed, or unable or unavailable to work because of one of the COVID-19 related reasons in Section 2102(a)(3)(A)(ii)(I) of the CARES Act, then he or she may be eligible for PUA." (*Id.*). In other words, the fact that a full-time student who is not able and available to perform full-time work would not disqualify the student from PUA eligibility, shows that the requirement of ineligibility for state unemployment benefits prevails over conflicting state eligibility requirements.

It is telling that Michigan has interpreted the CARES Act to make PUA benefits available to students who are ineligible for state unemployment benefits under state law. Guidance on Michigan's Department of Labor and Economic Opportunity website indicates that, although full-time students are ineligible for state unemployment benefits under Michigan law, they are eligible to apply for PUA benefits. Michigan Dep't of Labor and Economic Opportunity, *Is There a*

*Certain Age to Qualify for Unemployment Benefits?*[3] There is no meaningful distinction between full-time students who cannot work full-time and other part-time workers, such as the disabled, who are unable and unavailable to work full-time.

Equally telling, the UIA's own guidance indicates that "individuals who are self employed, independent contractors . . . *and part-time workers* may qualify for unemployment benefits." (Holifield Written Argument, Ex 12, Michigan Unemployment Insurance Agency Unemployment Insurance Agency PUA Fact Sheet 172 (April 2020) (emphasis added). The Fact Sheet asserts that "[i]ndividuals are eligible for PUA if they do not qualify for regular UI benefits and cannot work" because of a qualifying coronavirus-related reason. (*Id.*)

The DOL has also underscored that "states have flexibility to determine what type of work is suitable for an individual and *what it means for that individual to be able, available*, and seeking work, even when quarantined or otherwise affected by COVID-19." (Holifield Written Argument, Ex. 3, Department of Labor, Unemployment Insurance Program Letter 10-20, p 3). And the DOL explains that a "state may consider an individual available" where they have limits on their availability, so long as they do not withdraw from the labor market. Thus, the DOL has gone out of its way to ensure that state law does not work to deprive needy unemployed workers of valuable PUA benefits. Where, as here, the federal

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[3] Available at https://www.michigan.gov/leo/0,5863,7-336-94422_97241_98585_98650-527668--,00.html (last visited 4/16/2021).

government has given states the flexibility to avoid a conflict with the clear purpose of federal law, Michigan should do so.

## III. Even if the correct application of Michigan and federal law called for denial of benefits in this case, such a result violates Title II of the Americans with Disabilities Act, as well as the Rehabilitation Act of 1973.

Even if this Court were to conclude that a mechanistic application of § 28(1)(c) required a denial of PUA benefits, it should still reverse the UIA's decision because that decision would constitute discrimination against a disabled person, which is forbidden under federal law.

Title II of the Americans with Disabilities Act (ADA), provides, in broad terms, that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 USC 12132. Further, § 794 of the Rehabilitation Act of 1973, 29 USC 794, provides, "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance[.]"

It cannot be seriously contested that access to PUA benefits constitutes "the benefits of the services, programs, or activities of a public entity" for purposes of the ADA. Nor can it be contested that the PUA is a "program activity receiving Federal financial assistance" under the Rehabilitation Act. And the only reason the UIA

gave for excluding Holifield from PUA funds is her inability to work full-time—and in turn, the only reason Holifield is unavailable to work full-time is her disabled status. The denial of PUA benefits therefore is based directly and solely on Holifield's disability.

The ADA defines a "qualified individual with a disability" to mean "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 USC 12131(2). In a case in which the UIA was denying a claimant ordinary unemployment benefits, there might be some question as to whether availability for full-time work is an "essential eligibility requirement" or not. Here, however, there can be no question. Availability for full-time work is *not* an essential eligibility requirement for PUA benefits. As discussed in Argument II above, Congress expected and intended that PUA benefits be available to part-time as well as full-time workers who had lost income due to the COVID-19 pandemic. Holifield meets the essential eligibility requirements for PUA benefits and is therefore a "qualified individual with a disability" under the meaning of the ADA.

The UIA contends that this body lacks jurisdiction to consider whether denial of PUA benefits would violate federal law. In support, the UIA cites *Bauserman v Unemployment Ins Agency*, 330 Mich App 545, 572–573 (2019). But *Bauserman*'s holding is inapposite to this argument. In *Bauserman*, the class plaintiffs sought money damages as a remedy for constitutional torts they alleged the UIA had

committed in violation of their due process rights. *Id.* at 572. The Michigan Court of Appeals held that the administrative process "does not provide an avenue for plaintiffs to seek redress in the form of monetary relief for the alleged violation of their due-process rights." *Id.* But Holifield is not suing in tort to obtain damages for the violation of her rights; rather, she is contesting the UIA's denial of benefits. *Bauserman* was careful to limit its holding—it pointed out that that case was "not one in which the plaintiffs are merely disputing the determination of their individual employment benefits." *Id.* at 573. But in this case, Holifield *is* disputing the determination of her benefits. And, as *Bauserman* recognized, a constitutional claim may be considered in such a context. *Id.* at 572 (citing *Shirvell v Dep't of Attorney General*, 308 Mich App 702, 732–749 (2015)). And so there should be no reason that this Commission cannot consider these federal statutes, since Holifield is "disputing the determination of their individual employment benefits" and *not*, as was the case in *Bauserman*, "mounting a direct and large-scale challenge to an administrative process of the Agency." *Id.* at 573.

To use Holifield's inability to work full-time due to a disability as a basis to deny her benefits constitutes discrimination against an individual with a disability, contrary to the ADA and the Rehabilitation Act. Congress passed the ADA in 1990 based on its findings that individuals with disabilities had historically faced discrimination in many areas, including "such critical areas as employment . . . and access to public services." 42 USC 12101(a)(3). Congress further found that the discrimination faced by disabled people included "overprotective rules and policies,

failure to make modifications to existing . . . practices, exclusionary qualification standards and criteria, . . . and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." *Id.* (a)(4).

If this case were only about ordinary unemployment benefits under § 28(1)(c), the denial of benefits might not violate the ADA or the Rehabilitation Act. Because of her disabled status, Holifield collects social security disability insurance (SSDI) benefits instead of unemployment benefits. And amicus does not argue—nor does she understand Holifield to be arguing—that exclusion of Holifield from ordinary unemployment benefits while providing her with SSDI benefits violates federal law.[4] But what *does* violate federal law is to provide the non-disabled recipients of unemployment benefits funds made available under the PUA while denying those funds to disabled recipients of SSDI benefits for no reason other than the disability of the claimant.

In answer to this, the UIA cites *Bauserman* and contends that this body is not allowed to choose to avoid violating federal law—but that case does not apply here, as has been explained above. And then the UIA argues that the decision does not discriminate because Holifield had "access to *apply* for her unemployment benefits," and so it does not matter that she was denied those benefits due to her disability, since the benefits were denied "pursuant to the statutory provisions."

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[4] Nor does this case present the question of a disabled individual being denied unemployment benefits solely because that individual receives SSDI benefits. Cf *Ross v Acrisure P1, LLC,* unpublished opinion per curiam of the Court of Appeals, issued August 14, 2014 (No. 315347); 2014 WL 3973380, at *4 n2.

(UIA's Arguments, p 8 (emphasis added).) But the benefit Holifield is seeking here is not the privilege of being permitted to ask the State for unemployment benefits. The benefits sought are the benefits themselves. And if those benefits are being denied due to Holifield's disability, it is not enough to say that there was no discrimination because she was allowed to apply—any more than an employer could argue it could refuse to hire a qualified candidate based on a disability as long as it allowed them to apply.

The UIA also states that "[d]isabled workers with limits imposed by their disability may meet the requirement so long as they have the physical capabilities to work full-time and there is some sort of suitable job out there for them." (*Id.*) In other words, it is all right to deny someone a benefit due to their disability because, if they had a *different* disability that did not prevent them from working full-time, they would be eligible for the benefit. By that logic, there would be no need to, e.g., construct barrier-free entrances to buildings—after all, disabled individuals can simply climb the stairs (as long as their disability is not one that prevents them from climbing the stairs). That cannot be how a ban on disability discrimination works.

Again, this Commission need not reach this question because the ALJ erred in enforcing a full-time work requirement in the first instance, as discussed above. But it still bears noting that to affirm the decision below would be to violate federal law. This Commission should decline to ratify this discriminatory decision.

## IV. Michigan suffers when part-time workers (especially disabled workers) who are unable or unavailable to work full-time are categorically excluded from obtaining federal pandemic relief funds.

The Commission's decision here matters to Michigan. A decision that PUA funds are categorically unavailable for part-time workers (including disabled part-time workers) who have lost their jobs but are unavailable for or unable to perform full-time work, hurts those individuals, their families, and the State as a whole.

### A. Part-time workers suffer disproportionately when the economy suffers.

Part-time workers are typically hard hit by economic downturns. They are often the first to be let go and the ones who had the least security to begin with. According to findings from a report released this past January by Los Angeles-based Economic Roundtable, the recession brought on by the COVID-19 pandemic is expected to send 603,000 working-age adults into homelessness across the United States by 2023. Elizabeth Chou, Study: *LA County's low-wage, part-time workers will be hardest hit by homelessness, COVID recession*, Los Angeles Daily News, January 12, 2021.[5] And according to that organization's analysts, part-time workers are among those projected to be most affected by homelessness. *Id.* Many of them have already been living on poverty-level wages working jobs at colleges, universities, social service organizations, retail shops, restaurants, entertainment companies,

[5] Available at https://www.dailynews.com/2021/01/12/study-la-countys-low-wage-part-time-workers-will-be-hardest-hit-by-homelessness-covid-recession/ (accessed 4/16/2021).

churches, clerical jobs, personal care, and construction—industries hardest hit by the recession brought on during the pandemic. *Id.*

Problematically, many part-time workers in Michigan simply are not able or available to work full-time. Take the youth, for instance. They are often employed part-time, and their income often assists with their family's finances or is used to help them save for higher education. Yet, many of them cannot work full-time while sustaining their studies. And statistics show that they were hard hit by the pandemic.

Workers in the 16-to-24 age group were the most likely to experience both unemployment and underemployment from February 2020 to May of 2020. Nationally, the number of unemployed workers in that age group increased from 1.7 million in February 2020 to 4.9 million in May of 2020. US Dep't of Labor, Bureau of Labor Statistics, Employment and Unemployment Among Youth—Summer 2020, at 3 (Aug. 18, 2020).[6] Young workers suffered notable pandemic-related work losses because the sectors where job losses were greatest matches up with sectors where youthful employment is concentrated—notably leisure and hospitality industry. Elise Gould & Melat Kassa, *Young workers hit hard by the COVID-19 economy*, Economic Policy Institute (October 14, 2020).[7]

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[6] Available at https://www.bls.gov/news.release/pdf/youth.pdf (accessed 4/16/2021).

[7] Available at https://www.epi.org/publication/young-workers-covid-recession/ (accessed 4/16/2021).

In short, part-time workers are just the type of workers the PUA was intended to help. They are ineligible for state unemployment relief, and the PUA funds would provide them a temporary safety net.

### B. Part-time workers with disabilities have been particularly hard hit by the pandemic.

Although the coronavirus outbreak has affected all industries, sectors, businesses, economies, part-time workers with disabilities have faced even greater challenges. They are a vulnerable group that needs protection and assistance.

Over 20 million Americans with disabilities are of working age, yet even pre-pandemic—in 2019—the Department of Labor found that only 19.3% of people with disabilities were employed. U.S. Bureau of Labor Statistics, Persons with a Disability: Labor Force Characteristics Summary, US Department of Labor (Feb. 26, 2020).[8] By comparison, the employment-population ratio for people without disabilities was 66.3%. *Id.* The pandemic has worsened that situation. Since the pandemic began just over a year ago, 1 in 5 workers with disabilities has lost their employment, compared with 1 in 7 for their able-bodied peers. As of last summer, one million jobs nationwide have been lost in the disabled community. Kessler Foundation, *April 2020 Jobs Report: COVID Recession Hits Workers with Disabilities Harder.*[9]

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[8] Available at https://www.bls.gov/news.release/disabl.nr0.htm (accessed 4/16/2021).

[9] Available at https://kesslerfoundation.org/press-release/ntide-april-2020-jobs-report-covid-recession-hits-workers-disabilities-harder (accessed 4/16/2021).

Forbes recently noted the same disproportionate impact of the pandemic on those with disabilities. Forbes, *Workers with Disabilities Disproportionately Impacted by Covid-19 Pandemic*, June 22, 2020.[10] And Forbes recognized that workers with disabilities who were laid off, furloughed, or forced to stop working because of the health implications associated with catching COVID-were the "same individuals were already disproportionately represented in the labor market before the pandemic began." *Id.*

A CNN wire story echoed this turmoil, noting that "[i]t can be harder for Americans with a disability to find work as opportunities dry up, and they may have more trouble living independently." CNN Wire from Hartford Business Journal, *Workers with disabilities are especially hard hit in the coronavirus economy*, posted May 14, 2020.[11]

Bloomberg likewise noted that "[t]he global pandemic is worsening a labor market that already presents obstacles for workers with disabilities." Olivia Rockeman and Catarinea Saraiva, *Disabled Workers, Already in a Tough Spot, Now Have it Worse*, Bloomberg, July 18, 2020.[12] During the peak of pandemic-induced job losses, 18.9% of disabled Americans were unemployed, compared with 14.3% of

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[10] Available at https://www.forbes.com/sites/allisonnorlian/2020/06/22/workers-with-disabilities-disproportionately-impacted-by-covid-19-pandemic/ (accessed 4/16/2021).

[11] Available at https://wreg.com/news/workers-with-disabilities-are-especially-hard-hit-in-the-coronavirus-economy/ (accessed 4/16/2021).

[12] Available at https://www.bloomberg.com/news/articles/2020-07-18/disabled-workers-already-in-a-tough-spot-now-have-it-worse (accessed 4/16/2021).

the non-disabled population, according to unadjusted April data from the Bureau of Labor Statistics. In June, as states started to reopen their economies, the jobless rate for disabled Americans fell only to 16.5%, while the rate for everyone else dropped to 11%, signaling a faster recovery for the general population than for those with disabilities. *Id.*, citing Bureau of Labor Statistics, Table A-6, *Employment status of the civilian population by sex, age, and disability status, not seasonally adjusted.* The Director of the Yang-Tan Institute on Employment and Disability at Cornell University, Susanne Bruyère, noted that, in an economic downturn, "individuals with disabilities are usually the first laid off and the last to be rehired." *First Out, Last Back: The economic Impact of the COVID crisis on New Yorkers with Disabilities*, Center for an Urban Future, March 2021.[13]

Here in Michigan, pre-pandemic data shows that disabled workers as a whole were not positioned well to cope with job loss or furlough. There were roughly 155,670 part-time workers with a reported disability—about 3.3% of the total Michigan labor force. 12.7% of them were already unemployed. C18120, C18121, B23024, Disability Status (American Community Survey 5-Year Estimates 2019).[14] Then the pandemic took its toll. The percentage of part-time disabled workers dropped sharply from March 2020 to April 2020 and from Jan 2021 to Feb 2021, where the number of part-time disabled workers went from about 83,000 to about

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[13] Available at https://nycfuture.org/research/first-out-last-back (accessed 4/16/2021).

[14] Available at https://www.socialexplorer.com/tables/ACS2019_5yr/R12807057 (accessed 4/18/2021).

48,000 and from about 70,000 to about 43,000 respectively. US Census Bureau (2020). Current Population Survey Basic Monthly Estimates.[15] On average, the number of total unemployed disabled MI workers more than doubled after March 2020 (11,971), with the highest numbers coming around May (51,623) and June 2020 (51,570). *Id.* Among both full-time and part-time disabled workers, the percentage of unemployed workers increased after March 2020 to 16%, on average. The biggest jumps were immediately after March 2020, with a high of 32% in May 2020. *Id.*

Michiganders with developmental disabilities were especially hard hit. Prior to the pandemic in Michigan, 81% of people with intellectual and developmental disabilities were unemployed, compared to 9% of individuals without disabilities, according to statistics released by Michigan Developmental Disabilities Network. Candice Williams, *Developmentally disabled hit hard with pandemic job losses,* Detroit News, Sept 1, 2020.[16] Brent Mikulski, who heads Dearborn Heights-based Services To Enhance Potential, known as STEP, said only 20 of the 200 developmentally disabled people that the nonprofit placed in jobs last year were able to keep their jobs when businesses were forced to close because of the pandemic. *Id.*

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[15] Available at https://data.census.gov/mdat/#/search?ds=CPSBASIC202003 and https://data.census.gov/mdat/#/search?ds=CPSBASIC202103. Note: Estimates for unemployment, disability status, and full-time/part-time status were gleaned using variables PREXPLF, PRDISFLG, and PRFTLF.

[16] Available at https://www.detroitnews.com/story/business/2020/09/01/develop mentally- disabled-hit-hard-pandemic-job-losses/3358790001/ accessed 4/16/2021).

Data such as this translates to poverty levels. Pre-pandemic data from Michigan shows that disabled individuals between the ages of 20 and 64 constituted 26% of those who lived below the poverty line. C18120, C18121, B23024, Disability Status (American Community Survey 5-Year Estimates 2019).[17]

Nationally, based on Bureau of Labor Statistics data, 28.8 percent of noninstitutionalized adults aged 21-64 with a disability in the United States live in poverty; by comparison, only 12.3 percent of noninstitutionalized adults without a disability live in poverty. U.S. Bureau of Labor Statistics, Persons with a Disability: Labor Force Characteristics Summary, US Department of Labor (Feb 26, 2020).[18] See also National Council on Disability, *Highlighting Disability/Poverty Connection, NCD Urges Congress to Alter Federal Policies that Disadvantage People with Disabilities* (Oct 26, 2017) (study showing that twice as many Americans with disabilities live in poverty as compared to those without disabilities).[19] Even before the pandemic, the US Senate Committee on Health, Education, Labor, and Pensions found that Americans with disabilities constitute the single most economically vulnerable demographic in the country. US Senate Committee on Health,

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[17] Available at https://www.socialexplorer.com/tables/ACS2019_5yr/R12807057 (accessed 4/18/2021).

[18] Available at https://www.bls.gov/news.release/disabl.nr0.htm (accessed 4/16/2021).

[19] Available at https://ncd.gov/newsroom/2017/disability-poverty-connection-2017-progress-report-release (accessed 4/16/2021).

Education, Labor, and Pensions, *Fulfilling the Promise: Overcoming Persistent Barriers to Economic Self-sufficiency for people with Disabilities*, 6 (2014).[20]

Certain factors exacerbate this vulnerability. For example, disabled individuals often face additional but necessary living expenses. Sophie Mitra et al., *The hidden extra costs of living with a disability*, Salon (July 31, 2017).[21] They tend to have higher healthcare costs, require assistive devices, and need more expensive housing or transportation. *Id.*

Their precarious situations only worsened with COVID-19. Often, the only type of work persons with disabilities can find is low-paying and physically taxing—often in the service industry, which was hit hard by the pandemic. And to make matters worse, once unemployed, disabled individuals' search for a new job often takes longer. In a field experiment where over 6,000 job applications were sent to posted jobs, researchers found that applicants with disabilities were 26% less likely to receive any expressions of employer interest—even where their disability would have no effect on their ability to perform the job they seek. Mason Ameri, et al., *The Disability Employment Puzzle: A Field Experiment On Employer Hiring Behavior*, National Bureau of Economic Research, 15, 29 (September 2015).[22] What this means is that workers with disabilities will often need to apply to more jobs, go on

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[20] Available at https://www.help.senate.gov/imo/media/doc/HELP%20Committee%20Disability%20and%20Poverty%20Report.pdf (accessed 4/15/2021).

[21] Available at https://www.salon.com/2017/07/30/the-hidden-extra-costs-of-living-with-a-disability_partner/ (accessed 4/16/2021).

[22] Available at https://www.nber.org/papers/w21560.pdf (accessed 4/16/201).

more interviews, and wait longer to be re-employed. During that trying wait time, PUA funds would provide them with essential economic support.

### C. The loss of PUA funds hurts Michigan.

Unquestionably, the economic support from the PUA Program would help individuals and their families, but also the State as a whole. It is better for society if individuals are more financially independent, because living in poverty has ripple effects. During the last recession, for example, unemployment insurance prevented 1.4 million housing foreclosures. Michele Evermore, *In Case of Downturn: Extended Unemployment Insurance is an Economic Lifeline*, National Employment Law Project (August 22, 2019).[23] In 2009, that assistance prevented 5 million workers from falling into poverty. *Id.* And access to benefits while unemployed helps workers find more suitable employment, leading to less job turnover. *Id.*

PUA Program benefits would reap similar gains for Michigan. The assistance they would give to part-time workers, particularly disabled workers, as they navigate the challenges of unemployment and the search for stable employment in a fiercely competitive job market, would translate to reduced need for state social services, more stable housing, and healthier family situations. Part-time workers who have lost their jobs due to COVID-19 but are ineligible for state unemployment benefits employment, are just the type of individual the PUA Program was designed to benefit.

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[23] Available at https://www.nelp.org/blog/in-case-of-a-downturn-extended-unemployment-insurance-is-an-economic-lifeline/ (accessed 4/15/2021).

## CONCLUSION AND RELIEF REQUESTED

For these reasons, the Attorney General respectfully asks that this Commission reverse the decision of the Administrative Law Judge and hold that part-time workers in Michigan—including those who are disabled and others who are unable and unavailable to work full-time—are not categorically excluded from obtaining benefits under the PUA program of the federal CARES Act.

Respectfully submitted,

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Dated: April 19, 2021

STATE OF MICHIGAN
MICHIGAN UNEMPLOYMENT INSURANCE APPEALS COMMISSION

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IN THE MATTER OF:

INVOLVED CLAIMANT:
CHRISTINE M. HOLIFIELD
SSN: [redacted]

ALJ: LINDSAY WILSON

APPEAL DOCKET NOs.
20-024143-262734W,
20-028282-263102W

UIA CASE NUMBERS:
24375735,
24375736

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**MOTION TO FILE AMICUS BRIEF**

Now comes Michigan Attorney General Dana Nessel and requests permission to file an amicus brief in this case, pursuant to Rule 792.1142(8). The Attorney General says in support:

1. Rule 7.92.11423 provides that, "[w]here the parties are permitted to submit written argument pursuant to this rule and section 34 of the Act," this Commission "may consider requests for permission to submit an amicus brief from persons or organizations that are not parties" to this matter.
2. Additionally, the Commission's Notice of Matter of First Impression in this matter—Dockets 262734W and 263102W—states that the Commission "may consider amicus briefs" from nonparties.
3. The Attorney General is not a party to this matter, although her Office is representing the UIA in this matter.

4. The Attorney General seeks permission to submit an amicus brief to ensure that Michigan law is properly interpreted, that the interplay between federal law and the applicable state law is correctly understood, and that rights are protected under Americans with Disabilities Act and Rehabilitation Act, and to opine on the impact of the Administrative Law Judge's ruling on part-time workers, especially disabled workers, on their families, and on the State as a whole. These are issues of statewide importance.
5. The Attorney General is the constitutionally established officer who serves as the chief law enforcement officer for the State. The Legislature has authorized the Attorney General to participate in any action in any state court when, in her own judgment, she deems it necessary to participate to protect any right or interest of the State or the People of the State. MCL 14.28.
6. The Attorney General's amicus brief is submitted for filing with this motion.

WHEREFORE, Michigan Attorney General Dana Nessel respectfully requests permission to file an amicus brief in this matter.

Respectfully submitted,

Dana Nessel
Attorney General

Fadwa A. Hammoud (P74185)
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Counsel of Record

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Dated: April 19, 2021