

IN THE CIRCUIT COURT FOR THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

FLORENTINA FLORES DE VEGA,
HTOO LER PAW, ALICIA JIMENEZ,
HEATHER FRANKLIN, VICKI
PETROTTA, WARREN CHAN,
BRENDA COOK, DAVID HAINES,
LISA EXTEROVICH, KINNARI SHAH,
ABDELKADIR ABDELKADIR
MOKRANI, DIANA OROPEZA, and
DAVID KNELL,

Petitioners,

v.

OREGON EMPLOYMENT
DEPARTMENT and DAVID
GERSTENFELD,

Respondents.

Case No.

PETITION TO COMPEL AGENCY ACTION

(ORS 183.490)

Petitioners allege:

INTRODUCTION

1.

Oregon is facing an unprecedented public health and economic crisis. In March 2020, the Governor used her emergency powers to direct Oregonians to stay home to the greatest extent possible to stem the transmission of COVID 19.

2.

These essential public health measures forced many businesses to close their doors. Hundreds of thousands of Oregonians suddenly found themselves out of work.

3.

Congress responded to the crisis by enacting the largest expansion of unemployment benefits in U.S. history. The expansion increased weekly benefit amounts, extended eligibility time periods, and made unemployment benefits available to self-employed and contract workers. In Oregon, these expanded benefits, called Pandemic Unemployment Assistance (“PUA”) and Pandemic Emergency Unemployment Compensation (“PEUC”), as well as the traditional unemployment insurance (“UI”), are administered by respondent Oregon Employment Department (“OED”).

4.

Complex rules govern whether a worker is eligible for UI or one of the expanded types of unemployment insurance created by Congress. The vast majority of Oregonians qualify for the traditional UI benefits. Even so, there has been inadequate guidance since the COVID emergency began and for many workers, choosing the correct application category is impossibly

confusing. Compounding the problem, there was no correct application for the expanded federal PUA or PEUC benefits for weeks or months. Desperate workers applied using any application available.

5.

Petitioners are among the more than 600,000 Oregon workers who have applied for these critical benefits since the public health emergency began. Initially, they welcomed news of the expanded benefits, relieved they would be able to pay rent, buy food, and take care of other necessities during the crisis.

6.

That relief quickly turned to frustration. Some struggled to apply for traditional UI benefits (the only benefit available at the beginning of the COVID crisis) online using OED's antiquated computer system, which repeatedly crashed and would not accept applications. With in-person WorkSource centers closed due to the pandemic, phone lines at OED were hopelessly overwhelmed. Applicants called dozens of times a day, hoping to apply over the phone, only to get a busy signal. Those who managed to get through sat on hold for hours, often getting disconnected without ever speaking to someone about their claim.

7.

Even after the online application for traditional UI benefits stopped crashing, the confusing web-based application process and limited or no phone access made it difficult for workers, including workers with disabilities or lack of technological sophistication, to apply for benefits.

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8.

The barriers were worse for the tens of thousands of unemployed Oregonians who do not read or speak English. OED's longstanding and knowing failure to make its online benefits system for traditional UI benefits available in any language other than English meant that these claimants had no alternative to attempting to apply by phone.

9.

Those non English speakers who were persistent and lucky enough to be able to talk to someone at OED were often told that there was no one available to speak to them in their language, and that they should wait for a call back from someone at OED who speaks their language, or with an interpreter on the line. For many non English speakers, that promised call back never came.

10.

In the end, most petitioners overcame these barriers and submitted applications. Some never successfully applied because they never received help in a language that they understand.

11.

Some petitioners have received written notice that there was a problem with their claim. Others received nothing in writing, but believe that there must be some problem with their claim because they have been waiting for months without getting paid. Applicants who try to contact OED to address these errors cannot get through or are told that OED is working to get through the claims backlog.

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12.

OED's backlog is not processed chronologically.¹ Many petitioners fear that the agency is now employing a complaint-driven approach to resolving claims that prioritizes claimants who have the resources and ability to spend all day calling over and over. The agency acknowledges that claim issues cannot be resolved without speaking to claimants, but that the agency does not employ a callback system.² In addition, the agency appears to be prioritizing the complaints forwarded by state legislators.³

13.

Many out of work Oregonians who do not qualify for traditional UI benefits endured six or seven weeks of waiting until OED created an application for PUA benefits. Oregon requires many people to apply for and be rejected for traditional UI benefits before applying for PUA benefits (the category of federally expanded benefits that covers self-employed and other workers who do not qualify for traditional UI). Instead of automatically evaluating applicants who are denied UI to see if they are eligible for PUA, OED require people to file a separate PUA application after being denied traditional UI.

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¹ Kyle Iboshi, *State employees wasted hours on Instagram as unemployment backlog grew*: "A lot of us were playing on our phones." KGW8 (June 29, 2020) <https://www.kgw.com/article/news/investigations/oregon-employment-department-employees-wasted-time-on-instagram-as-pua-unemployment-backlog-grew/283-9ff7a8a0-fe16-4b17-9fc0-681f39034d76>

² Mike Rogoway, *Q&A: What's the state of Oregon's troubled jobless benefits system?* The Oregonian/OregonLive (July 2, 2020), <https://www.oregonlive.com/business/2020/07/qa-whats-the-state-of-oregons-troubled-jobless-benefits-system.html>

³ Iboshi, *supra* note 1.

14.

A major backlog in evaluating PUA applications for payments now exists. As of the beginning of July, there are still over 65,000 PUA applications that have not even been processed. Even those individuals whose PUA applications have been processed and approved cannot get weekly benefit payments unless they call the OED every week and ask a worker to manually process their weekly payment.

15.

Many petitioners, whether they speak English or not, have now lived through more than three months without the promised unemployment benefits: Three months of rent and utility costs; three months of needing to feed themselves and their families; three months of car insurance and medical bills; three months of sleepless nights, worry, anxiety, and fear. There have been reports that the delays have caused such desperation that some Oregonians are contemplating suicide.⁴

16.

Such inexcusable delay is, in part, a product of circumstances outside OED's control: a global pandemic and a surge of unemployment claims. But the delay is also attributable to decisions within OED's control. Petitioners have been waiting three months for benefits because of OED's historic failure to modernize its systems and make them accessible to all Oregonians, regardless of English proficiency. They have also been waiting three months for benefits because

⁴ Jeff Manning, *Participants offer inside look at employment department debacle*, The Oregonian/OregonLive (June 20, 2020), <https://www.oregonlive.com/business/2020/06/participants-offer-inside-look-at-employment-department-debacle.html>; Alex Zielinski, *"We were told to lie": Q&A with State Worker Processing Unemployment Claims*, Portland Mercury (June 25, 2020), <https://www.portlandmercury.com/blogtown/2020/06/25/28576547/we-were-told-to-lie-qanda-with-state-worker-processing-unemployment-claims>.

OED has mishandled claims processing and payment during the crisis by failing to ensure equal access to its application, failing to expedite processing applications and issuing benefits, and failing to prioritize claimants who have been waiting the longest.

17.

OED took some actions to address the historic surge in demand for its services, such as hiring additional staff to process the backlog of traditional UI applications. However, some of those actions did not have a meaningful impact on the main problems facing out of work Oregonians, as “processing” applications did not result in actually paying out benefits, few new staff were bilingual, and new hires were not trained to speak directly to claimants on the phone for weeks. Even after they were allowed to answer phones, some of these workers were not empowered to take actions that would speed up processing and payment of benefits.⁵

18.

OED is unlawfully failing to act and unlawfully delaying taking action and making decisions. These failures have deprived hundreds of thousands of newly out-of-work Oregonians of exactly what OED is supposed to provide: a financial lifeline to pay for the basic necessities of life such as food and rent. OED’s failures have forced an untold number of Oregonians to live without the critical financial safety net of unemployment benefit money for a staggering 15 weeks—with catastrophic consequences for Oregonians who were low-income even before losing their jobs.

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⁵ Zielinski, *supra* note 4.

PARTIES

19.

Petitioners are residents of Multnomah, Washington, Clackamas, Marion, Lane, and Lincoln Counties in Oregon. The facts regarding their attempts to obtain the unemployment benefits to which they are entitled under Oregon and federal law are set out below.

20.

OED is an agency according to ORS 183.310(1) because it is a “state board, commission, department, or division” of the state of Oregon.

21.

David Gerstenfeld is the Acting Director of OED. As such, he is an agency under ORS 183.310(1) because he is “an officer authorized by law to make rules or to issue orders” as described in ORS 657.610.

22.

Director Gerstenfeld is charged with the duty to “[a]dminister the unemployment insurance laws of this state to support Oregonians during periods of unemployment.” ORS 657.601.

JURISDICTION AND VENUE

23.

The Circuit Court for Multnomah County has subject matter jurisdiction pursuant to ORS 183.490.

24.

Venue is proper in the Circuit Court for Multnomah County pursuant to ORS 183.490 and ORS 183.484(1).

HISTORICAL FACTS

A. Oregon's Pre-COVID 19 Unemployment System

25.

According to 2018 U.S. Census data, more than 229,000 Oregonians—about 6% of the population—speak a language other than English and speak English less than “very well.” An estimated 136,429 Oregonians speak Spanish and speak English less than “very well.”

26.

These percentages likely understate the proportion of applicants for unemployment benefits who do not speak or read English. According to a June 9, 2020 report by the Pew Research Center, nationally, immigrants have faced deeper job cuts in the COVID 19 downturn, with a 19% job loss rate compared to a 12% job loss rate for U.S.-born workers.⁶

27.

Job loss in the wake of COVID 19 is particularly severe for Latina women, who have seen unemployment rise more than any other race or gender group.⁷

28.

Workers who speak English "less than very well" make up 13% of Oregon's food preparation and service related workforce, according to OED.⁸ Service occupations have been

⁶ Rakesh Kochhar, *Hispanic women, immigrants, young adults, those with less education hit hardest by COVID 19 job losses* (June 9, 2020), <https://www.pewresearch.org/fact-tank/2020/06/09/hispanic-women-immigrants-young-adults-those-with-less-education-hit-hardest-by-covid-19-job-losses/>.

⁷ Lena I. Jackson, *'We need help,' say Latina workers, hit hard by pandemic job losses*, PBS News Hour (July 6, 2020), <https://www.pbs.org/newshour/show/we-need-help-say-latina-workers-hit-hard-by-pandemic-job-losses?fbclid=IwAR1IeNm-cHIjSWEx6dzuVf43rjy3cvbMYTrVC3GcIg857PNXXR2Ny8AZBv8>.

⁸ Sarah Cunningham, Oregon Employment Department Workforce and Economic Research Division, *Ability of*

hit especially hard by COVID 19 related layoffs.⁹

29.

Oregonians who do not speak or read English have long faced difficulties in accessing unemployment insurance benefits. In 2001, monolingual Spanish speakers filed a federal lawsuit in the U.S. District Court for the District of Oregon, *Lechuga v. Crosley*, Civil Case No. 01-450-AS, alleging that OED was violating their right to equal access to unemployment benefits under Title VI of the Civil Rights Act.

30.

In 2003, OED entered into a settlement in *Lechuga*, pursuant to which OED agreed to improve language access to unemployment benefits.

31.

Since active monitoring of the *Lechuga* settlement stopped in 2010, advocates have continued to bring language access problems to the attention of OED through advocacy for individual clients as well as participation in boards such as the UI Modernization Project Stakeholder Board.

32.

Despite these efforts, OED has consistently failed to prioritize language access in the unemployment benefits system.

Oregon Workers to Speak English Varies by Type of Job (April 15, 2020), <https://www.qualityinfo.org/-/ability-of-oregon-workers-to-speak-english-varies-by-type-of-job>.

⁹ Amy Vander Vliet, Oregon Employment Department Workforce and Economic Research Division, *Portland Metropolitan Area Initial Claims for Unemployment Insurance* (June 25, 2020), <https://www.qualityinfo.org/-/portland-metropolitan-area-initial-claims-for-unemployment-insurance>; Migration Policy Institute, Oregon State Immigration Data Profile, <https://www.migrationpolicy.org/data/state-profiles/state/workforce/OR#> (last visited July 7, 2020).

33.

OED processes claims for unemployment benefits using a computer system so old that some of its coding dates to the 1980s.

34.

For more than a decade, OED has publicly acknowledged the dire need to update the unemployment computer system.

35.

In 2009, OED received \$85.6 million in funding under the federal Unemployment Insurance Modernization Act to help modernize the state unemployment system. As of October 2019, \$81.7 million remained unspent. OED waited nearly ten years to even begin updating the system, and now says that it does not expect the overhaul to be complete until 2025.

36.

The limited updates OED has made, such as the creation of an online application in English, have generally helped only English-speaking claimants.

B. The COVID 19 Public Health Emergency and Changes to the Unemployment System

37.

In response to a global outbreak of COVID 19, Oregon's Governor Kate Brown announced the convening of a Coronavirus Response Team on February 28, 2020. This task force was charged with coordinating state and local agencies and health authorities in preparation for response to COVID 19.

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38.

On March 8, 2020, Governor Brown issued Executive Order 20-03, declaring a state of emergency in Oregon due to COVID 19.

39.

On March 11, 2020, the World Health Organization declared a global pandemic. On March 13, 2020, the COVID 19 outbreak was officially deemed a national emergency in the United States.

40.

During the month of March, 2020, Governor Brown issued Executive Orders which prohibited large gatherings, closed all schools, declared an abnormal market disruption, closed restaurants and bars, and ordered the postponement of non-essential health care procedures, among other things. On March 23, 2020, the Governor issued an order to all Oregonians to “stay home and save lives”, requiring all Oregonians except those deemed “essential workers” to stay at home, and businesses deemed non-essential to close temporarily, in order to accomplish the social distancing necessary to prevent the catastrophic increase in COVID 19 diagnoses that was forecasted to occur without such social and economic interruptions.

41.

On March 22, 2020, in recognition of the fact that the COVID 19 pandemic had already caused a significant economic downturn in Oregon and severe economic hardship for Oregonians making it difficult for them to pay basic household expenses, Governor Brown issued Executive Order 20-11, prohibiting residential evictions for nonpayment of rent for the following 90 days.

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42.

On March 27, 2020, Congress passed the federal CARES Act, which dramatically expanded unemployment benefits. The CARES Act created three new sources of federally funded unemployment benefits:

- a. Pandemic Unemployment Compensation (“PUC”), which increased by \$600 the amount of weekly unemployment benefits paid from late March through July 2020, in order to ensure that the benefits would provide full wage replacement for the typical worker;
- b. Pandemic Emergency Unemployment Compensation (“PEUC”), which extended by 13 weeks the duration unemployment benefits are available, so that even individuals who had recently been unemployed would have access to benefits; and
- c. Pandemic Unemployment Assistance (“PUA”), which is available to workers typically ineligible for unemployment benefits, such as self-employed or contract workers.

43.

As a result of COVID 19 disease, the “stay at home” order, and the order for non-essential businesses to close, hundreds of thousands of Oregonians lost their jobs or lost significant income. In March 2020, Oregon’s unemployment rate was 3.5%—an historic low. In April 2020, as a result of the economic crisis caused by the COVID 19 pandemic, Oregon's unemployment rate reached a record high level of 14.2%.

44.

A large number of newly jobless Oregonians filed for unemployment benefits between March and June 2020. By the beginning of April 2020, more Oregon workers had filed

applications for unemployment benefits than in the prior 39 weeks combined.¹⁰

C. Oregon’s Inadequate Steps to Ensure Prompt Processing and Payment of Unemployment Benefits During the COVID 19 Emergency

i. General Problems

45.

In order to receive traditional UI, a claimant must have a qualifying work separation and must be able to work, available for work, and actively seeking work. On March 17 and 26, OED filed temporary rules to redefine these requirements to account for COVID 19-specific reasons for being out of work. For example, in order to avoid forcing claimants to take unnecessary health risks, the rules provide that a claimant will be considered to be “actively seeking work” if she is willing to look for work when the state of emergency ends.

46.

The new temporary rules were not compatible with Oregon’s unemployment application. OED created video instructions explaining to claimants how they should answer application questions. Because of the mismatch between the old and new rules, the instructions are often counterintuitive. For example, the unemployment application asks, “Is there any reason you can’t begin full-time work now?” An applicant whose workplace was closed due to COVID 19 and truthfully answers that, “yes,” there is a reason she cannot begin full-time work now, is automatically disqualified from receiving benefits. The video instructs an applicant in these circumstances to answer “no” to the question.

¹⁰ Mike Rogoway, *Laid off workers are confounded by Oregon’s overwhelmed jobless claims system*, The Oregonian/OregonLive (April 3, 2020), <https://www.oregonlive.com/business/2020/04/laid-off-workers-are-confounded-by-oregons-overwhelmed-jobless-claims-system.html>.

47.

Many people who filed for UI without watching the instructions or who weren't able to access those online instructions answered the COVID related questions incorrectly and are either in the agency's informal "adjudication process" or have been erroneously denied UI benefits.

48.

By May, enormous numbers of Oregonians had still received no unemployment insurance benefits—some of those individuals had been out of work since mid-March. Many applicants had not even received any information on whether their claim was being processed, or if they needed to take some action to fix a problem with their application or claim.

49.

Beginning in late March, people desperate for replacement income were attempting to call the agency for information, and OED phone lines were overwhelmed.¹¹ OED acknowledged publicly that many people could not get through by phone. Many callers tried for hours every day to get through, only to get a busy signal over and over again. Those who were lucky enough to get through by phone had an average wait time on hold of over 3.5 hours. Many people waited on hold for many hours only to be disconnected by OED phone system before ever speaking to OED staff.

50.

On May 27 and 30, 2020, OED Director Kay Erickson and then-Assistant Director David Gerstenfeld reported to the Oregon Legislative committee on Labor that 200,000 applications for

¹¹ Mike Rogoway, *Oregon Employment Department faces continued problems, new pressures as laid-off workers' frustrations mount*, The Oregonian/OregonLive (April 8, 2020), <https://www.oregonlive.com/business/2020/04/oregon-employment-department-faces-continued-problems-new-pressures-as-laid-off-workers-frustrations-mount.html>.

UI had yet to even be initially “processed”. OED stated publicly that its inability to respond to the unprecedented increase in UI applications, as well as rapidly changing eligibility criteria for UI, were largely due to the state’s antiquated computer system.

51.

OED asserted that by June 13, 2020, more than 99% of the 495,600 UI applications filed since mid-March had been “processed”. However, an application that is “processed” is not the same as one that has been either approved or denied for UI benefits. To date, OED has not provided data on how many of the nearly half million applicants have received a final agency decision either approving or denying their application for benefits.

52.

An unknown number of Oregonians whose UI applications have been “processed” have been put in OED’s informal adjudication process. This informal adjudication process requires that an OED employee contact the applicant and ask for additional information, or clarification of information provided on the application. There is no timeline by which the adjudication process must end and a final agency decision be issued. UI Applicants have no right to challenge the agency’s decision to put them into this adjudication process. Applicants placed in this adjudication process have been waiting for as long as 15 weeks—and counting—for a final agency decision on whether they can get UI benefits.

ii. Language Access

53.

Since the COVID 19 pandemic caused a surge in calls to OED, and access to OED by phone has become excruciatingly difficult, individuals who need to apply for traditional UI

benefits over the phone because they don't speak English have been severely limited in their ability to apply for UI benefits. Additionally, OED does not have an adequate number of bilingual staff dedicated to talk to non English speaking callers, so even those non English speaking callers who manage to reach OED by phone do not receive adequate help, or any help at all, in the language they understand when they call.

54.

Most Oregonians apply for traditional UI benefits through the state's online application. This online application is the most direct and most efficient way to apply for UI benefits. Oregon's online application for traditional UI benefits is only available in English. The only way to file a traditional UI claim in any language other than English is to call OED and apply over the phone with an interpreter, or to request a paper application in a language other than English, fill it out, and submit that application to OED.

55.

For many weeks after the declaration of the public health emergency, the counterintuitive COVID 19 instructions described above were not available in any language other than English. Without these specific instructions, applicants with limited English proficiency truthfully answering the UI application questions such as whether they left work voluntarily or whether they were currently actively looking for work would answer the questions incorrectly, leading to a referral to the lengthy adjudication process or an erroneous denial of benefits.

56.

OED addresses problems with claims languishing in adjudication by responding to individual complaints. Taking this approach, rather than prioritizing resolution of claims by the

length of time the person has been waiting for benefits, again falls most heavily on the shoulders of applicants who do not speak English, who are less likely to be able to communicate with OED about the problem with their claim.

57.

OED did not create an email address to which people who speak a language other than English who have computer access can send an email request for a call back from someone who speaks their language until the end of May 2020.

In the face of mounting pressure,¹² OED agreed to outsource part-time phone application assistance for limited English proficient speakers beginning on July 6, 2020. The phone line will not assist with resolving ongoing problems with benefits.

iii. Pandemic Unemployment Assistance (“PUA”)

58.

On April 28, 2020, OED began accepting applications for PUA, the program created by the federal CARES Act to support workers who lost work or earnings due to COVID 19, but who do not qualify for UI.

59.

Applicants can apply for PUA by downloading a fillable PDF and uploading the completed PDF through OED website (the preferred method) or by completing a paper application and submitting it by fax or mail.

¹² Kate Davidson, *Applying For Unemployment Is Even Harder For Workers With Limited English*, Oregon Public Broadcasting (May 16, 2020, updated May 19,2020) <https://www.opb.org/news/article/unemployment-harder-workers-with-limited-english/>

60.

The PUA application requires the claimant to “certify” that they are ineligible for regular UI benefits.

61.

The rules governing eligibility for UI are highly technical. Many workers do not know if they are employees who may qualify for UI or self-employed workers who would qualify for PUA. Others do not know if they have worked a sufficient number of hours or earned enough money during the “base period” to qualify for UI.

62.

Many individuals who likely qualify for PUA benefits, and not traditional UI benefits, were directed to apply for UI benefits so that they could “certify” they did not qualify for regular UI benefits on the PUA application. Because of the backlog in processing UI applications, this meant a lengthy delay before the claimant could submit her application for PUA benefits.

63.

Furthermore, in about May 2020, upon information and belief, OED adopted a policy regarding the classification of employment that required certain classes of self-employed or “gig worker”¹³ applicants to submit an application for regular UI after they had already submitted a PUA application.

64.

In Oregon, individuals who apply for UI in order to be able to “certify” that they are not

¹³ “Gig worker” is a term used to describe a person who is hired to work on demand to perform a single project or task, often using a website or mobile application that matches the worker with customers. Elka Torpey and Andrew Hogan, U.S. Bureau of Labor Statistics, *Working in a gig economy* (May 2016), <https://www.bls.gov/careeroutlook/2016/article/what-is-the-gig-economy.htm>.

eligible for UI benefits on their application for PUA benefits must wait for their UI applications to be “processed”, for any eligibility questions to be resolved through an informal “adjudication” process or “Tax Department” review process, and then wait for their UI claim to be formally approved or denied. This process often has taken many months, and many are forced to fill out a PUA application after they are denied UI benefits, and then wait in line to have their PUA application processed. OED’s policy of making people apply separately for PUA benefits after being found ineligible for UI adds more time to an already unreasonably long delay in processing PUA applications.

65.

By July 6, 2020, more than 92,000 people had submitted PUA applications to OED. Of those applications, more than 65,000 of those applications had yet to even be “processed”, and only about 21,000 claims had been paid.¹⁴

66.

People who have been approved for PUA benefits are not getting regular PUA payments, despite filing weekly claims to certify that they still qualify for PUA benefits. In order to get their benefits, these individuals must call weekly to prompt OED staff to manually release that week’s benefits. This need to call in order to have PUA benefits paid weekly is made more difficult because access to OED by phone is limited due to demand, and also creates an incentive for people to call the OED often, adding to the difficulty for anyone trying to get through on the already overburdened OED phone lines.

¹⁴ State of Oregon Employment Department, Unemployment Claims Progress as of 7/6/2020, https://govstatus.egov.com/ORUnemployment_Claims-Progress (last visited July 7, 2020).

iv. *Pandemic Emergency Unemployment Compensation (“PEUC”)*

67.

On May 22, 2020, OED launched the PEUC Program, which provides 13 weeks of additional benefits to workers whose unemployment benefits had exhausted or expired on or after July 1, 2019. Applying for PEUC is a mandatory requirement for workers who are eligible for this extension. In a June 18, 2020 Facebook post, OED acknowledged that there are at least 35,000 workers entitled to Oregon PEUC benefits.

68.

Because OED did not launch PEUC until nearly two months after the CARES Act was passed, and after more than two months of pandemic-related economic hardship for Oregonians, mandatory PEUC applicants have suffered and continue to suffer financial harm by delaying their ability to apply for PEUC.

v. *Mismanagement of the Unemployment Benefits System Caused Widespread and Severe Delay in Processing and Paying Benefits During the COVID 19 Emergency*

69.

OED unreasonably delayed acting or making decisions by not promptly approving or denying applications for unemployment benefits. Although the Agency reports progress on “processing” large numbers of traditional UI applications, “processing” denotes an initial assessment of an application and not a final decision to either pay or deny benefits. “Processed” applications enter a waiting limbo, and applicants have no deadline by which they can expect money or an official denial with the chance to appeal. Additionally, over 65,000 PUA applications still have not even been “processed”. Specifically, OED failed to:

- a. Establish a reasonable timeframe after an application for unemployment benefits within which OED must make a final decision on eligibility and pay benefits to eligible applicants;
- b. Limit how long an application can wait in the informal “adjudication process” or in the Tax Department Review process (determining whether someone is an “independent contractor” or an “employee”) before a final decision is made;
- c. Require that, as the backlog of applicants are “processed”, the oldest applications are prioritized for final decisions so that the people who have waited for unemployment benefits the longest can get paid; and
- d. Create a system to process and pay weekly PUA claims without requiring individuals to call and request payment each week.

70.

OED failed to evaluate eligibility for and failed to pay applicants’ retroactive benefits in the traditional UI program. Specifically, OED failed to create a mechanism for applying for retroactive regular unemployment benefits; furthermore, OED has failed to collect information from UI applicants about when they first became unemployed and tried to apply for benefits, but were thwarted by the online application crashing and/or the inability to reach OED by phone to apply for traditional UI benefits, or request a paper application.

71.

OED failed to provide adequate notice, guidance, and instruction to applicants so they would know which unemployment benefits to apply for. Specifically, OED failed to:

- a. Give clear, accurate information so that applicants could understand which application to

submit, given their particular circumstances; and

- b. Communicate with applicants to explain the status of the applications received by OED, whether there were errors in the application or outstanding questions that still need to be answered, and, if appropriate, what additional application they must submit to obtain benefits. Lack of communication and unclear, contradictory notices have increased the need for applicants to call OED, exacerbated the overburdened OED phone lines, and added to the frustration of people who are still waiting for unemployment benefit money.

72.

OED failed to provide adequate access to unemployment benefits to Oregon residents who speak a language other than English. Specifically, OED failed to:

- a. Create an online application for traditional UI benefits for non English speakers, especially for Spanish speakers who make up a large portion of Oregonians who are out of work for COVID related reasons;
- b. Provide adequate phone access for non English speakers who cannot use the online application for traditional UI benefits due to language barriers;
- c. Provide adequate interpreter services over the phone for non English speakers who cannot get PUA payments without talking to an OED employee over the phone every week;
- d. Clearly communicate to non English speakers on the internet about the complex unemployment benefits system so that individuals can understand which type of unemployment benefits to apply for; and
- e. Consult with non English speaking clients to identify deficiencies in the application

process and then address them appropriately.

73.

Finally, OED's failure to act or unreasonable delay in even accepting applicants for the new benefits categories of PUA and PEUC until April 28, 2020 and May 27, 2020, respectively, have caused agonizing hardship for Oregonians, who were counting on these expanded benefits to help them survive. Specifically, OED failed to:

- a. Immediately consider whether applicants denied UI were eligible for PUA, based on information in the UI application and without requiring the applicant to start over with a new application for each separate program, as permitted by the U.S. Department of Labor;¹⁵ and
- b. Timely create applications for PUA and PEUC.

74.

Oregon law gives the courts the power to order state agencies to take action that is unlawfully withheld or unreasonably delayed. Petitioners cannot afford to wait any longer.

D. The Individual Petitioners

i. Florentina Flora de Vega

75.

Florentina Flores de Vega lives in Marion County. Ms. Flores de Vega is a seasonal agricultural worker. Her first language is Mixteco Alto. Her second language is Spanish. She does not speak, read or write English. Ms. Flores de Vega has been out of work since December.

¹⁵ United States Department of Labor, Unemployment Insurance Program Letter 16-20, and UIPL 16-20 Appendix I Question and Answer Document, https://wdr.doleta.gov/directives/attach/UIPL/UIPL_16-20_Change_1_Attachment_1.pdf

During the winter months she called her former employer to see if there was work for her but was told that there was no work available.

76.

In approximately mid-March, she tried to apply for unemployment benefits by showing up in person at the Woodburn Worksource Oregon office. She found the office closed to the public due to COVID, but a Worksource employee yelled to her through the locked glass door that Ms. Flores de Vega should call on the phone. Ms. Flores de Vega tried to phone the Woodburn Worksource office numerous times, but the line was always busy. Finally, at the beginning of June, Ms. Flores de Vega sought out help from an advocacy organization and was advised to call a different Worksource office number.

77.

On approximately June 3, 2020, Ms. Flores de Vega tried calling this new Worksource Oregon office number, and finally reached an employee, but that employee did not speak Spanish. That employee asked her, in English, for her phone number and date of birth. Ms. Flores de Vega was unable to understand what the Worksource employee was asking, so she sought help from her daughter who got on the phone and answered the Worksource employee's questions. The Worksource employee told Ms. Flores de Vega's daughter that no one was available to talk to her mom in Spanish, but that someone would call her back. Ms. Flores de Vega waited for the rest of that week, but did not receive a call back.

78.

Ms. Flores de Vega found work for herself and began working on June 9, 2020. At some point after she began her new job, Ms. Flores de Vega received a call from OED. The employee

did not appear to Ms. Flores de Vega to be fluent in Spanish, and she had some trouble communicating with that OED employee. The employee asked Ms. Flores de Vega if she still wanted unemployment insurance benefits. Ms. Flores de Vega reported that she was currently working, and did not understand whether she could still apply for unemployment benefits for the past months when she was unemployed. The employee did not advise her that she could apply now for retroactive benefits. The employee told her to just wait until the next time she is unemployed, and then apply again for benefits.

79.

Even though Ms. Flores de Vega attempted to apply for unemployment benefits in March, she was never offered the chance to apply over the phone for unemployment benefits, and she was never informed that she could receive retroactive benefits. Because Ms. Flores de Vega was not able to use the English online application for unemployment benefits, and was not able to apply at the local Worksource office in person, and was not able to apply over the phone, her access to unemployment benefits was wholly blocked due to the fact that she doesn't speak English. She never successfully completed an application, and she never received any unemployment benefits.

ii. *Htoo Ler Paw*

80.

Htoo Ler Paw lives in Multnomah County. She is 29 years old, is married, and is raising three children. Ms. Paw has lived in Oregon since 2012, when she arrived as a refugee from Myanmar. Ms. Paw speaks Karen. She speaks and understands only a very little English.

81.

Ms. Paw was working at a hotel as a cleaning person in March of this year, when the COVID pandemic struck. She was laid off from her job in mid to late March, due to COVID. Ms. Paw does not read English, so she could not use the online application for traditional unemployment benefits on her own.

82.

She applied for traditional unemployment insurance benefits through the online application on approximately March 20, 2020, with the help of her former manager who speaks both English and Karen. Her former manager is also helping Ms. Paw make her online weekly certifications in English.

83.

Several weeks after she applied for unemployment benefits, Ms. Paw received a document from OED asking that she send them a copy of her green card (also known as her lawful permanent resident card). Ms. Paw complied and mailed a copy of her green card to OED. The next week, she received another letter from OED requesting that she send a copy of her green card. Ms. Paw complied again, and again sent a copy of her green card to OED. The following week Ms. Paw received yet another letter from OED requesting that she send a copy of her green card. Ms. Paw complied again. This pattern continued, and Ms. Paw mailed a copy of her green card to OED a total of five times.

84.

Because Ms. Paw still hadn't received any unemployment benefits and because OED kept repeating their request for her green card even after she'd sent it to them, Ms. Paw became concerned that something was wrong with her claim, and she began to call OED. She called

repeatedly. She was able to call and talk to an OED employee several times, but each time she requested a Karen interpreter, but never received one. Sometimes after she asked for an interpreter she was put on hold for hours, only to be disconnected. Sometimes she was told she would be called back with a Karen interpreter, but she never received a call back from an interpreter.

85.

As of July 2, 2020, it has been 14 weeks since Ms. Paw applied for unemployment benefits, but Ms. Paw has not received a single call from OED with a Karen interpreter, and she has not received a single payment of unemployment benefits, or a final decision denying her benefits.

iii. Alicia Jimenez

86.

Petitioner Alicia Jimenez lives in Lane County. Ms. Jimenez is a Black Latina healthcare worker who applied for unemployment benefits after COVID 19 reduced her earnings from self-employment. Prior to becoming self-employed in February 2020, Ms. Jimenez was an employee in a long-term care facility. Ms. Jimenez left that position after experiencing and reporting worsening racist treatment in the workplace. Ms. Jimenez reported race-based disparities in the care provided to Black patients and had experienced egregious incidents of racist harassment, including being called a “uppity nigger” by her colleagues. Despite her complaints over the course of months, Ms. Jimenez’s employer took little or no action to remediate the workplace discrimination, but instead retaliated against her by holding her to a higher work standard than her colleagues in order to find pretexts for discipline.

87.

Because her wages from this job comprised sufficient base year earnings for unemployment purposes, Ms. Jimenez was obligated to apply for regular UI. After waiting approximately 14 weeks for her UI application to be processed, Ms. Jimenez was contacted by an OED adjudicator who informed her that her employer did not contest the payment of unemployment benefits, but that nevertheless, OED was denying Ms. Jimenez's claim for benefits. On or about June 29, 2020 the OED adjudicator orally informed her that while the racist treatment she experienced was "grave," Ms. Jimenez did not have good cause to quit.

88.

Because Ms. Jimenez lost subsequent self-employment due to COVID 19, Ms. Jimenez is entitled to apply for PUA benefits. The OED adjudicator did not inform of her eligibility nor direct her to apply for PUA, and was not until Ms. Jimenez consulted an attorney did she learn of her eligibility for PUA benefits. Ms. Jimenez applied for PUA benefits on or about June 29, 2020, and then contacted the agency by phone. After waiting hours, she was told her weekly benefit applications were not submitted successfully. Ms. Jimenez spent the next several days attempting to file her weekly benefit applications, only to be told that agency computers were down and supervisor involvement was necessary. On or about July 1, 2020, OED staff told Ms. Jimenez that even after her application was submitted, she would still be at the back of the line for payment, regardless of the fact she first applied for benefits in March.

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iv. Heather Franklin

89.

Petitioner Heather Franklin of Multnomah County is a parent of six children. Ms. Franklin attempted to apply for unemployment benefits in March after she was forced to close her business because of COVID 19 related school closures. Ms. Franklin did not receive any denial of unemployment application. However, on April 23, 2020, OED sent an email to Ms. Franklin indicating she'd been selected for the PUA pilot program.

90.

On May 22, 2020, Ms. Franklin received an email from OED stating her application for PUA would be processed within two weeks. Ms. Franklin has continued to send in timely weekly certifications for benefits, but has yet to receive any additional notices or benefits. Ms. Franklin is concerned about the financial toll this delay has taken on her young family.

vi. Vicki Petrotta

91.

Petitioner Vicki Petrotta is a 70-year-old housecleaner living in Washington County. Ms. Petrotta first applied for regular UI benefits in March 2020. Ms. Petrotta lives with an impairment that makes processing written information difficult for her. Subsequent to her application, Ms. Petrotta received notice that she was required to contact OED to discuss her claim. She has also received numerous confusing written communications, including a letter addressed to her as an employer asking about her own work as an employee. Ms. Petrotta has attempted to reach OED by phone on multiple occasions but has not been able to reach OED because the line rings busy.

92.

Ms. Petrotta is worried and uncertain about her ability to meet her financial needs with this long delay.

vii. *Warren Chan*

93.

Petitioner Warren Chan of Multnomah County applied for unemployment benefits on March 29, 2020, after the closure of his workplace because of COVID 19. Mr. Chan received a notice that he would be entitled to \$406 in benefits per week. Mr. Chan called OED hundreds of times in order to get more information on his claim and emailed OED as well. On April 26, 2020, Mr. Chan received an automatic response to an email query informing him that OED was busy working through thousands of claims. On May 2, 2020, Mr. Chan received a similar response to another email. On May 29, 2020, Mr. Chan received an automated message that his application would be addressed through the Project Focus 100. To date, Mr. Chan has received no benefits. Mr. Chan fears for the financial security of his family without his income.

viii. *Brenda Cook*

94.

Petitioner Brenda Cook of Clackamas County, a single parent of three and survivor of recent domestic violence, applied for unemployment benefits on March 15, 2020 after her business closed and her children's school closed because of the COVID 19 pandemic. Ms. Cook tried to reach OED by telephone 86 times in April, 51 times in May, and as of June 22, 2020, 48 times in June. Ms. Cook did not receive any benefits until May 2020; until that time, she was so impoverished that she could not afford to pay for incontinence supplies for her disabled child.

Ms. Cook sought domestic violence assistance through the Department of Human Services and a staff member passed her the direct number to an OED fraud investigator. That employee assisted Ms. Cook in receiving lump payments for past accrued weeks of unemployment which she received on May 22, 2020. Many additional calls resulted in payments on June 1 and June 12.

95.

While grateful for the back payments, Ms. Cook continues to have problems receiving her weekly benefits even after timely submitting her weekly claim certification. Ms. Cook has received no notice or explanation of why her benefits are delayed or unpaid, but OED staff have suggested that she must call in order to have her payments authorized. Ms. Cook spends her free time during the week redialing OED in the hope that she will be able to speak with someone who will be willing to manually authorize her weekly benefit amount. It is very difficult for Ms. Cook to reach OED staff. For example, on June 22, 2020, Ms. Cook was able to reach OED, was placed on hold for two hours, and then disconnected by OED.

96.

As of July 6, Ms. Cook has not been paid for the previous two weeks even after 459 attempts to reach the PUA line. Ms. Cook has now had her cell phone service disconnected and her car insurance cancelled due to non-payment. As a survivor of domestic violence, Ms. Cook feels that her and her family's safety is jeopardized by the delayed and unpredictable payments by OED.

ix. David Haines

97.

Petitioner David Haines of Multnomah County, a 52-year-old former Lyft driver and

single father of two children, applied for regular UI benefits on April 4, 2020 and then PUA on May 4, 2020. Mr. Haines had hoped to apply for benefits when he became unemployed weeks prior, but due to the lack of a clear application process for contract workers, endeavored to apply in early April.

98.

Mr. Haines receives weekly correspondence from the agency indicating his claim for traditional UI is not valid and requesting proof of his earnings, which he has submitted on multiple occasions.

99.

Mr. Haines spends most days continuously calling both the toll free and local numbers for OED. However, despite thousands of attempts usually lasting for six hours at a time, he has only been able to speak with a representative on a handful of occasions. Finally, on June 2, 2020, Mr. Haines was able to reach agency staff who told him that his PUA application was in order but that needed to be sent to the agency's Tax Department in order to determine if his claim was a regular UI claim or eligible for PUA. At that time, the agent assured him that she would forward his application to the tax department and follow up with a phone call in a few days. Mr. Haines has not heard back from the agency. Mr. Haines is deeply worried about his financial future.

x. *Lisa Exterovich*

100.

Petitioner Lisa Exterovich, a resident of Multnomah County, is a single parent and a survivor of domestic violence. As a survivor of domestic violence, Ms. Exterovich and her child

are particularly vulnerable to financial disruption and economic hardship. Due to school closure and slowdown of her employment, Ms. Exterovich applied for regular UI on April 13, 2020 and PUA thereafter. Ms. Exterovich has made hundreds of calls to the agency but only got through once, on June 12, 2020. During that call, she was told that the system had lost her PUA application and it had to be retaken over the phone. Ms. Exterovich still has yet to receive any benefits or meaningful communication.

101.

Ms. Exterovich is a renter extremely concerned about her ability to pay rent for her and her daughter.

xi. Kinnari Shah

102.

Petitioner Kinnari Shah, of Multnomah County, is a single parent who exhausted her regular UI benefits in January 2020. Ms. Shah attempted to apply for extended unemployment benefits in March 2020 after her children's COVID 19-related school closure. Ms. Shah attempted to reopen her UI claim online but continually received an error message indicating she needed to call directly to OED.

103.

Ms. Shah called OED all day long for weeks. At one point, Ms. Shah managed to reach OED and was put on hold for three hours before she was disconnected. In April 2020, Ms. Shah applied for PUA and submitted weekly certifications. Subsequently, she tried reaching OED through the PUA line. Ms. Shah called 183 times or more before she was able to get through. At

that time, she reached staff who told her that her PUA application was not valid and that she must submit a different application for PEUC benefits.

104.

In May, Ms. Shah received no response to her PEUC application and weekly certifications. In June, in desperation, Ms. Shah submitted an application for regular UI. The agency promptly denied this application, but has not issued a decision on either her PEUC or PUA applications.

105.

Ms. Shah has exhausted her savings and is deeply worried about her family's future.

xii. Abdelkadir Abdelkadir Mokrani

106.

Petitioner Abdelkadir Abdelkadir Mokrani, a resident of Multnomah County and parent to 5 children, applied for regular UI on March 29, 2020. Mr. Mokrani worked multiple part-time jobs to support his family. By March 2020, some of Mr Mokrani's work had slowed down because of the pandemic; in addition, Mr. Mokrani was unable to perform his other work because of health risks associated with the pandemic. Mr. Mokrani's application status indicated his claim was not valid, so he unsuccessfully attempted to contact OED hundreds of time by phone. Mr. Mokrani received multiple requests for the same documents, specifically his 2019 tax returns and associated 1099 forms, which he repeatedly submitted to the agency.

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107.

In early May 2020, Mr. Mokrani submitted a PUA application. Weeks later, on May 28, 2020, Mr. Mokrani received notice that he was "potentially eligible" for PUA and his weekly claims were "not yet processed."

108.

Mr. Mokrani again made multiple unsuccessful attempts to contact OED to confirm receipt of his PUA application, his weekly claims, and his previously submitted requested documents. Unsure of his status, Mr. Mokrani submitted a new application for PUA on June 4, 2020. To date, Mr. Mokrani has not received benefits, nor an explanation as to why he has not received payment.

109.

Mr. Mokrani has waited 15 weeks for unemployment benefits and is worried about caring for his children.

xiii. Diana Oropeza

110.

Petitioner Diana Oropeza, a resident of Multnomah County, is a restaurant worker, employed by the same employer since 2016. After she was laid off due to temporary closure of her employer, Ms. Oropeza applied for regular UI on March 22, 2020. On April 1, 2020, she received a denial notice stating that she did not make enough money during the base period to qualify for benefits. On April 3, 2020 Ms. Oropeza submitted a request for redetermination and hearing.

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111.

On May 11, 2020, Ms. Oropeza received an email response indicating that she needed to submit proof of her earnings, without instruction about how or where to submit them. The agency offered no information about processing her request for hearing. Ms. Oropeza submitted the proof of income to the same email address she had used to request a hearing.

112.

Meanwhile, Ms. Oropeza attempted to call OED repeatedly but was unable to get through. WorkSource told Ms. Oropeza that it looked like OED was still processing her application. In May, Ms. Oropeza was finally able to speak with an agent from OED who confirmed that “everything looks good with the request, but it’s still being processed.” Ms. Oropeza still has not received any benefits and the OED online portal only states that her claim is “not processed yet.” Ms. Oropeza is suffering great financial hardship after going months without unemployment benefits.

xiv. David Knell

113.

Petitioner David Knell of Lincoln County is a hybrid worker, with base years earnings from regular employment as well as self-employment. Because of his regular employee earnings, he applied for traditional UI on March 28, 2020. On April 28, 2020, he submitted a PUA application as well. On or about May 12, 2020, Mr. Knell received notice from the agency that his traditional benefits application was not valid based on his work history, with a determination pending. Mr. Knell assumed that this denial was based on the agency's failure to obtain his out-of-state wages. The notice did not advise Mr. Knell about what steps to take.

114.

Mr. Knell tried reaching the agency, calling at least ten times per day. In early June, Mr. Knell discovered that there was a new phone line for PUA applicants, and after multiple tries, was able to get through. Agency staff advised him that his PUA application would be approved and he would receive benefits within a couple of days. At the very end of the call, Mr. Knell asked if the agency had gathered all of his wages. In response, agency staff told him that instead of paying his PUA benefits, they would transfer his application to the Tax Department for further review. Mr. Knell contacted the Tax Department and OED staff told him that they could not assist him.

115.

To date, Mr. Knell has not received any benefits. He recently took out a substantial loan in order to pay living expenses. He is worried about how he will repay the loan and how he will meet his basic needs when the loan money runs out.

FIRST CLAIM FOR RELIEF

**(Unlawful Refusal to Act or Unreasonable Delay in Taking Action or Making a Decision –
Final Decisions on Applications for Benefits)**

116.

Petitioners reallege paragraphs 1–115.

117.

ORS 183.490 authorizes the circuit court to “compel an agency to act where it has unlawfully refused to act or make a decision or unreasonably delayed taking action or making a decision.”

118.

OED has either unlawfully failed to act or unreasonably delayed issuing decisions on tens of thousands of UI, PUA, and PEUC applications by either failing to process those applications in a timely manner, or by processing them, putting them into the informal “adjudication process”, and not issuing a final agency decision either approving or denying benefits in a reasonable amount of time.

119.

OED is required to “promptly examine each claim for benefits and make a decision to allow or deny the claim.” ORS 657.267.

120.

The plain meaning of ORS 657.267 indicates that OED must make decisions on applications quickly. The common understanding of the word “promptly” indicates an action that is taken “without delay: very quickly or immediately”.¹⁶ An agency’s decision has been unreasonably delayed if not made in time to make the decision meaningful to the individual requesting the agency decision. *Lombardo v. Warner*, 340 Or 264, 273-74 (2006). The U.S. Department of Labor defines the payment of benefits as timely if at least 87% of regular unemployment claims are paid within 14 days of the end of the first week for which claimants were eligible for benefits.¹⁷ Petitioners have been waiting *seven times* that long—and counting—to receive benefits they desperately need. Unemployment benefits are meaningful to Petitioners if they can replace wages that generally come to people weekly or bi-weekly, allowing

¹⁶ Merriam Webster Dictionary, <https://www.merriam-webster.com/dictionary/promptly>.

¹⁷ U.S. Government Accountability Office, Unemployment Insurance: States’ Customer Service Challenges and DOL’s Related Assistance, at 26 (May 2016), <https://www.gao.gov/assets/680/677082.pdf>.

individuals to pay for necessities that can't wait, like food, rent, or medicine. A 15-week delay in issuing benefits designed to help people pay for urgent basic needs like food and rent renders the benefits significantly less meaningful.

121.

The clear statutory directive to the agency to decide UI claims “promptly” coupled with the dire need of applicants for UI benefits to provide money for basic living expenses after the loss of a job or wages, indicates that the current delays facing Oregonians who have applied for traditional UI, PUA, and PEUC are patently unreasonable.

SECOND CLAIM FOR RELIEF

**(Unlawful Refusal to Act or Unreasonable Delay in Taking Action or Making a Decision –
Effective Denial without Due Process Hearing)**

122.

Petitioners reallege paragraphs 1–121.

123.

ORS 183.490 authorizes the circuit court to “compel an agency to act where it has unlawfully refused to act or make a decision or unreasonably delayed taking action or making a decision.”

124.

Respondents have a duty to provide UI, PUA, and PEUC applicants with a final agency decision either denying or approving their application. The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that claimants receive timely processing of their UI and PUA applications, and then a due process hearing if benefits are denied.

125.

The Oregon Administrative Procedure Act requires a contested case hearing for every “proceeding before an agency . . . [i]n which the individual legal rights, duties or privileges of specific parties are required by statute or Constitution to be determined only after an agency hearing.” ORS 183. 415(2); ORS 183. 310(2)(a)(A). By not providing a final decision to Petitioners, even though Petitioners have been without any income or unemployment benefits for, in some cases, up to 15 weeks, OED has effectively denied Petitioners’ applications and refused to provide a contested case hearing.

126.

Although all Oregonians had significant barriers to reaching OED by phone to ask for help with their application, non English speakers had even less access than English speakers. Petitioners who were persistent and lucky enough to get through to OED by phone were not able to speak to someone in their own language, or in many cases, even receive a call back by someone who spoke their language. Without this phone access, non English speakers did not have the chance to access advice from the OED to help them complete their application correctly, or to answer simple questions about any missing information the OED identified on their application. Therefore, non English speakers were more likely to be forced into the informal adjudication process delaying a final decision on whether benefits will be paid.

127.

Non English speakers were delayed in submitting their application for unemployment benefits. Because they had to wait to even apply for benefits, they have faced additional delays in receiving final decisions or unemployment benefits. Because the online UI application was (and

still is) only available in English, non English speakers had to wait until they could reach someone by phone to help them apply, or send them a paper application for UI. Oregon’s PUA applications were not available in languages other than English until after the English PUA was available.

THIRD CLAIM FOR RELIEF

(Unlawful Refusal to Act – Lack of Language Access)

128.

Petitioners reallege paragraphs 1–127.

129.

ORS 183.490 authorizes the circuit court to “compel agency action where it has unlawfully refused to act.”

130.

Respondents have a legal duty to make applications for UI, PUA, and PEUC benefits available to non English speakers. Title VI of the Civil Rights Act and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution prohibit the state from discriminating on the basis of national origin in the provision of public benefits like unemployment insurance. 29 CFR § 38.9 requires that Respondent “take reasonable steps to ensure meaningful access to each limited English proficient (LEP) individual served or encountered so that LEP individuals are effectively informed about and/or able to participate in the program or activity. UIPL 02-16 clarifies that the federal regulations specifically require that language assistance must be provided in a timely manner, and UIPL 02-16 clarifies that the U.S. Department of Labor believes that language assistance is considered timely “when it is provided

at a place and time that ensures equal access and avoids delay or denial of any aid, benefit, or service at issue.” The regulations further explain that vital information, including applications for benefits, is among the information that must be translated or provided access to in a timely manner. 29 CFR § 38.4(ttt), UIPL 02-16.

131.

OED has knowingly and intentionally prioritized English-speaking claimants over claimants with Limited English Proficiency in its program design, including by deciding to create an English-only online application as the primary method to apply for unemployment benefits. That decision was made despite OED having had ample resources to correct the problem since at least 2009.

132.

Despite knowing that the only way for non English speakers to apply for UI in Oregon is by calling OED, the agency failed to act to provide dedicated phone access for non English speakers when their phone system became hopelessly overwhelmed by callers. It was not until July 6, 2020 that OED established a part-time language access line for taking initial and weekly applications for benefits. However, the part-time hotline is limited only to application assistance, and upon information and belief, does not assist non English speakers with ongoing, necessary communication with the OED to maintain their claims.

133.

Due to the lack of language access, non English speakers were not informed of which unemployment benefit they should apply for (regular UI or PUA) and some applied for the wrong program.

134.

Non English speakers were not able to correctly fill out their PUA applications with the nuanced, complicated, COVID 19 specific answers required because they lacked access to the COVID 19 specific instructions that were only available in English until approximately mid to late May. Many answered questions incorrectly which resulted in their applications being diverted into the informal adjudication process that is so delaying final decisions or paying of benefits.

135.

Many non English speakers were significantly delayed in their ability to initially apply for unemployment benefits, because the online application was only available in English, applying over the phone was almost impossible because the phone lines were so jammed, and the PUA application was not out in languages other than English until after the English application was created.

136.

Applicants for all types of unemployment benefits who do not speak English are more likely to be diverted into the informal adjudication process, which greatly delays issuing a final decision and/or actual benefits. Non English speakers did not have instructions available to them in languages other than English about how to accurately answer the COVID related questions regarding whether a person is able, available for, and actively seeking work until approximately May 2020. Therefore, they were more likely to answer the complicated and nuanced questions incorrectly, and be placed in the informal adjudication process, causing excessive delay in getting benefits or a final agency decision.

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137.

OED's actions amount to intentional discrimination in violation of the Fourteenth Amendment and Title VI and have a disparate impact in violation of Title VI.

PRAYER

WHEREFORE, Petitioners pray that this Court order Respondents to:

1. Consider any denied UI claim as an application for PUA benefits and process that request promptly.
2. Issue final agency decisions on UI, PEUC and PUA applications within a reasonable amount of time, but not later than 4 weeks from the date of application, including any time spent in the informal adjudication process and/or Tax Department review.
3. Review and make decisions on applications that have not yet been approved or denied based on the original application date for any type of unemployment assistance, so that the people who have waited the longest get relief the soonest.
4. Establish a process to track the elapsed time between when applications are received and when a final decision is made regarding benefits, and a system for reporting adherence with time standards set by which such decisions should be made.
5. Create a fast track adjudication process for individuals who answer the UI questions relating to COVID 19 related reasons for eligibility incorrectly, to determine whether those individuals are actually eligible.
6. Communicate promptly with applicants to explain the status of the applications received by OED, whether there were errors in the application or outstanding questions that still need to be answered, and, if appropriate, what additional application they must submit to obtain benefits.

7. Create a Spanish-language online application for unemployment insurance;
8. Open dedicated telephone access for non English speakers to provide over the phone assistance and response to problems related to the receipt of any of kind of unemployment benefit.
9. Create an online mechanism for submitting retroactive weekly certifications for regular unemployment benefits for English and non English speakers.
10. Award such other relief as the Court may deem just and proper.

DATED: July 7, 2020

By:

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